



Volume 76 | Issue 3

Article 13

April 1974

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Recommended Citation

Rolla D. Campbell, Lynn C. Johnson & Ernest F. Hays II, *Ad Valorem Taxation of Coal Bearing Lands in West Virginia—A Viewpoint of the Coal Industry*, 76 W. Va. L. Rev. (1974).

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AD VALOREM TAXATION OF COAL BEARING LANDS IN WEST VIRGINIA—A VIEWPOINT OF THE COAL INDUSTRY

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I. INTRODUCTION

Although there has been a marked increase in the world demand for energy, the coal industry has experienced a lessening of its position in the energy market. Mr. Wilbur G. Helt, Director of Engineering for the National Coal Association, has made the following observations:

There has been a tremendous growth in total energy demands in the United States. Although coal is the nation's largest energy resource, it has not shared market growth in the same proportion that oil and gas have. Oil has had its largest growth in the transportation field—gasoline and petroleum products for automobiles and aviation—and has replaced coal for railroad needs; gas and electricity have grown most in home heating and cooling and industry use. At one time, coal was the principal fuel for energizing America; now its major use is for production of electricity, where it meets intense competition from other fuels.

. . . Even though the coal industry has made many innovative improvements in the extraction and preparation of coal to meet competition in the past, it has not developed a clean-burning fuel capable of meeting the popular environmental and convenience demands of the customer.¹

This observation brings into perspective the idea that the coal industry, reputed to be the "bedrock" of the State's economy, is not such a firm foundation. It is constantly being chipped away by the heavy hammer of competition. In this regard, some thought should be directed to the idea that since coal is the principal re-

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¹Helt, "Uses of Coal," in *ELEMENTS OF PRACTICAL COAL MINING* 71 (S. Cassidy ed. 1973).

source of the State, its development should be nurtured rather than abused.

For several years, there has been a popular hue and cry to levy a severance tax upon the extraction of coal, but the proponents of this measure disregard the effect of the tax already being levied upon the production of coal, that is, the three and one-half percent business and occupation tax.² Under this tax, a ton of coal selling for fifteen dollars is taxed at fifty-three cents, regardless of the fact that it cost the operator from ten to fifteen dollars to produce it. If an acre of land should yield five thousand tons of coal selling for fifteen dollars per ton, then that acre of land is subjected, in effect, to a "severance tax" of \$2,650, and this is in addition to ad valorem taxation of the land.

While advancing the concept of nurturing the basic industry of the State, no one in the industry would suggest preferential tax treatment. None would suggest that the industry should not bear its fair share of the tax burden of the State and county. However, these same people would oppose concerted efforts to impose a discriminatory share of that burden upon the industry.

Coal, the raw material for the industry, is found in seam deposits in the earth in large areas of the State. Owing to the expense of developing a mining operation it is essential that the operator have sufficient coal reserves to justify the necessary capital investment.³ Over a hundred years ago, those interested in the development of coal began acquiring title to coal bearing land or the coal therein in areas large enough to sustain the investment for its development. In many instances today, the coal operators own the land or coal in which they operate; in other cases the operators lease the land or coal. Whether owned or leased, the ownership of the coal bearing land cannot be separated from the coal industry. Neither can its taxation be separated from other costs of operation.

²W. VA. CODE ANN. § 11-13-2a (1973 Cum. Supp.):

Upon every person exercising the privilege of engaging or continuing within this State in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use any natural resource products, the amount of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as otherwise provided, multiplied by the respective rates as follows: Coal, three and five-tenths percent

³The generally accepted rule of thumb in the coal industry is that at least 25 million tons of reserves are required to support the investment necessary to compete in the present energy market.

With this brief background, we turn now to the purpose of this writing—a discussion of the industry's view of ad valorem taxation of coal bearing land.

II. THE STANDARD FOR ASSESSING COAL PROPERTY: TRUE AND ACTUAL VALUE

Ad valorem taxation of coal bearing land has been a perplexing problem for many years for both the owner and the taxing authorities. The constitution of West Virginia sets forth the basic law of ad valorem taxation. It provides:

Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, shall be taxed *in proportion* to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value⁴

The exceptions referred to establish limits of the levy of taxes that may be made on the value of different species of property. They are set out in what is commonly called the "Tax Limitation Amendment," which was ratified November 8, 1932.⁵

The West Virginia Supreme Court of Appeals in *In re Assessment of Kanawha Valley Bank*,⁶ overruling several prior cases to the contrary, held that this section of the constitution not only requires uniformity of taxation within classes of property, but also requires that no one species, or class, of property shall be taxed higher than any other species, or class, of property of equal value. The overruled cases apparently adopted the view that the uniformity prescribed by the constitution applied only to property of the same species. In the *Kanawha Valley Bank* case, the court held article X, § 1 of the constitution to be "clear and unambiguous,"⁷ prohibiting the taxing of any one species of property higher than any other species of property of equal value.⁸

⁴W. VA. CONST. art. X, § 1 (emphasis added).

⁵Acts of the 39th W. Va. Leg. ch. 10, Ex. Sess. (1932). See Philipps, *The West Virginia Constitution and Taxation*, 71 W. VA. L. REV. 260, 279-97 (1969).

⁶144 W. Va. 346, 109 S.E.2d 649 (1959). See Note, *Equality and Uniformity in Property Taxes*, 62 W. VA. L. REV. 70 (1959).

⁷144 W. Va. at 383, 109 S.E.2d at 670.

⁸*Id.* at 383-84, 109 S.E.2d at 670. The court, in referring to the constitutional provisions, stated: "Section 1 is composed of simple words that were in general usage a hundred years ago as well as the present time. Their meaning was the same as it is now."

