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VALID EXISTING RIGHTS AND THE CONSTITUTION: 1983 REGULATORY CHANGES

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I. INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977[1] (the Act or SMCRA) is a study in legislative compromise. Disputed and debated for over six years before passage,[2] the Act attempts to balance a societal interest in reducing environmental damage caused by surface mining[3] of coal and a private coal industry interest in production of coal by surface mining techniques. Its stated purposes are a mix of coal production and environmental protection values.[4]

The balancing of interests is nowhere more clear than in the sections of the Act designating lands unsuitable for mining. The Act expressly prohibits mining within three hundred feet of an occupied dwelling, certain public buildings, schools, churches, or public parks.[5] It prohibits mining within one hundred feet of a cemetery or a public road.[6] There are also prohibitions upon mining in specified federal lands, such as national parks, recreation areas, or in historic sites.[7] In addition to these per se prohibitions, other lands may be deleted from allowable areas for surface mining by designation of unsuitability for mining.[8]

None of these prohibitions are absolute. These limitations do not apply to operations which existed on the date the Act became effective.[9] In addition, these per se limitations are "subject to valid existing rights."[10] While this new[11] term is the statutory standard, the Act itself does not define it. Congress left it to the Office of Surface Mining (OSM) of the Department of the Interior to define this term by regulation. During the time since the Act became law, the regulatory definition

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[1] 30 U.S.C. § 1201 (1982).

[2] For a discussion of the legislative history of the Act, see Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Legal Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

[3] The Act also regulates the surface effects of underground mining. *See* 30 U.S.C. § 1266 (1982).

[4] 30 U.S.C. § 1202 (1982).

[5] 30 U.S.C. § 1272(e)(5) (1982).

[6] 30 U.S.C. § 1272(e)(4)-(5) (1982).

[7] 30 U.S.C. § 1272(e)(1)-(2) (1982).

[8] 30 U.S.C. § 1272(a) (1982).

[9] 30 U.S.C. § 1272(e) (1982).

[10] *Id.*

[11] The term "valid existing rights" had been used in other contexts. *See, e.g.*, 25 U.S.C. § 463 (1982) (Indian Reorganization Act), 43 U.S.C. § 1613(g) (1980) (Alaska Native Claims Settlement Act). In the final rulemaking under the Surface Mining Control and Reclamation Act, the Secretary of the Interior did not rely upon meanings of "valid existing rights" established in other contexts. 44 Fed. Reg. 14,993 (1979).

of "valid existing rights" has been the subject of two rulemakings[12] and two court challenges.[13] This Article examines the current definition and discusses problems which may result in attempting to apply that definition.

II. History of the Valid Existing Rights Definition

Soon after the Act was effective, the Office of Surface Mining of the United States Department of the Interior began defining valid existing rights by regulation. After publishing a proposed regulation and receiving public comment, the agency defined valid existing rights, except for haul roads, as "property rights created by a legally binding conveyance, lease, deed, contract, or other document authorizing the applicant to use surface mining techniques to produce coal".[14] The property right had to be in existence by August 3, 1977.[15] To qualify as holding valid existing rights, the applicant had to have all necessary federal or state permits by August 3, 1977, or demonstrate that the coal was needed for an immediately adjacent ongoing surface mining operation for which permits were obtained before August 3, 1977.[16] The regulations explicitly stated that a mere expectation of a right to mine coal is not the equivalent of valid existing rights.[17] The documents serving as the basis of the property right underlying valid existing rights were to be interpreted by custom and usage at the time and place where the document came into existence.[18] The applicant must show that the parties to the document, in fact, contemplated a right to conduct the coal mining operations necessitating the exemption as valid existing rights.[19]

Within the statutory[20] sixty day comment period from publication of the regulations, various interests filed nine complaints raising approximately one hundred challenges to the regulations. Included were challenges to the valid existing rights regulations.[21]

Citizens concerned about potential environmental damage challenged as overbroad the provision to allow surface coal mining when needed by adjacent existing operations. Judge Flannery found the regulations to be a rational method to allow mining in circumstances that otherwise would be an unconstitutional taking.[22]

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[12] 44 Fed. Reg. 15,342 (1979) (codified at 30 C.F.R. § 761.5 (1984)); 48 Fed. Reg. 41,348 (1983) (codified at 30 C.F.R. § 761.5 (1984)).

[13] *In re* Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) 1084 (D.D.C. 1980); *In re* Permanent Surface Mining Regulation Litig. II, No. 79-1144 (D.D.C. filed 1984).

[14] 44 Fed. Reg. 15,342 (1979) (codified at 30 C.F.R. § 761.5(a) (1984)).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] 30 U.S.C. § 1276(a) (1982).

[21] *In re* Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) 1084.

[22] *Id.* at 1091-92.

