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APPROXIMATE ORIGINAL CONTOUR AND THE TAKING ISSUE—

Virginia Surface Mining and Reclamation Association, Inc. v. Andrus

In *Virginia Surface Mining and Reclamation Association, Inc. v. Andrus*,[1] a coal industry association filed a complaint to enjoin the enforcement of the Surface Mining Control and Reclamation Act of 1977.[2] The complaint alleged that the Act was unconstitutional on the grounds that it violated the fifth amendment to the United States Constitution which prohibits the taking of private property without just compensation. The petitioner also contended that the granting of cessation orders[3] without providing for a prior hearing violates the due process clause of the fifth amendment. The petitioner further alleged that if the Act was enforced the association would suffer irreparable harm, thus leaving it without an adequate remedy at law.

The court applied the test adopted in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*[4] and granted a preliminary injunction against the respondents. The injunction was based on a finding by the court that the petitioner had made a strong showing that it would prevail upon the merits. The court indicated that the reclamation requirements may be a taking of private property without just compensation and that the cessation orders issued under section 521(a) of the Act[5] may violate the due process requirements since they can be issued without prior notice of a hearing.

The court found that the Act's imposition of stringent measures upon coal mining operations on slopes greater than twenty degrees made the mining of such coal economically unfeasable. Since as much as 95% of Virginia coal is located on slopes exceeding twenty degrees, the mining of such coal is commercially impracticable under the requirements of the Act. In view of these circumstances, the court concluded that the Act interfered with

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[1] No. 78-0244-B (D. Va., Feb. 14, 1979) (order granting preliminary injunction) [hereinafter cited as *Virginia Surface Mining*]. The Association is a voluntary nonprofit association of approximately 63 small coal producers, the principal purpose of which is to represent the interests of the coal mining industry in Virginia.

[2] Surface Mining Control and Reclamation Act of 1977, §§ 101-908, 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978) [hereinafter referred to as the Act].

[3] 30 U.S.C.A. § 1271 (West Supp. 1978).

[4] 550 F.2d 189 (4th Cir. 1977).

[5] 30 U.S.C.A. § 1271 (West Supp. 1978).

the present use of the land (the mining of the coal reserves) and therefore constituted a taking of property without just compensation.[6]

In its truest sense, the Act is a police measure that does not, in any legal manner, contemplate the taking of private property for public use. It is generally recognized that a statute which controls mining within a certain area is not invalid as a confiscation of property without compensation if these controls appear to bear a reasonable relation to the protection of the health and safety of that area.[7] In fact, the United States Supreme Court has gone so far as to uphold land regulations that destroyed real property interests when those regulations were found to be for the general welfare of society.[8]

The court in *Virginia Surface Mining* ignored these cases and relied heavily on the case of *Pennsylvania Coal Co. v. Mahon*[9] for the proposition that the government cannot take private property without just compensation. In *Mahon* the claimant conveyed certain parcels of property but reserved all of the mineral rights with the intention of developing the coal. The Pennsylvania legislature subsequently enacted a statute forbidding the mining of coal when such mining would endanger the surface property. Since the statute destroyed all of the property rights for which the claimant had contracted, the Court held that there was a taking without just compensation.

The *Mahon* case is understood by many to stand for the proposition that the taking question turns primarily upon the degree of economic injury imposed by the regulation. However, case law has progressed to the point that *Mahon* is no longer considered to represent the general rule, but rather, an exceptional case. In considering *Mahon,* a Massachusetts court[10] noted that the opinion had been decided by a divided court on peculiar facts and has been superseded by Supreme Court decisions in which zoning ordinances limiting the removal of minerals from land have been determined to be reasonable under the circumstances.[11]

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[6] Virginia Surface Mining, *supra* note 1, at 3.

[7] Spillertown v. Prewitt, 21 Ill. 2d 228, 171 N.E.2d 582 (1961).

[8] Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

[9] 260 U.S. 393 (1945).

[10] Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, *cert. denied,* 326 U.S. 739 (1945).

[11] *See* Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891

A more modern approach in deciding whether a government regulation constitutes a taking was set forth in *Goldblatt v. Hempstead.*[12] The *Goldblatt* Court devised a two part test: (1) was there a diminution in the value of the property, and if so; (2) was the underlying rationale of the regulation sufficient to justify its enactment. In deciding whether there was a taking in *Virginia Surface Mining,* however, the court relied on the fact that as a result of the restrictions imposed by the Act the petitioner would suffer a more severe impact than the rest of the nation's coal producers. While the Act may have a greater impact on Virginia coal companies, that alone should not give rise to a taking. In *Penn Central Transp. Co. v. City of New York*[13] the Supreme Court recognized that legislation designed to promote the general welfare commonly burdens some more than others and as such, the mere fact that the Surface Mining Act has the effect of increasing the cost of the strip mining should not render the Act unconstitutional.