This provision of the constitution is implemented by the West Virginia Code, where the Legislature has provided:

All property shall be assessed annually as of the first day of July at its *true and actual value*; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold, and not the price which might be realized if such property were sold at a forced sale, except that the true and actual value of all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants shall be arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented⁹

There is no other statutory prescription for the assessment of property for the purpose of taxation. Thus, except for residential and farming property where anticipated rental income is to be given consideration, the statutory criteria is that "all property" shall be assessed at its *true and actual value*, as therein defined.¹⁰ However, the Legislature, recognizing deficiencies and inequalities persisting in the assessment of property throughout the State, enacted the "State Aid to Schools Amendment."¹¹ By this legislation, the computation of the local (county) share for the public school support program is made dependent upon the rate of assessment of property by the county assessor. The Code provides for a state-wide reappraisal program:

The tax commissioner shall make or cause to be made an appraisal in the several counties of the state of all nonutility real property and all nonutility personal property *which shall be based upon true and actual value* as set forth in article three (§11-3-1, et seq.)¹²

Further:

As such appraisal of property in a county, under this section, is completed to the extent that a total valuation for each class of property can be determined, such appraisal shall be delivered to the assessor and the county court, and in each

⁹W. VA. CODE ANN. § 11-3-1 (1966) (emphasis added).

¹⁰*Id.*

¹¹*Id.* §§ 18-9A-1 to -20 (1971 Replacement Volume).

¹²*Id.* § 18-9A-11 (emphasis added).

assessment year commencing after such appraisal is so delivered and received, the county assessor and the county court, sitting as a board of equalization and review, shall use such appraised valuations as a basis for determining the *true and actual value* for assessment purposes of the several classes of property. The total assessed valuation in each of the four classes of property shall not be less than fifty percent nor more than one hundred percent of the appraised valuation of each said class of property.¹³

In passing, we cannot refrain from raising the question: Does the allowable fifty percent tolerance permit different percentages of assessment of the different classes (or species) of property? A study of the State Tax Commissioner's annual reports of property valuations in the various counties¹⁴ reveals that in almost every county the percentages of assessment between the four classes of property¹⁵ vary considerably. It is suggested that to the extent this statute is interpreted to permit the maintenance of an *avoidable* disparity between the percentages of assessment of the different classes of property, it is contrary to the ruling in the *Kanawha Valley Bank* case.¹⁶

¹³*Id.* (emphasis added). The reappraisal program was a legislative attempt to equalize property tax assessments and thereby provide a fair and stable base for county, municipal, and school finances. Assessors are now required to keep the total assessed valuations at not less than fifty nor more than one hundred percent of the total appraised valuation for each class of property. After considering the total county, municipal, and school revenue requirements, the assessor sets the assessed value of property at a percentage of the appraised value sufficient to generate adequate income when subjected to the applicable tax rate. Obviously, the effective tax burden will be substantially influenced by the appraised value and the assessed/appraised value ratio of the property. For a brief history of the reappraisal program, see W. VA. STATE TAX COMMISSIONER, REPORT OF STATEWIDE REAPPRAISAL PROGRAM (HOUSE BILL No. 75) 1-2 (1961). See also Note, 75 W. VA. L. REV. 50, 61-62 (1972).

¹⁴W. VA. STATE TAX COMMISSIONER, REPORT OF STUDY OF PROPERTY VALUATIONS (1972).

¹⁵W. VA. CONST. art. X, § 1. The four classes of property are:

- I. Agricultural personal property, products of agriculture, money, notes, bills, stock, accounts receivable and other similar intangible personal property;
- II. Residential property and real property used in farming;
- III. Other real and personal property situated outside municipalities; and
- IV. Other real and personal property situated inside municipalities.

¹⁶144 W. Va. at 388-89, 109 S.E.2d at 672-73 (1959):

Whether one taxpayer is *taxed* twice as much as the other by virtue of the imposition of a *rate* twice as high as the other, or by an assessment twice as high as the other, it is forbidden by Section 1, Article X of the Constitution. Furthermore, it is of no materiality whether the different

From the foregoing, it can be seen that there are now two statutes requiring two different public officials to perform the same act. The assessor is required to assess all property for the purpose of taxation at its true and actual value,¹⁷ and the State Tax Commissioner is required to make or cause to be made an appraisal of all nonutility property on the basis of true and actual value.¹⁸ Furthermore, the assessments made by the assessor must be not less than fifty, nor more than one hundred percent of the appraised valuations of the State Tax Commissioner.¹⁹ Are not both these public officials presumed to have complied with the law? Such a presumption is well settled.²⁰ Thus, two presumably correct assessments are, by statute, allowed to vary from one another by as much as fifty percent.

Digression from the avowed purpose has been made to see if we can establish just what ground rules now persist in the assessment of coal bearing lands. Apparently, true and actual value is still the standard, although there appears to be some legislative negation of the common law presumption regarding the assessments made by the county assessor, since his assessments are required to be not less than fifty nor more than one hundred percent of the appraised valuations made by the Tax Commissioner.

How then is the true and actual value of coal bearing land—"the price for which such property would sell if voluntarily

species of property happens to fall in one or the other of the "classes" of Code, 11-8-5, as amended. If a taxing official, even without legislative sanction, can now tax the owner of one species of property twice as high as the owner of another species of property of equal value by fixing the assessed value of the property of the former at double the value of the property of the latter, when the actual value of both properties is identical, there is no reason why such an official could not have achieved the same evil result prior to the Amendment of 1932 by assessing the properties equally and then placing a rate on one twice as large as the other. . . . The Constitution forbids this kind of discrimination as between the owners of property of equal value whether the tax gatherer comes at the taxpayer through the front door or the back door. And it is forbidden whether the taxpayer owns much property or a small amount of property. And it matters not what kind or species of property he happens to own.