The National Coal Association raised three challenges. First, it argued that state law should be used to interpret valid existing rights. OSM agreed to incorporate in the regulations state law interpretation of documents as an alternative to "custom and usage." Second, it objected to the requirement that all permits to mine coal be obtained before August 3, 1977, in order to qualify as valid existing rights. The Association argued that the "all permits" requirement was unfair because expeditious issuance of permits is beyond the coal operator's control. An operator making a good faith effort to obtain all necessary permits should not be penalized for bureaucratic delay.[23] Judge Flannery agreed. The Court remanded 30 C.F.R. § 761.5(a)(2)(i) to the Secretary for incorporation of the good faith effort to obtain all permits by August 3, 1977.[24]

Finally, the Association challenged the definition of valid existing rights as an unconstitutional taking of property. The Association argued that a person owning property or owning the right to mine property "may be deprived of his reasonable use and expectation of mining because he fails to meet the strictures of the regulatory definition."[25] The Secretary argued that advancement of public health and safety by SMCRA necessitates a narrow construction of a taking.[26] While finding the Secretary's argument persuasive, the Court declared the Coal Association's challenge hypothetical and reserved judgment until presented with a specific claim rather than a facial challenge.[27]

Two subsequent challenges to section 522(e) of the Act were, in effect, sidestepped by the United States Supreme Court.[28] Each case presented a facial challenge to section 522(e) rather than a concrete controversy over application of the Act to specific property interests. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court upheld section 522(e) on its face because it merely regulates conditions under which operations may be conducted. The section does not prohibit alternative uses of the land; thus it does not deny an owner all economically viable uses of his land.[29] The taking question was considered not ripe because the appellees had not pursued administrative relief with regard to their individual property interests. The finding that the "mere enactment" of the Act does not effect a taking does not prevent coal mine operators from challenging as a "taking" application of section 522(e) to their specific property.[30] The Court only commented on the federal regulations in a footnote and then only about the "all permits" test. While noting that the regulation had been remanded to the Secretary, the Court made an unclarified general statement that the "all permits"

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[23] *Id.* at 1091.
[24] *Id.* at 1090, 1110.
[25] *Id.* at 1090.
[26] *Id.* at 1091.
[27] *Id.*
[28] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Hodel v. Indiana, 452 U.S. 314 (1981).
[29] *Id.* at 294-95.
[30] *Id.* at 296.

test was not compelled by the Act or the legislative history.[31] Until the September 1983 revised regulations were promulgated, the Secretary essentially applied the existing regulations with the good faith effort changes in the "all permits" section.[32]

After a change in Administration in 1981, the Secretary announced his intention to amend many sections of the regulations on surface mining. The Secretary's stated purpose was to extend greater *flexibility* to the states to meet particular state circumstances[33] and to operate more *efficiently*.[34] Among the changes was a proposed change in the definition of valid existing rights.[35]

The Secretary's announced reason for this change in the definition of valid existing rights was a desire to be consistent with the ruling of Judge Flannery in *In re Permanent Surface Mining Regulation Litigation*.[36] This decision was cited as the basis for the failure of the original definition on judicial review.[37] While it is true that the definition was found lacking on judicial review, the decision only proposed a modification in the "all permits" test to include a good faith effort to obtain all necessary permits. In this way, those who had applied would not be penalized for bureaucratic delay, something which is beyond their control. Contrary to the Secretary's broad characterization of Judge Flannery's decision as requiring a complete revision of the valid existing rights definition,[38] the regulation was remanded solely to make revisions in accordance with the enunciated modification.[39] Judge Flannery specifically did not rule on the overall taking question.

Two proposed changes were relatively noncontroversial. The language explaining the needed adjacent area exemption allowing surface coal mining in prohibited areas was expanded to include situations where the "extension of mining is essential to make the surface coal mining operation as a whole economically viable."[40] The change was perceived to be in line with Judge Flannery's opinion in *In re Permanent Surface Mining Regulation Litigation* and not significantly affecting the existing balance of interests.[41] The revised regulations also formally adopted Judge Flannery's order that state law as well as custom and usage be used to interpret

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[31] *Id.*

[32] 3 E. MIN. L. INST. 7-20, 7-21 (1980).

[33] 48 Fed. Reg. 41,312 (1983).

[34] *Id.*

[35] *Id.* at 41,313 (1983) (to be codified at 30 C.F.R. § 761.5).

[36] *In re* Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) 1084.

[37] 48 Fed. Reg. 41,314 (1983) (to be codified at 30 C.F.R. § 761.5).

[38] *Id.*

[39] *In re* Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) at 1091.

[40] 30 C.F.R. § 761.5 (1984).

[41] OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, U.S. DEPT. OF THE INTERIOR; PROPOSED REVISIONS TO THE PERMANENT PROGRAM REGULATIONS IMPLEMENTING SECTION 501(B) OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, VOL. II COMMENTS, 135 (January 1983) [hereinafter cited as PROPOSED REVISIONS].

documents and contracts to determine what property rights or interests a producer possesses.[42]

The radical change came in the definition of valid existing rights. The Secretary proposed alternatives including exercising good faith prior to August 3, 1977, (similar to the first regulation as interpreted by Judge Flannery) and defining valid existing rights, as coal ownership alone. After extensive public comment,[43] the Secretary adopted the following regulation:

> (a) Except for haul roads, that a person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of a person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.[44]

These regulations are also the subject of a judicial challenge. Within the sixty day time limit,[45] a consortium of citizens' groups filed an action for review of these regulations with the United States District Court for the District of Columbia. This issue has recently been ruled on by the court.[46]

III. Implications of the Changes in the Definition of Valid Existing Rights

The dramatic change in the revised regulations is the shift in the valid existing rights definition from a mechanical test to a constitutional one. Under the previous regulation, an administrator could mechanically apply the "all permits" test. Under the revised regulations, the administrator must apply a constitutional taking analysis to valid existing rights determinations. This has significant implications both for the ease of program administration and the amount of land which the new definition may open for surface mining.