Even assuming, arguendo, that the Act does constitute a taking, the court in *Virginia Surface Mining* did not fully comply with the *Goldblatt* test since it failed to consider the underlying rationale of the Act in determining whether there was a compensable taking. Strip mining, while not a nuisance per se, has caused serious threats to life and property in the form of hazardous flooding, reduction in water storage and human exposure to potentially dangerous pollutants.[14] The legislative history and case law is so replete with the dangers and environmental impacts of strip mining that very little need be said about the propriety of exercising these police powers.[15] The Act represents the government's recognition of the adverse effects of strip mining on public and private interests, of the need for regulation of the industry, and of conservation and restoration of the land.

The standard for reviewing the propriety of the Act requires that great deference be given to the judgment of the legislature where, as here, there has been a showing of fundamentally fair standards enacted for the purpose of preserving the health, safety

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(1972), *cert. denied,* 409 U.S. 1108 (1973).

[12] 369 U.S. 590 (1962).

[13] 438 U.S. 104 (1978).

[14] H.R. No. 95-218, 95th Cong., 1st Sess. at III, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593.

[15] *Id.* at 59, [1977] U.S. CODE CONG. & AD. NEWS at 597.

and general welfare of the affected area.[16] Moreover, the means adopted by the legislature to accomplish the purposes of the Act are reasonably necessary for the realization of these objectives. The requirements of the Act are not unduly oppressive to those engaged in strip mining. The Act does not reach the degree of regulation that requires compensation to be paid since the restrictions are actually insignificant when compared to the overall social benefits gained.

The district court also found that section 521(a) of the Act,[17] which permits a federal inspector to shut down a mine upon notice of an alleged violation before the opportunity for a hearing, is a denial of due process of law in violation of the fifth amendment. The court based its opinion on the assumption that some irreparable harm could result from the compelled cessation of the mining operation. However, this type of expedited administrative autonomy is reasonably necessary to protect health and safety, the very basis for the Act. Thus, the Act sets forth performance standards for the strip mine industry. If an operation is found to be in violation of these standards, then cessation of the mining operation should be permitted until such time as formal proceedings may be held. Although formal proceedings are delayed, the more important interests of public health and safety are safeguarded against possible continuing harm.

The court, resting its opinion on the possibility of irreparable damage to the coal companies, failed to consider the irreparable damage to the environment that could result in the absence of the Act's expedited procedures. Even assuming that operators would suffer a loss, it would be a purely economic one and therefore recoverable. The loss to the public, on the other hand, could result in a serious and unrecoverable harm to the environment.

The West Virginia Supreme Court of Appeals,[18] has decided the very issue involved in this case. That court held that a regulation allowing for the immediate cessation of strip mining operations[19] without a prior hearing satisfies both the substantive and procedural due process requirements of the United States Consti-

[16] McGinley, *Prohibition of Surface Mining in West Virginia*, 79 W. VA. L. REV. 445 (1976).

[17] 30 U.S.C.A. § 1271(a) (West Supp. 1978).

[18] Anderson & Anderson Contractors, Inc. v. Latimer, No. 13976 (W. Va., March 27, 1979).

[19] W. VA. CODE § 20-6-14(a) (1978 Replacement Vol.).

tution. Likewise, a federal court in Pennsylvania[20] interpreted a similar statute authorizing cessation orders as not violating any constitutional rights.

The cases in the area of governmental taking of private property without just compensation are in harmony on at least one point—that there is no distinct line that can be drawn between regulation and taking. However, where the regulation in question involves fundamentally fair standards enacted to protect the health and safety interests of the public, courts should afford great deference to the judgment of the legislature. This appears to be the situation in the *Virginia Surface Mining* case. In view of the case law from other jurisdictions, and considering the Surface Mining Control and Reclamation Act of 1977 and the facts before the court in the case, it appears that the petitioner failed to sustain the heavy burden of showing that the Act went beyond a reasonable and necessary exercise of the police power.

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[20] Lucas v. Morton, 358 F. Supp. 900 (W.D. Pa. 1973).