¹⁷W. VA. CODE ANN. § 11-3-1 (1966).

¹⁸*Id.* § 18-9A-11 (1971 Cum. Supp.).

¹⁹*Id.*

²⁰*Bankers Pocahontas Coal Co. v. County Court*, 135 W. Va. 174, 62 S.E.2d 801, 804 (1950), citing *Liberty Coal Co. v. Bassett*, 108 W. Va. 293, 297, 150 S.E. 745, 746 (1929): "The state places special reliance on the well-settled rule that public officials will be presumed to have performed their duty."

offered for sale by the owner thereof . . ."²¹—to be ascertained? The most reliable method, and the one most commonly used, is to refer to reasonably current sales of comparable coal bearing lands. However, it is seriously doubted if this is the proper gauge. Owing to the many variables found in coal bearing property, it is difficult to find sales of comparable lands. The comparability of such lands must usually be an assumption because of differences in the quality, quantity, and physical characteristics of the coal seam being valued.²² It is these same variables which make the application of a set formula to fix a value of coal bearing land for assessment purposes most difficult. Therefore, the minability of the coal in a particular seam generally can be ascertained only when the coal has been extracted, processed, and profitably sold. In many coal seams it is almost impossible to predict or project minability even a few feet away. Use of comparables is also made uncertain because the ownership of coal bearing land in some areas of the State is so settled that there are not enough sales to establish a standard of true and actual value. This, no doubt, has spurred the taxing authorities to turn to some other acceptable method.

III. DETERMINATION OF TRUE AND ACTUAL VALUE BY FORMULA

Perhaps in partial recognition of the influence of many of the variables affecting the value of coal bearing lands, the West Virginia State Tax Commissioner has from time to time undertaken to develop a formula which may be applied to this type land for assessment purposes.

Probably the first formula for assessment of coal lands in the State was promulgated in 1922 by Walter S. Hallanan, then State Tax Commissioner.²³ This formula was designed to be applied to coal lands in central and southern West Virginia and was based upon the thickness, quality, and number of coal seams, proximity to railroad, and development. "Thickness" of the coal seam was intended to mean the thickness of clean coal, excluding the thickness of the impurities therein. "Quality" was intended to consider the purity, uses, and demand in the markets. "Development" was

²¹W. VA. CODE ANN. § 11-3-1 (1966).

²²Department of Pub. Works & Bldgs. v. Chicago Title & Trust Co., 408 Ill. 41, 95 N.E.2d 903 (1950). The word *comparable* necessarily includes dissimilarities as well as similarities.

²³W. HALLANAN, DATA FOR EQUITABLE VALUATION OF COAL LANDS (1922). The following textual discussion of the Hallanan formula and examples pertaining thereto were taken from *Data For Equitable Valuation of Coal Lands*.

to apply to operating mines. For purposes of valuation, coal bearing land was divided as follows: (1) developed area—ten percent of the total operating area around the development of the mines; (2) partially developed area—thirty percent of the operating area immediately surrounding the developed area; and (3) undeveloped area—sixty percent of the operating area not developed but proven near the developed area or adjacent thereto.²⁴

This formula was also based on the theory that at seventy percent recovery, a seam of coal would produce one hundred tons per inch of seam thickness per acre. At the average royalty rate for coal, ten cents per ton, the present value of the seam of coal was projected on the annuity basis, using forty years as the time required to mine the area and the rate of interest of eight percent. Using this present value figure, the value of the coal seam was broken down over the three areas of development. The value of the developed area was assumed to be one hundred percent of its present value; the partially developed area was assigned a value between eighty and eighty-five percent of its present value; the undeveloped area was given a value between forty and sixty percent of its present value. Using figures suggested by Hallanan, a seam containing four feet of clean smokeless coal (physical partings excluded), being operated, would be valued: ten percent at two hundred dollars per acre; thirty percent at one hundred sixty dollars per acre; and sixty percent at one hundred ten dollars per acre. Thus, a one thousand acre tract of coal land in which mining operations had been commenced would be valued: one hundred acres at twenty thousand dollars; three hundred acres at forty-eight thousand dollars; and six hundred acres at sixty-six thousand dollars—for a total valuation of one hundred thirty-four thousand dollars.

As the mining progressed, the mined out acreage was transferred into the category of barren acreage, which was valued at one dollar per acre. Further, as the mining progressed, the exhausted, mined-out acreage was deducted from the undeveloped area until depleted, then from the partially developed area, and then from the developed area until all the categories were completely depleted and the area was completely mined out. The appraised valuation so ascertained, for assessment purposes, was subjected

²⁴Under this formula, the smokeless (metallurgical) coals were considered the most valuable and were to be valued at one hundred percent, the steam (generating) coals were to be valued at eighty percent, and the splint coals at sixty percent.

to the percentage of assessment generally being applied in the county. Thus, the employment of this formula had the inherent allowance for the depletion of the coal by actual mining each year, as well it should. Certainly the owner of the coal land is entitled to have his assessed valuation reduced when the quantity of his coal is reduced.²⁵

The Hallanan formula was, in fact, employed in the southern West Virginia counties beginning in 1926. However, by 1936 most of the county courts realized that the application of the formula contemplated a reduction of the assessed valuations and a resultant reduction of tax revenue, while they anticipated a somewhat uniform revenue requirement over the years. Thus, the county courts caused the suspension of the Hallanan formula and arrested the reduction of assessed valuations of coal lands at the figure they had reached at that time, with the understanding that they would remain unchanged until the entire tract should become completely mined out. The inequity of this decision is exemplified rather clearly by a 4,500 acre tract owned by one landowner in McDowell County which, by operation of the formula, had reached the assessment rate of 157 dollars per acre at the time the formula was suspended and the per-acre rate of assessment frozen in 1936. Coal mining has continued in that tract from that time, and today there remain less than two hundred acres of coal to be mined. As the situation exists, 4,300 acres of that tract contain no coal but are being assessed as though they do.