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[42] 30 C.F.R. § 761.5 (1984).

[43] The public comments are compiled in Proposed Revisions, *supra* note 41. In summary, the environmental interests argued that valid existing rights should be narrowly construed. The industry representatives maintained that the Office of Surface Mining should adopt the most liberal definition possible. They pointed out that the expanding of mining allowed under a more liberal definition of valid existing rights might not come about because of other restrictions in the Act, such as limits on blasting. There was also some dispute over the amount of land that would be affected by the proposed change. Environmental interests, citing the Environmental Impact Statement prepared in connection with the promulgation, contended that 1.2 million acres would be opened up for surface mining. Industry commenters contended that only 285,000 acres would be affected.

[44] 48 Fed. Reg. 41,439 (1983) (to be codified at 30 C.F.R. § 761.5).

[45] 30 U.S.C. 1276(a)(1) (1982).

[46] *In re* Permanent Surface Mining Regulations Litig. II, No. 79-1144. On March 22, 1985, the court ruled that the federal regulation defining valid existing rights had been promulgated in a procedurally incorrect manner and remanded the regulation to the federal Office of Surface Mining. In so ruling, the court noted that it had not reached the merits of the regulation.

A. *Constitutional Theory and Its Application to Valid Existing Rights*

The United States Supreme Court has consistently recognized that all governmental regulation has an economic impact.[47] It is inevitable that some class of persons will be hurt by a regulation; others will be helped. While the impact upon various property owners varies, governmental action does have an impact upon the value of property. The Court has also conceded the impossibility of governing where the government was required to make each person whole when some governmental action resulted in diminution of the value of that person's property.[48]

The Court has repeatedly tried to build some theoretical framework so as to resolve the tension between private property rights and the necessity of some governmental regulation. Such a result has been based upon the fifth and fourteenth amendments to the United States Constitution. As this body of law has developed, it has produced some varying (and at times overlapping) tests for determining when a "taking" that requires just compensation has occurred. The manner in which the various tests are applied, and which test is applied, could lead to varying results in any analysis of whether a company had valid existing rights under the Surface Mining Control and Reclamation Act.

1. "Noxious Use" Test

The first test to be developed was a "noxious use" test. Such a test required a finding by a legislative body that a particular use of property was offensive and should, as a matter of public policy, be prohibited. Once this finding was made, and the finding had survived judicial scrutiny of whether it is an "unreasonable and arbitrary exercise" of authority,[49] such a use could be prohibited without paying compensation to persons whose property was destroyed[50] because of the regulation.

An early example of this "noxious use" theory is *Mugler v. Kansas*.[51] In that

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[47] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[48] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[49] Reinman v. City of Little Rock, 237 U.S. 171, 177 (1915).

[50] The United States Supreme Court suggested for purposes of constitutional taking analysis there is no difference between an appropriation for public use and a destruction of property. *See* United States v. General Motors Corp., 323 U.S. 373, 384 (1945). *But cf.* United States v. Causby, 328 U.S. 256, 265-66 (1946). The Supreme Court has not emphasized this distinction in recent cases involving regulations challenged as takings of property without compensation. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264; Andrus v. Allard, 444 U.S. 51 (1979). In a 1983 article, Professor Freilich suggests that this is an important distinction and a key to understanding "taking" jurisprudence. It is Professor Freilich's thesis that an appropriation of property for public use should be considered as an instance of eminent domain and compensated accordingly. Instances of destruction or diminution in value without any appropriation for use should be subjected to "substantive due process analysis" and declared void if they fail to meet that test. Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW 447 (1983).

[51] Mugler v. Kansas, 123 U.S. 623 (1887).

case, Kansas passed a statute prohibiting the brewing of beer except in some very limited circumstances. The petitioner had owned a brewery at the time the statute was passed. In spite of this brewery being rendered very nearly worthless by the passage of the statute, the Court held that there was no taking. The Court seemed to equate taking without due process of law with a taking for public use without just compensation. The Court said, in effect, that so long as the statute was to protect such things as public health, morals, safety, and welfare, then it did not take without due process of law. If it did not take without due process of law then, according to the Court, it was not a taking without just compensation. So long as the police power was not exercised arbitrarily, its exercise apparently did not require the payment of compensation.

The Court took a similar approach in *Hadacheck v. Sebastian.*[52] There the plaintiff owned a brickyard which had been located outside the city. The city annexed the area where the yard was located and passed an ordinance prohibiting brick making in a designated area. The brickyard was in the designated area. The Court ruled that this was not a taking without compensation. This was in spite of evidence that the land where the yard was located was worth $800,000 as a brickyard but only $60,000 for any other use. In so holding, the Court said:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is least limitable. It may, indeed, seem harsh in its exercise, usually on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exercised arbitrarily.[53]

If one applies such a "noxious use" test to determine whether some person has valid existing rights under the surface mining statute[54] and regulations,[55] one finds that, in all likelihood, no one has valid existing rights. Both the federal[56] and the West Virginia[57] statutes contain strong prefatory language on the evils of uncontrolled surface mining. Both statutes contain prohibitions upon mining in the national forest and within certain distances of roads, homes, and public buildings.[58] In light of the record before Congress on the problems which mining could and did cause,[59] one would be hard pressed to argue that the prohibition in certain limited locations was arbitrary.

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[52] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[53] *Id.* at 410.

[54] 30 U.S.C. § 1272 (1982); W. VA. CODE § 20-6-22 (1984).

[55] 30 C.F.R. § 761.5; West Virginia Surface Mining Reclamation Regulations, Department of Natural Resources, Chapter 20-6, Series VII § 2.119 (1983). For recent amendments to the federal regulatory definition, see 48 Fed. Reg. 41,312 (1983).

[56] 30 U.S.C. § 1201 (1982).

[57] W. VA. CODE § 20-6-2 (1981).

[58] 30 U.S.C. § 1272; W. VA. CODE § 20-6-22 (1984).

[59] *Regulation of Surface Mining: Hearings Before the Subcomm. on the Environment and Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs,* 93rd Cong., 1st Sess. (1973) (hearings on April 9, 10, 16 and 17 and on May 14 and 15). Especially interesting are

Current regulations defined valid existing rights,[60] in essence, as whatever rights an owner must be allowed to exercise so as to prevent application of the limitations on locations of mines from resulting in an unconstitutional taking of that person's property.[61] If the reach of the police power is as unfettered as the cases discussed above seem to indicate, then there are no such rights. Congress and the West Virginia Legislature have, in effect, declared that surface mining is, in certain locations, a "noxious use" of land. Such a declaration makes prohibition of mining in that location acceptable even without compensation.

2. "Some Remaining Use" Test

While the Court continued to apply the "noxious use" theory until at least the 1960s,[62] the Court softened the absolute of the "noxious use" theory and began use of a balancing approach with *Pennsylvania Coal Co. v. Mahon*[63] in 1922. There a Pennsylvania statute required underground coal mining to be conducted in such a way as to not cause subsidence to public buildings, roads, stores, or private occupied buildings. Even though the mining company had acquired the right to mine all of the coal beneath the Mahon property before the statute became effective, the Mahons sought to use this statute to prevent mining of the coal beneath their property.

Although the Court could have applied the "noxious use" theory and upheld the validity of the statute,[64] it did not. Instead it introduced for the first time the overt[65] use of a continuum. This continuum recognized that any regulation has some impact on the value of property. At one end of the continuum are instances where the impact upon the value of the property affected is relatively small. Here there would be no taking. At the other end of the continuum are instances where the impact of the regulation is so dramatic that it amounts to complete destruction. In such a case there would be a taking.

Although the Court did not give any guidance for locating the point on that continuum where taking began, it did indicate that somewhere along that line one passed from regulation[66] to taking.[67] "The general rule at least is that while property

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pages 775-96. *See also*, Act of July 21, 1977, Pub. L. No. 95-87, 1977 U.S. CODE CONG. & AD. NEWS, 595-99.

[60] 48 Fed. Reg. 41,312 (1983).

[61] *Id.* at 41,349 (1983) (to be codified at 30 C.F.R. pt. 761).

[62] Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962).

[63] *Mahon*, 260 U.S. 393.

[64] It certainly would have been a legitimate finding that mining of coal in such a way as to cause collapse of the surface and resulting damage to the overlying land is a "noxious use" of that property.

[65] The Court apparently had done some balancing seven years earlier in *Hadacheck*, but had not articulated this balancing or used a continuum as a basis for its decision.

[66] Presumably this would require no compensation in spite of the regulation's effect upon the value of property rights.

[67] Justice Holmes' use of the term "taking" had led subsequent courts to assume that this con-

may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[68] Having confused[69] the law of "takings" by establishing this standard, Justice Holmes left it to later courts to determine what this standard meant.[70]

In making a constitutionally based determination of valid existing rights under this theory, a regulatory authority could come to varying results depending upon that particular authority's application of the test. One reasonable application of the test would result in finding that no one (or almost no one) has valid existing rights. As later refined,[71] the test under this theory of constitutional taking would be whether there remains any use of the property which can be made after the application of the statute to it. With coal mining (particularly where the mining company owned both surface and minerals) there would always (or almost always) be some other use for the land even where the statutory distance limits prohibit mining. In most situations the land would have some value as agricultural, pasture, or forest land if for no other use. It is, of course, true that these uses would be much less valuable monetarily than would use of the land for mining.[72] But such a reduction in value is not dispositive.[73] So long as there remains some beneficial use of the land, there is no taking. Under this theory, only an absolute destruction of property is a taking which requires compensation.[74]

While this "no other use" test for resolving taking questions would appear simple enough, it is not always so. It first presents the problem of determining how substantial a remaining use must be to prevent a prohibition of coal mining

templated some payment of compensation when a taking was found. In *Mahon*, 260 U.S. at 412, no compensation was sought and none awarded. Professor Freilich suggests that this confusion over remedy reflects a confusion in the analysis frequently given to cases where a regulation is challenged as an unconstitutional taking of property. Freilich, *supra* note 50.

[68] *Mahon*, 260 U.S. at 415.

[69] The actual holding is much more limited than the proposition for which *Mahon* is cited in cases such as *Penn Central*, 438 U.S. at 127 (1978). As Professor McGinley and Mr. Barrett correctly point out, the facts in *Mahon* involved adjustment of private rights between individuals. It did not involve the relationship of the state to an individual. The regulation failed not, as the oft-quoted language implies, because a regulation went too far. It failed because there was no public interest to be advanced. McGinley & Barrett, *Pennsylvania Coal Co. v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L. J. 418 (1981).