While this method has ultimately resulted in coal lands in southern West Virginia being assessed at higher rates without any allowance for depletion of the coal, an altogether different system of assessing coal lands has been used in the northern part of the State. There, allowance is made for depletion of the coal each year.²⁶ Uniformity certainly cannot exist as long as different meth-

²⁵W. VA. STATE TAX COMM'R, REPORT OF STUDY OF PROPERTY VALUATIONS, iii (1956):

Even though the active acreage was frequently small in comparison with the total acreage shown on the Land Books, no allowance except in a very few instances where information was recorded, primarily with the northern field, was made for worked out or barren acreage The total acreage in many cases being carried on the Land Books is the same as for the original tract, even though in some cases it was found that the major portion of larger tracts had been worked out or barren. *Equalization cannot be achieved as long as this practice persists.* (Emphasis added).

²⁶*Id.*

ods of assessment are employed in different parts of the State.

Several neighboring coal producing states have adopted formula systems for valuation of coal lands for the purpose of taxation. As in West Virginia, these neighboring states adopt the criteria of true and actual value, or fair market value, as the basis for assessing property for the purpose of taxation. In Virginia, the assessing agent is required to assess coal bearing land in two categories—mineral lands not under development and mineral lands under development.²⁷ Mineral lands not under development, *i.e.*, those lands which have not been mined, are normally assessed in accordance with the quality and quantity of coal therein. Assessments generally run from a low of ten dollars per acre to a high of two hundred dollars per acre. At the time the coal is mined the mined land is transferred to the category of mineral lands under development, and for that year, the year mined, the previous not-under-development assessment rate is multiplied by ten. Thus, each year acreage is mined it is assessed at ten times the rate applied prior to mining. The Virginia taxing authorities also recognize that when the coal is mined from an acre of land, the mineral value of that acre is gone. Such land is transferred to a third category—mineral lands barren or mined out—where it is thereafter assessed at a nominal rate of one dollar or two dollars per acre.

Kentucky, another large coal producing state, has adopted a somewhat similar method of assessing coal lands. This method was reached by mutual agreement between the Kentucky Department of Revenue, the local assessing agents, the principal owners of coal land, and representatives of the coal industry itself. In developing this method, the Kentucky tax officials and representatives of the land owners and the industry, in full cooperation, arrived at what appears to be a most workable method whereby each county is broken down into zones depending upon the quality and quantity of the coal and its access to railway transportation. These zones are assigned base rates of assessment which prevail until the coal is mined. The base rates range from twenty-five dollars to two hundred dollars per acre, similar to the rates used in Virginia for mineral lands not under development. As in Virginia, when the coal is actually mined each acre mined is assessed that year at ten times its base rate. Likewise, when the acre is mined and so assessed, it is thereafter assessed at the nominal one dollar or two dollar rate as barren or mined out land.

²⁷Va. CODE ANN. § 58-774.2 (1969).

While the methods used in Virginia and Kentucky do afford some degree of stability to the tax structure, they are still subject to alteration by the local assessing agent. The method, but not the rate of assessment, is fixed by statute in Virginia.²⁸ No such statute exists in Kentucky, although the local assessing agents there are under the direct supervision of the State's Department of Revenue.²⁹

Under the Hallanan method, and those employed in Virginia and Kentucky, there is recognition that coal bearing land has three values, *i.e.*, a reasonable value while it lies dormant and undeveloped; a higher value when it is mined; and a nominal value after it has been mined. Analogously, the West Virginia court has noted that coal, although a solid mineral, is somewhat unique in that its minability cannot be confirmed until it is actually mined, removed from the earth, and sold at a profit.³⁰

There are several objections to adoption of a fixed formula for the assessment of coal lands, the principal objection being that very few fixed formulae allow for the many variables that influence the value of coal bearing land. Another is that even though a formula may be promulgated by the State Tax Commissioner, unless it is imposed upon the taxing authorities by statute, they have no obligation to adhere to it.³¹ Of course, the very purpose of adopting a formula for assessing property is to attain some degree of uniformity and stability, both for the benefit of those who rely upon the tax revenue and the taxpayer. As the law persists today, there is no stability. The local assessor is virtually without limit as to the manner in which he may arrive at property assessments. In a contest of assessments, the assessors are clothed with the presumption of correctness,³² limited only by the doctrine of mala fides, prejudice, capriciousness, arbitrariness, and the mandate of uni-

²⁸*Id.*

²⁹Ky. REV. STAT. § 132.420 (1971).

³⁰"Minnable coal . . . [is] . . . coal which could be profitably mined by judicious methods." *Tressler Coal Mine Co. v. Klefeld*, 125 W. Va. 301, 306, 24 S.E.2d 98, 101 (1943), *citing* *Atwater & Co. v. Collieries Co.*, 119 W. Va. 549, 195 S.E. 99 (1937).

³¹*Norfolk & W. Ry. Co. v. Board of Pub. Works*, 124 W. Va. 562, 569-70, 21 S.E.2d 143, 147 (1942). "An assessing agency is not bound by any systematic formula or theory in reaching its conclusion as to valuation, and it may consider an unlimited number of pertinent contributing factors."

³²*Bankers Pocahontas Coal Co. v. County Court*, 135 W. Va. 174, 179, 62 S.E.2d 801, 804 (1950).

formity as prescribed by article X, § 1 of the constitution.³³ The West Virginia Supreme Court of Appeals has indicated that it will not interfere with conclusions reached by the Board of Public Works, the assessing authority of public utility property, unless the assessment is clearly illegal or grossly and palpably wrong on the facts.³⁴ Until there is some legislative mandate to compel adherence to a prescribed formula by the assessing authorities, it would appear strange to ask the taxpayer to submit to any such formula voluntarily, without any assurance of stability or dependability.