[70] While *Mahon*, has long been assumed to be the cornerstone of "taking" jurisprudence and Justice Holmes' dictum as the standard for determining when a taking has occurred, the authors would suggest otherwise. While this standard may be useful in analyzing public interferences with relations between private individuals, it is unsatisfactory as a limit of public control on private use. For a nearly contemporaneous example of court sanctioned destruction of private property upon a finding that the public interest would be served, see Miller v. Schoene, 276 U.S. 272 (1928).

[71] *Andrus*, 444 U.S. 51; *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264.

[72] In some situations this may be true only in the short term. With obligations to treat discharges from acid seams continuing long after the mine is closed, the most economic use of the land might be forestry, agriculture, or some other nonmining use. Webb v. Gorsuch, 699 F.2d 157 (4th Cir. 1983).

[73] *See, e.g., Andrus*, 444 U.S. 51.

[74] *See, e.g., Penn Central*, 438 U.S. 104; Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908).

from being an unconstitutional taking. While there may be instances in which the remaining use will be clear, there will inevitably be instances where the remaining use is so insubstantial that it essentially amounts to no residual use at all.[75] Results of determinations could be chaotic. Some regulatory authorities might conclude that the remaining use had to be comparable in monetary value to the monetary value that coal mining would have.[76] Others might conclude that any legally protectible use of the land[77] would be sufficient to prevent application of the distance limits of the Surface Mining Act from being an unconstitutional taking. While the Supreme Court cases point toward the latter as the more nearly correct approach,[78] the standard is vague enough to justify a wide range of applications of the standard to particular situations.

Perhaps more troublesome in applying this test to a valid existing rights determination is the practice of severing the mineral rights from the surface estate. If the mineral owner held only the mineral rights and could not mine the coal, then there is no alternative use which can be made of the only property held at that location. In its latest discussion on that point, the Supreme Court has indicated that it will not give constitutional protection to fragmented interests. In *Penn Central Transportation Co. v. City of New York,*[79] the owner of a building sought to put a substantial addition on top of it. A local ordinance required approval for such an addition and the company could not win such approval. The landowner contended that this was a taking of its property without compensation. As part of its argument, the company asserted that one part of its property rights, the "air rights" had been completely destroyed since it was prohibited from using those rights. The Court rejected this argument, saying that it would not allow this fragmenting of rights so that the rights when taken separately would be worth more than the parcel as a whole.[80] If this principle is applied to the mining industry, and mineral owners are unable to successfully argue that their entire estate (the minerals) has been taken, then there will, in all probability, be some use for any land and the prohibitions of the Surface Mining Act will not result in a taking.

Preliminary indications are, however, that regulatory agencies are not applying this principle to the mining industry. In perhaps the first widely reported administrative application of the revised regulatory definition of valid existing rights, the Deputy Under Secretary of the United States Department of the Interior deter-

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[75] The United States Supreme Court has recognized as a protected interest an aesthetic interest. Sierra Club v. Morton, 405 U.S. 727 (1972). While most would consider this an insubstantial use of coal bearing land, it is a legally protected, beneficial interest and could possibly work to prevent the application of restrictions of the Surface Mining Control and Reclamation Act from being an absolute taking of property.

[76] Agins v. Tiburon, 447 U.S. 255 (1980).

[77] Presumably this would include purely aesthetic uses, protected in *Sierra Club v. Morton.*

[78] *See, e.g., Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264; *Andrus*, 444 U.S. 51,

[79] *Penn Central*, 438 U.S. 104.

[80] *Id.* at 130. *See also Mahon*, 260 U.S. 393 (Brandeis, J., dissenting).

mined that the Otter Creek Coal Company had valid existing rights for land within the Monongahela National Forest in West Virginia.[81] In that situation, the company owned the minerals only. The Deputy concluded that, absent a favorable determination of the valid existing rights question, extraction of these minerals from within the national forest would be prohibited. From this, the Deputy concluded that such a prohibition would result in an absolute deprivation of all use of the property. Thus, the mining company had valid existing rights at this site. While this agency decision does not have the precedential weight of a court decision, it is significant. Assuming that this decision survives the pending appeal,[82] this introduces into the law the possibility of a landowner having more rights because the minerals have been severed from the surface than that owner would have if the surface and minerals had remained united. Apparently in law, if not in mathematics, addition by division is possible.

In short, a reading of this "no other use" test for determining when an unconstitutional taking has occurred[83] appears at first glance to result in the impossibility of a finding that a company had valid existing rights. There will always be some other use of land, even if it is not the most beneficial use. But the problems of severed mineral estates and uncertainty of just how much use must be left after mining is prohibited in a location leave this area confused.

3. "Distinct Investment-Backed Expectations" Test

The *Penn Central* case also introduced what has come to be a new standard for determining whether there has been a constitutional taking: "distinct investment-backed expectations." While the Court may have intended this new phase as only a refinement or a restatement of the line that must be crossed before there is a taking,[84] it has added a new dimension (and new confusion) to the law of taking.

That the Court intended this new standard as a gloss on *Mahon* is clear from its citation of that case in support of its first use of that term. The Court did not, however, clarify whether it intended the *Penn Central* decision to be a simple refinement of the "some remaining use" test first set forth in *Mahon* or as a useful clarification of the misleading language of that case. Despite this lack of clarity, it appears the Court was attempting a refinement of the "some remaining use" theory because of the Court's enhanced interest in economic matters. Instead of requiring that there be some use for the land[85] or that some value remain, the Court began to review the property in question to determine if there would still be profit to be made from it in the face of the governmental control or regulation.

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[81] 49 Fed. Reg. 31,228 (1984) (to be codified at 28 U.S.C. § 1491).
[82] *Potomac Chapter of Sierra Club v. Reed*, No. 84-822 (Interior Bd. of Land Appeals, filed 1984).
[83] Such a taking would presumably require compensation.
[84] *See Mahon*, 260 U.S. 393.
[85] *See Andrus*, 444 U.S. 51.

The first indication of this expanded interest in economic matter appears in the footnotes to *Penn Central*.[86] There the Court indicated that the City of New York had conceded in oral argument that if the property ceases to be "economically viable" because of the restrictions placed upon it by the ordinance in question, Penn Central would be entitled to compensation. While the Court did not specifically say so, it appears to acquiesce in this interpretation. The expanded interest in economic analysis appears again in *Agins v. Tiburon*.[87] There a developer objected to a zoning ordinance which would have restricted development. While upholding the ordinance, the Court announced as the standard for when a taking had occurred as when the regulation "denies an owner economically viable use of his land." If these words are taken literally then this may be an announcement that the Court is willing to examine regulations with a view toward making a determination of whether the landowner could still make a profit in spite of the questioned regulation.

The better interpretation of the new "distinct investment-backed expectations" test, however, is one that focuses the inquiry upon what parties to a contract might reasonably have expected. As commentators have noted,[88] the expectations of the parties in *Mahon* would have been that strictly private relations would not be interfered with. But the parties could not expect to carry out their private contract in such a way that would cause damage to members of the public not parties to the contract.

This interpretation of the "distinct investment-backed expectation" standard is supported by the United States Supreme Court's latest pronouncement on the subject as well as language in the venerable and often cited *Mahon*. In *Mahon*, the Court went to great pains to distinguish *Plymouth Coal Company v. Pennsylvania*.[89] That case (decided just eight years before *Mahon*) involved a restriction on coal mining. This restriction survived a challenge because its purpose was to promote safety of the miners. While the restriction on mining in *Mahon* was offensive to the Court because it interfered with privately negotiated rights, the restrictions in *Plymouth Coal Company v. Pennsylvania* were acceptable because they were designed to protect members of the general public from the externalities of private conduct.[90] Although Justice Holmes did not use the term, it fits well with a "reasonable investment-backed expectation" test for determining an unconstitutional taking. One might reasonably expect that purely private relations not affecting persons other than the parties should be allowed to continue without public interference. On the other hand, one could not reasonably expect that relations between private individuals that have an adverse impact on the public at large

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[86] *Penn Central*, 438 U.S. at 138 n.36.

[87] *Agins*, 447 U.S. 255.

[88] McGinley & Barrett, *supra* note 69.

[89] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[90] *Mahon*, 260 U.S. at 413-15 (1922). Indeed, the authors know of no case in which a statute or regulation which had as its purpose protection of the safety of the public being stricken as a taking of property without just compensation.

could proceed free of governmental control. This emphasis on the reasonable expectations is the focus of the most recent Supreme Court ruling on this topic.

In *Ruckelshaus v. Monsanto Company*,[91] the Court considered permissible uses that could be made of data that was submitted to the United States Environmental Protection Agency in support of an application for approval of a pesticide.[92] The company contended that disclosure of the data to the public (which would include its competitors) would amount to a taking for which it must be compensated. After deciding that the data was, in fact, protectible property, the Court applied a "reasonable investment-backed expectation" test to determine whether there had been a taking.

The statute[93] at issue in *Monsanto* had been amended in 1978 authorizing disclosure of data, even though it may result in disclosure of trade secrets. During some time periods, the statute had made specific provisions for disclosure or non-disclosure of the data submitted. The Court made distinctions based upon the language of the statute at the time the data was submitted. If the statute gave someone a "reasonable investment-backed expectation" of nondisclosure, then disclosure might be a taking. If the statute gave no assurance, then there might not be a taking. Although the language is the same as in *Penn Central*, the term "reasonable investment-backed expectation" has taken on the additional meaning of not just what a person could contemplate as a return on investment but what a person could be expected to contemplate as a governmental reaction to the investment.

How the standard of "reasonable investment-backed expectation" would apply to valid existing rights determinations is problematic. If the regulatory authority attempts to apply economic analysis, the result would be an administrative nightmare. To faithfully apply what the Supreme Court appears to be saying would require analysis of economic data on profitability of land when faced with a negative determination of the valid existing rights issue. Such a determination would necessarily involve some assumptions about the rate of return that companies are entitled to. Presumably, any land which could not be used for surface mining could produce either timber or agricultural products which would in most cases produce some profit from the land. Presumably some profit, however small, is sufficient to meet the test enunciated in *Agins*.[94] If regulatory agencies attempt to define what they will consider as a fair rate of return for valid existing rights purposes, they will inevitably become ensnared in thorny policy disputes that they cannot possibly resolve.

The easier (and theoretically sounder) application of a "reasonable investment-backed expectation" test to valid existing rights determinations involves examina-

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[91] Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984).

[92] Statutes prohibit sale of any pesticide not properly registered with the Environmental Protection Agency. 7 U.S.C. § 136(j) (1982).

[93] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1982).