The coal industry has, from time to time, been the target of unusual tax treatment in a number of counties of the State. Those who have, through purchase, acquired holdings sufficient to sustain the investment necessary to develop a coal production operation have been assailed as “absentee landlords.” In some counties of the State, candidates for the assessor’s office even campaign on platforms attacking the coal land owners or the “absentee landlords” and the coal industry itself. While this climate persists, the courts are perhaps a little hasty to clothe such assessments with the cloak of purity—the presumption that the valuations fixed by the assessor are correct.³⁵

An example of the frustration of the complaining taxpayer is found in *Bankers Pocahontas Coal Co.*,³⁶ where the court stated:

We cannot determine whether the valuations fixed on the lands of Bankers and Crozer result in inequality or lack of uniformity when compared with other lands, since the record is silent as to the true and actual value of the Bankers and Crozer lands, *as well as the lands with which there is an attempt to compare them.*

In that case, the taxpayers did, in fact, show that the minable coal

³³*Pardee & Curtin Lumber Co. v. Rose*, 87 W. Va. 484, 490-491, 105 S.E. 792, 794-795 (1921):

It is . . . stated that equity will relieve if the assessor purposely made the assessment too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity.

³⁴*Western Md. Ry. Co. v. Board of Pub. Works*, 124 W. Va. 539, 21 S.E.2d 683 (1942).

³⁵135 W. Va. 174, 181, 62 S.E.2d 801, 804 (1950).

³⁶*Id.* at 181, 62 S.E.2d at 805 (emphasis added).

in the lands, the assessments of which were being contested, had been mined to exhaustion. Certainly, it is true that a legal presumption serves in the place of evidence until the opposing party comes forward with his evidence, at which time it disappears and is not to be considered in weighing the evidence.³⁷ Furthermore, if there is a presumption as to the correctness of the assessments fixed by the assessor, and truly there is—until the complaining taxpayer comes forth with his evidence—why then would the court require the complaining taxpayer to establish the correctness of the assessments of other lands with which he attempts to compare the assessments of his own lands? Is there no presumption as to the correctness of these other uncontested assessments made by the assessor? These uncontested assessments of the other lands were also fixed by the same assessor—why are they not also presumed to be correct?

Again, we reiterate that without the formal prescription of a formula by the Legislature there can be no dependability or stability of the tax structure. The valuation of coal bearing lands for the purpose of taxation is a somewhat technical matter, with many factors having an influence upon that value. In many instances, the assessor, being an elected official, has very little knowledge of the influence of these variable factors upon value. Furthermore, the West Virginia Supreme Court of Appeals has stated that the assessments of property by the county assessor involve the performance of discretionary duties.³⁸ In the *Bankers Pocahontas Coal Co.* case, the court stated:

We also reiterate that many elements enter into the valuation of lands, and that such valuations are fixed *opinions* in the last analysis. Of course, such *opinions* must be reasonable and based upon conditions which would add to or detract from, the valuation of a certain tract of land.³⁹

The court has also noted that the only limitation on the Legislature's power to provide a method for arriving at tax assessment values is the constitutional mandate that the tax be equal and uniform.⁴⁰ It should be noted that that mandate must be extended

³⁷*Davis v. Hazlett*, 107 W. Va. 192, 147 S.E. 877 (1929).

³⁸*Central Realty Co. v. Martin*, 126 W. Va. 915, 918-19, 30 S.E.2d 720, 723 (1944). "The determination of the value of property by an assessor requires the exercise of discretion, but the classification of property for tax purposes and the maximum rate at which such property shall be taxed are prescribed by law."

³⁹135 W. Va. 174, 182, 62 S.E.2d 801, 806 (1950) (emphasis added).

⁴⁰*In re National Bank*, 137 W. Va. 673, 679-80, 73 S.E.2d 655, 660 (1952).

to incorporate the rest of the constitutional provision that no one species of property may be taxed higher than any other species of property of equal value.⁴¹ As is stated in the *Kanawha Valley Bank* case, article X, section 1 of the constitution of this State is clear and unambiguous and prohibits the taxing of any one species of property higher than any other species of property of equal value.⁴²

One may fairly ask why coal lands must be singled out for such special treatment as the development of a specific formula for its assessment while other species of property are not so specifically treated? In the *National Bank of West Virginia* case, can we not observe the sense of frustration of the Supreme Court of Appeals and the admission of the court's hesitancy to give serious consideration to the mandate of the constitution? There the court said:

Uniformity, however, must be used in a somewhat relative sense, for no method has been devised, and probably cannot be, whereby exact uniformity of taxation results to each taxpayer. In the opinion in the case of *In Re Tax Assessments Against Charleston Federal Savings & Loan Association*, 126 W. Va. 506, 30 S.E.2d 513, Judge Fox uses this language: "While our State Constitution requires uniformity and equality in taxation, no one has ever believed that either could be attained as a practical matter. The constitutional provision is a statement of an ideal, and is implemented by numerous statutes, all seeking to put into practice such ideal so far as is humanly possible. But do all we can, and attempt as rigidly as we may to enforce such statutes, we will fall far short of attaining equality, uniformity and justice in levying taxes"⁴³

More often than not, this is the final answer when the complaining taxpayer asserts that his property is not being assessed for taxation in the same manner as is the comparable property of his neighbors. The assessment is only a discretionary opinion, and the constitutional provision, although recognized to be a mandate, is only the statement of an ideal which no one really believes can be attained.