[94] *Agins*, 447 U.S. 255.

tion of the expectation which the owner of the mineral interest could reasonably have had. At a minimum, this would require a negative valid existing rights determination for all companies which acquire the land in question after the effective date of the Act.[95] Under the rationale of *Monsanto*, companies' protected expectations are only those which the law would have protected at the time the expectation arose. Thus, companies who acquired land or mineral rights after the effective date of the Act did so knowing that the mining would be prohibited in certain areas. In that situation they would have no "reasonable investment-backed expectation" and, thus, no valid existing rights.

The broader application of this test to a valid existing rights determination would restrict the situations where companies are found to have valid existing rights. Companies owning coal reserves could legitimately expect that their contractual relations with other private persons would remain intact. Companies could not reasonably expect that the effects of the mining borne by persons not parties to the contract would be immune from public control.

The Act itself is designed to deal with the externalities of mining. The Congressional findings[96] speak of "causing erosion and landslides, contributing to floods, polluting the water," and "creating hazards dangerous to life and property by degrading the quality of life in local communities" as the evils of unregulated surface mining. While buyers of coal lands might reasonably expect to acquire the right to do as they will on the land itself, they could not have expected to inflict these damages upon persons not parties to the contract. The buyers never dealt with those persons and never acquired any right to cause external damage.

Thus, very few mining companies would have valid existing rights under a "reasonable investment-backed expectation." They could not expect to impose their externalities with impunity. The distance and location limitations of the Act are designed to ensure that the effects of the mining are confined to the mine site.[97] Since one's ownership and use of property is always limited by potential harm to others, one could reasonably expect limits such as the Act imposes and could rarely have the expectations needed to support a finding of valid existing rights.

B. Effects of the Changes on Enforcement and Carrying Out of the Surface Mining Control and Reclamation Act

The approach of the revised regulations basing valid existing rights determinations on constitutional taking considerations creates several problems. First, it virtually assures that the regulation of surface mining will no longer be nationally

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[95] August 3, 1977.

[96] 30 U.S.C. § 1201 (1982).

[97] In its Environmental Impact Statement, the federal Office of Surface Mining refers to distance limits as buffer zones. PROPOSED REVISIONS, VOL. I, *supra* note 41.

uniform.[98] This is true because each of the tests discussed above could be applied to yield a different result. Because regulatory authorities in different states will be applying these tests, this possibility of different results would almost certainly result in similar situations being treated differently in different states.

Under the "noxious use" test, there is probably the least room for state-to-state variation, but the possibility still exists. Under that test, deference to the legislative findings of public harm is paramount.[99] The prefatory language in the statute [100] and the legislative history[101] both strongly suggest that surface mining in many locations is a "noxious use" of the land. Given the importance of the deference to legislative findings, it would be difficult for a regulatory authority to conclude that surface mining is not a "noxious use" at the locations where it is restricted.[102] With the authority to make these constitutional taking determinations given to regulatory authorities, however, such a conclusion is possible.

The "some remaining use" test for identifying a constitutional taking leaves vast possibility for widely varying decisions in different states. This is true because application of the test requires a regulatory authority to determine the quality of a use that must remain to avoid an unconstitutional taking by application of the statutory restrictions on the location of mines. One regulatory authority might conclude that any legally protected use of land was sufficient. Under such a rule, a restriction on use of land for mining which left the landowner with only a recreational use of the land would not be a constitutional taking.[103] At the other end of the scale, a regulatory authority could decide that a constitutional taking has resulted unless there remains the highest and best use of the land after application of the restrictions on mining.[104] There are indications that the federal Office of Surface Mining has already moved toward this approach.[105]

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[98] National uniformity so as to prevent states from gaining a competitive advantage through lax environmental standards was one of the stated goals of the Surface Mining Control and Reclamation Act. *See* 30 U.S.C. § 1201(g) (1982).

[99] *See, e.g., Hadacheck*, 239 U.S. 394; *Mugler*, 123 U.S. 623.

[100] 30 U.S.C. § 1201.

[101] *Regulation of Surface Mining: Hearings Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, supra* note 59.

[102] Restrictions include within 300 feet of homes, within 10 feet of roads, in certain public lands and so forth. *See* 30 U.S.C. § 1272.

[103] A recreational use is a legally protected use of land. *See supra* note 75. If the only requirement of the "some remaining use" test is that there be *any* use remaining, then a restriction on mining which left the landowner with a recreational use of the land might well satisfy this test.

[104] The authors know of no United States Supreme Court case which requires that, in order to avoid an unconstitutional taking, the highest and best use of land remain after application of some regulation. But, there is probably enough ambiguity in the decisions of the Court that some regulatory authority could assume that this is the standard.

[105] Conversation with Anna Norton, Solicitor for U.S. Dept. of the Interior, Pittsburgh, Pa (February 16, 1983).

Variations among states in application of this test is almost assured in resolution of the problem of the mineral owner who owns only the minerals and nothing else. As discussed above, the United States Supreme Court had indicated that one cannot gain more rights by dividing interests in land.[106] Yet in its first opportunity to resolve this issue, the federal Office of Surface Mining decided that inability to mine coal when one owned only the coal, because of a severence of the property, amounted to a taking without compensation.[107] It is death to any thought of a uniform program to leave this question to a multitude of regulatory authorities all across the country. This is particularly true when the guidance those authorities get from the Supreme Court and the Office of Surface Mining seems to be contradictory.