IV. FACTORS AFFECTING THE VALUE OF COAL PROPERTY

There is probably no equitable formula which can in reasonable justice be applied to coal bearing land in order to determine its value for the purpose of taxation, primarily because too many important variable factors directly influence the value of a tract

⁴¹W. VA. CONST. art. X, § 1.

⁴²144 W. Va. 346, 383, 109 S.E.2d 649, 670 (1959).

⁴³137 W. Va. 673, 680, 73 S.E.2d 655, 660 (1952) (emphasis added).

of lands supposed to contain coal. The following are some of the factors which a prospective purchaser-developer must consider before he can intelligently determine what he will pay for a parcel of land supposed to contain coal. The *location* of the land is of great importance. The developer must consider the accessibility of the land for development and whether he will be required to expend a large sum of money just to gain access to the property. The prospective purchaser must also ask if the land will physically fit into the development of adjoining coal bearing lands and if the land is near transportation facilities for the coal. The *availability and cost of coal transportation* in a prospective location must be analyzed before the value of coal to an investor can be determined.

The *physical condition of the land*, both above and below ground, must be considered. The developer must determine whether extraordinary environmental conditions exist above ground which will have an undue influence upon the cost of producing coal from the land, *i.e.*, are there highways, railroads, rivers, water impoundments, residential or public developments on the surface under which subjacent support must be maintained, thereby further limiting the percentage of recovery of the coal? Under the old method of mining the coal mine operator could in many instances recover as much as eighty percent of the coal of a particular seam. However, with the very sophisticated mechanized mining of today, the percentage of recovery has been greatly reduced. The industry recognizes an average recovery of only about fifty percent of the coal in underground mining.⁴⁴ In order to assure *subjacent support* for overlying structures or natural features, the coal mine operator will usually limit his recovery to about forty percent within the area deemed necessary to support the overlying strata. This underground area is usually considerably larger than the surface area to be protected. In addition, the modern mining operation requires much more elaborate facilities, and *surface space* therefor, than in the old days of the frame tippie, where the coal from the mine was dumped for loading directly into the transportation facilities.

A great deal also depends upon the nature of the owner's *mining rights* since restrictive mining rights decrease the rate of recovery of the coal. If the mine operator is constrained to provide

⁴⁴Phelps, *Modern Mining Methods—Surface*, in ELEMENTS OF PRACTICAL COAL MINING: 377 (S. Cassidy ed. 1973) [hereinafter cited as ELEMENTS].

subjacent support for the overlying strata, his recovery of the coal will be reduced to between forty percent and fifty percent of the seam. He will have to leave unmined in the seam fifty percent to sixty percent of the coal.

There is one other surface element the purchaser-developer must consider before he makes his investment: Is the coal deposit in question part of an area blocked up for development by a mine operator? A multitude of small areas in different ownerships cannot be developed until they are brought under one ownership, or at least under *unified control*. Sometimes this process takes years. Titles must be examined, defects cured, surveys made, and the assembly completed—a lengthy, tedious and expensive process, especially where the ownership is of mineral rights only.

But “blocking up” does not necessarily mean prompt development. Many blocked up properties have been held for long periods—some as much as a century—before development occurred. All this time the blocked up acreages must be managed and taxes paid. Compare the coal land owner with a stock holder in a listed company. What investor would wish to buy stock which paid no dividends but called for an annual assessment for taxes and expenses for a period of no predictable end? Yet, that is what many coal land owners do. They perform a necessary service because few commercial coal mining companies will take the time, trouble, expense, and risk to assemble a needed acreage from many small ownerships. The owners who have assembled tracts of some size hope that revenues from some of the holdings will be sufficient to carry the expense of the idle, undeveloped acreage—often a bare hope.

The need to block up coal properties has particular relevance to the imposition of an ad valorem property tax on coal reserves. Higher ad valorem tax rates generally would discourage the retention of property in unproductive capacities and force the owner to employ the property productively or dispose of it. Although this characteristic of the tax normally promotes the efficient utilization of real estate, the effect may be just the opposite of that desired as regards coal property. An ad valorem tax on coal reserves would only serve to discourage continued holding of idle and unproductive lands, causing the blocked up holdings to be broken up into smaller ownerships, making development difficult if not impossible. Additionally, transfer of ownership to tax free organizations of a public or private character would be encouraged.

The prospective purchaser-developer must also know the *geology* of the land being considered, the nature of the strata between the coal seam and the surface, and the nature of the strata below the coal seam, particularly immediately below. Determination of the *strata immediately overlying the coal seam* is extremely important since falls of roof account for over fifty percent of the fatalities that occur in coal mines in the United States. Frequently, the control of roof is the largest single cost item.⁴⁵ The *underlying strata* must be of such composition as will permit the use of the necessary mining equipment. Oftentimes, the coal mine operator finds that the floor is composed of clay, which after the accumulation of the inevitable mine water turns into a muck hampering the use of haulage equipment. Furthermore, this muck ultimately fails to hold adequately the pillars of unmined coal left to support the roof. The support pillars are pressed by the weight of the overlying strata into this muck, often rendering large areas of the coal seam forever unminable.

The factors affecting minability of a coal seam can only be discovered by a very extensive core drilling program. Of course, this drilling program is also conducted for the purpose of sampling the coal seam itself. This is essential to the prospective purchaser-developer for his own protection. Many thousands of acres of land have been purchased in this State on the blind assumption that they contained minable coal, and the purchaser subsequently learned that he had bought a "pig in a poke." This may explain the fact that there are large areas of the State alleged to contain coal not being developed for the production of coal. Generally, the lands have been prospected and found not to contain minable coal. Notwithstanding the West Virginia Geological Survey Reports, a great majority of the seams of coal reported are not minable.

The *quality and the quantity of the coal* is, of course, the principal variable to be considered in the valuation of coal lands. While there are known instances of coal in the neighborhood of twenty-eight inches in *seam thickness* being mined, it is doubtful that such a seam would be attractive for commercial development today unless it is of the very finest quality coal, demanding the highest market price. Today, because of the very high costs involved in the development of a coal operation, it is not considered economically feasible to develop coal in less than a thirty inch seam.

⁴⁵Gaddy, *Roof Control*, in ELEMENTS, *supra* note 44.

The prospective purchaser-developer must determine the extent of *impurities, partings, and sulfur content*, each of which will require more elaborate and expensive preparation equipment to make the product competitive in today's discriminating market. The inherent sulfur content will render the coal unmarketable if it exceeds the environmental standards,⁴⁶ no matter how thick the seam may be.

The coal producer-developer must also consider the *physical characteristics of the coal seam*. Very few coal seams lay on a level plane. If the seam slopes away from the point of entry, recovery is rendered more expensive because the coal must be trammed uphill for removal. If the seam varies in depth, the use of modern mining equipment may be precluded. Some properties contain *multiple coal seams*, but undue importance is probably placed on this characteristic. This would appear to be a bonanza for the owner of such land, but, in many instances, the mining of one coal seam will render the other seam totally unminable. For example, in one area of Fayette County, West Virginia, the mining of one seam lying thirty feet above the other has rendered the lower seam unminable. Several attempts have been made to mine the lower seam, all resulting in failure. The determination of which seam to mine first is usually influenced by economic necessity. The best coal will be mined first.

Mining the upper seam first is generally presumed to have no effect on later mining of a lower, but this is far from the case. A mined upper coalbed can cause as much, or more, trouble to a lower seam than a mined-out lower bed can cause the upper. It depends on the distance between beds, the nature of the intervening strata and just how the mining was performed.⁴⁷

The presence of large amounts of *mine water* also affects the value of the coal property. Mine water is probably one of the most unpleasant elements with which the coal mine operator must contend.

The handling and disposal of mine water is a much larger problem than is apparent at first glance. Many more tons of water are removed from underground coal mines in the United States each year than tons of coal. In the old anthracite region

⁴⁶Air Quality Act, 42 U.S.C. § 1857 *et seq.* (1970); 40 C.F.R. § 51 Appendix B 3.1 (1973); W. VA. AIR POLLUTION CONTROL COMM'N, ADMINISTRATIVE REGS., ch. 16-20, Series VIII, 4.01(b) (1970).

⁴⁷Schroder, *Modern Mining Methods—Underground*, in ELEMENTS, *supra* note 44.

of Pennsylvania the average was around 36 tons of water for each ton of coal produced, while bituminous mines average about 5 or 6 tons.⁴⁸

In many instances, this mine water is found to be highly acidic, requiring extensive treatment before it may be discharged.

In assessing the value of coal lands it should be remembered that the value of coal for today's market is influenced by its inherent properties. The two primary factors affecting marketability are the BTU value and the sulfur content of the coal. The heat value of the coal is customarily expressed in British Thermal Units per pound of coal.⁴⁹ The Environmental Protection Agency's regulations limit the sulfur content of coal to be burned to one percent or less.⁵⁰ Low sulfur coal is available, but it is remote from the present markets, thus carrying a higher transportation cost.⁵¹ Furthermore, the presently undeveloped low sulfur coals are often found to have a much lower BTU value with resultant decreased economic value. The West Virginia Coal Association has noted that the great majority of coal in West Virginia lying north of the Kanawha River will be unmarketable by 1975 when the Environmental Protection Agency intends to require full compliance with its sulfur content restrictions. Much of the coal in land lying south of the Kanawha River will also fail to meet these requirements.

In addition, other *regulatory legislation*, such as the recently enacted Federal Coal Mine Health and Safety Act of 1969,⁵² has rendered many coal mining operations uneconomical, and, as a result, many smaller mines have been forced to close in West Virginia and across the nation.

With today's high cost of developing a coal mining operation, the *availability of capital* is a very important factor. Many investors are hesitant to put their capital into an industry that has historically been the target of so much controversy.

The prospective purchaser of coal bearing land must, of necessity, be concerned with the system of *taxation* which will be applied to the land of which he is considering acquiring title. In many instances he is required to hold the land for years without any income from it whatsoever. During this dormant period, the

⁴⁸Berry, *Drainage*, in ELEMENTS, *supra* note 44.

⁴⁹Hopkins & Simon, *Geology of Coal*, in ELEMENTS, *supra* note 44.

⁵⁰42 U.S.C. § 1857, *et seq.* (1970).

⁵¹Helt, *supra* note 1, at 71.

⁵²30 U.S.C. § 811 (1970).

purchaser has had his investment capital tied up with virtually no return. He has had to protect his land and maintain his title. He may well have been in court several times to prevent his land from being taken by adverse possession. There are some instances where coal bearing lands have been held for fifty to one hundred years without being developed. All the while, the owner has done nothing but expend money to pay taxes and maintain his ownership to protect his investment.

Against the evaluation of the above factors, the purchaser-developer must weigh the *cost of developing the property* and the necessary mining machinery and preparation plant in order to determine whether the coal can be mined and marketed with a reasonable return on the total investment. If this cannot be done, then the coal bearing land has virtually no value.

How can all of these variable factors be considered and evaluated with respect to any given tract of coal land? Certainly it can only be done by experts familiar with the particular tract and generally with what investors will pay for an area of coal lands. Basically, the real difficulty is that the exact nature of the property to be valued is unknown, and cannot be known until development occurs and the coal is actually extracted and sold for a profit.