Application of the "distinct investment-backed expectation" theory leaves even more room for variation among states. A state could conclude, and find support from the Supreme Court,[108] that the theory required an economic analysis of the issue. This would necessarily involve assumptions about appropriate rates of return and other subjective criteria. It is unlikely that more than a few states would work their way out of this regulatory thicket in the same way. It is even less likely that enough states would resolve the question in the same way so as to result in a nationally uniform program.

A state could also conclude that application of this test requires a distinction between private rights of parties to an agreement and effects of mining on persons not parties to the contract. Assuming that the regulatory authority can make such a distinction, it would then have to decide whether the mining in the controversial area affected such private or public rights and make its valid existing rights decisions accordingly. Another, and perhaps easier, way of phrasing this test is whether the effects of the mining can all be limited to the mine site. The vagaries of such a determination are such that there is little hope that a nationally uniform program will result.

A state could also conclude that application of this test requires examination of the reasonable, although subjective, expectations of the mineral owner.[109] Such a test would require an examination of the state of the law at the time the mineral owner acquired the interest. With so little guidance from the Supreme Court, it is unlikely that various regulatory authorities would resolve these issues the same way.

In short, not even the United States Supreme Court can say with certitude what is and is not a taking.[110] To give that decision to different regulatory authorities

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[106] *Penn Central*, 438 U.S. 104.

[107] This decision was in the determination of valid existing rights in the Monongahela National Forest. 49 Fed. Reg. 31,228 (1984) (to be codified at 28 U.S.C. § 1491).

[108] *Agins*, 447 U.S. 255; *Penn Central*, 438 U.S. 104.

[109] *Monsanto*, 104 S.Ct. 2862.

[110] *See, e.g., Andrus*, 444 U.S. 51.

in each of the twenty-four states where coal is found and hope that they make sufficiently similar decisions to produce a uniform national program is more than anyone could expect.

The second problem with the approach taken by the revised regulations is that it gives responsibility for making constitutional determinations to administrators who are not equipped to make them. In some situations, it may not even be legal for state agencies to make constitutional determinations.[111] Even where administrators have the bare legal authority to make these determinations, they do not have the expertise. It is folly to take legal questions which the United States Supreme Court has difficulty answering[112] and leave their resolution to regulators, who by training and inclination know engineering, agriculture, and forestry.[113]

The third, and most serious, problem with the revised regulations is that they greatly expand the areas where surface mining potentially may be allowed. Exactly how great the expansion will be is the subject of some controversy. No matter its size, the acreage which will be affected is very important because it is the acreage closest to people's homes, churches, schools, and highways. The revised regulations achieve this expansion by at least raising the possibility that mining could be conducted in areas where it would otherwise be prohibited.

IV. Conclusion

As with all legislation, the Surface Mine Control and Reclamation Act is a compromise. At various times Congress was given the option of banning surface mining, taking no federal action, or doing something between these extremes. Congress chose the option of allowing surface mining under defined conditions in all but a few areas, such as within 300 feet of homes. So as to prevent undue hardship on coal operations which would be affected by the Act, Congress exempted from these limitations "existing operations" and those with valid existing rights.[114]

The original regulations were consistent with the legislative scheme. The goal was to prohibit mining in certain limited locations. To work toward that goal, the regulations allowed anyone who was mining, or who had applied for a permit to mine at the time of the Act, to continue. Since no mine lasts forever, these mines which had begun or were about to begin in 1977 would eventually exhaust their coal reserves and close. If no new mine was allowed to open in the listed areas, the Congressional goal of not having mining in certain designated areas could be achieved without taking the harsh step of requiring an operating mine to shut down.

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[111] The regulatory authority in Kentucky, for example, is prohibited from considering the validity of a property right. During consideration of proposed rule changes, Kentucky took the position that it could not administer the proposed rules because of this conflict with state law. Letter from Elmore Grim to James Harris, Director, Office of Surface Mining (February 28, 1983).

[112] *See, e.g., Andrus*, 444 U.S. 51.

[113] In West Virginia a background in these fields is mandatory. W. Va. Code § 20-6-4 (1984).

[114] 30 U.S.C. § 1272 (1982).

The new regulations change all that. Although still subject to the uncertainty of constitutional litigation discussed above, it is entirely possible under the new regulations for an operator to mine a tract within a prohibited area even though, prior to implementation of the Act, he had never considered mining in that area. Under the revised regulations, a mining company could buy mineral rights within 300 feet of a house today, tomorrow, or any time in the future and argue that the government's refusal to allow it to mine that tract deprived it of its property. While the confusion in the law of constitutional taking makes the outcome a bit uncertain, the company has at least some possibility of success with such an argument.[115]

This result could never have occurred under the previous regulations. Under those regulations, only those who were mining or who had applied for a permit could have any hope of being allowed to continue to mine within the prohibited areas.

Thus, the new regulations have dramatically changed the Act. By regulation, the United States Department of the Interior has changed a Congressional program of prohibiting mining within certain locations. It has gone from a scheme in which mining in these prohibited areas would die a relatively painless death by attrition to a scheme in which the constitutional determinations of administrators may allow it to live forever.

[115] Such a result would probably not be justified, particularly in light of the emphasis upon the state of the regulatory law at the time the property interest was acquired as discussed in *Ruckelshaus v. Monsanto Co.* But considering the chronic confusion in the law of constitutional takings, such a result is still possible.