V. THE CURRENTLY PROPOSED FORMULA⁵³

In the past few years the State Tax Commissioner has endeavored to promulgate a formula for the appraisal of coal bearing land. Each formula so devised has been abandoned. The Commissioner has now promulgated another, which is currently being considered for application. By this formula, in-place coal is assigned an assumed base value of five cents per ton. From this assumed base value a "weighted" value for the seam is reached by assigning weights for the BTU value of the coal and the thickness of the seam, down to and including a seam thickness of one foot. The BTU value and seam thickness are taken from the West Virginia Geological Surveye made in the early 1900's. Under this proposed formula each seam in a magisterial district is assigned a "seam value," and by applying the weighted value formula, a per acre weighted value of the coal land in the district is determined. Presumably, each acre of land in the particular district is to be appraised at the "weighted value" so ascertained.

⁵³The proposed formula referred to here is the weighted average formula, adopted by the State Tax Commissioner pending development of a program such as that discussed by John Melton, *supra*.

This proposed formula, like all the rest, leaves much to be desired. First, the assumed value of five cents per ton for coal in place is questionable. It assumes that all coal is minable down to, and including, a one foot thickness. As we have noted above, very few seams of coal are minable less than thirty inches in thickness.⁵⁴ The proposed formula makes no reference to the minability of the coal seam. To a large extent, minability determines value, and land without value should not be taxed. Compounding the error, if the coal in an unminable seam happens to have a high BTU value, its owner is further penalized by the influence of BTU content on the "weighted value."

Even though a particular seam of coal may be minable in one area of a magisterial district, its weighted value influences the ultimate value of land in other areas of the district where that seam is not minable at all. Using the example of Fayette County, the Geological Survey reports now in use are based upon 138 test core drillings in the county.⁵⁵ The work-up of the Tax Commissioner's current formula shows that in Fayette County, the Fire Creek Seam of coal is included to determine the "weighted value" of the land in the Fayetteville, Quinnimont, and Sewell Mountain Districts. A study of the summary of the core borings set out in the Survey⁵⁶ will show that in Fayetteville District there were fifty-seven borings, of which only two showed Fire Creek seam of minable thickness, only seven showed traces of the seam, and forty-eight did not even show the seam to exist. In Quinnimont District the summary shows that of twenty-two borings, none show the Fire Creek seam to exist. In Sewell Mountain District, of thirty-five borings only four show the seam of minable thickness and the remaining thirty-one show no trace of the seam. Therefore, the evidence upon which the Tax Commissioner bases this proposed formula shows that certain seams of coal are minable, or even present, in only limited acreages of the various magisterial districts in the county; yet the formula would include every seam of coal present in any part of the magisterial district as though it were present and minable throughout the district, thereby distorting the

⁵⁴Dr. I.C. White, in his preparation of the West Virginia Geological Survey Reports, investigated the seam thicknesses from actual coal mining operations. In Fayette County, for example, no coal mine was found operating in less than two and one-half feet of coal seam. Coal of less thickness is not minable by deep mining methods. If such a seam outcrops, then a limited amount is minable by surface mining methods, but that is all.

⁵⁵W. VA. GEOLOGICAL SURVEY, COUNTY REP., FAYETTE Co. 388A,B,C (1919).

⁵⁶*Id.*

“weighted value” of all the land in the district. Similarly, the formula gives no consideration to the fact that the coal from a seam has, for all practical purposes, been mined to exhaustion. Certainly, there is no justification for this “phantom” influence upon the assessed valuation of all the land in the particular district.

The use of geological surveys made as far back as the early 1900’s to determine the value of coal lands today seems to be suspect. No effort has been made until recently to update the information contained in those reports. It must also be borne in mind that the projected estimates of available coal contained in these reports are calculated down to one foot of coal seam thickness—a foot and a half below minable thickness.

The proposed formula allows no consideration for any of the other variable factors referred to above as affecting the value of coal lands. Certainly, one of the factors which has attained as much importance in the marketing of coal as the BTU value is the sulfur content. This is not even considered in the formula. Furthermore, there is no information which would tend to indicate any consideration of mined out acreage or the influence of such fact upon the ascertainment of the “weighted value.”

VI. CONCLUSION

Problems associated with the ad valorem taxation of coal bearing lands have no simple solution. No one affiliated with the coal industry would suggest preferential treatment in the ad valorem taxation of coal bearing lands. However, for the sake of the industry the pendulum must not be swung to the extreme of discrimination. The basic criteria for assessing property for ad valorem taxation is still true and actual value, and the basic guideline is still that no one species, or class, of property be taxed higher than any other species, or class, of property of equal value.

The imposition of a formula for assessing coal bearing lands which does not give consideration to all the many important variable factors which influence the value of this type of land works an injustice upon the taxpayer. These variable factors are certainly considered by a prospective purchaser-developer in determining the true and actual value before investing in such lands.

The proposed formula for assessing coal bearing lands would impose a fictional stability and uniformity as to method but would also serve as an injustice to a taxpayer, since it is hypothesized on theorized information. It is doubtful that a formula can be devel-

oped which will give adequate influence to these variable factors. Each particular property is unique in that these factors vary considerably from one property to another. This further frustrates the fitting of all such property into the confined recesses of a formula.

It would appear that there are three values to coal bearing land: One value while it lays dormant and unmined, which should not be taxed at such a rate as to confiscate the investor's purchase; another value at the time of development when the coal is actually mined and the profit realized, now being subjected to a severance tax in the form of the business and occupation tax; and a value after the coal has been extracted, which should certainly be only nominal since the value is forever gone.

In view of the fact that the application of a formula to coal bearing lands is not binding upon the assessing agents and the intention is to impose it upon the industry, the recipients of such special treatment should at least be called upon for in-put in the development of a formula, if such a system is to be used.

