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Strip Mining in Kentucky

DAVID A. SCHNEIDER *

In Kentucky, strip mining for coal has caused more controversy, political debate and citizen concern than any other issue relating to natural resources and our environment. And more of the same can be expected as long as the coal operators continue to rip away the earth in search of what many have referred to as "black gold." The practice of stripping away the surface material in order to uncover a seam of coal is not new in Kentucky. Proponents of strip mining will argue earnestly citing examples to prove that strip mining was a common practice in the early 1900's. While the existence of such early strip mining practices cannot be denied, it was for the most part confined to shallow seams, outcrops near the surface, and the flat areas of Western Kentucky. The real controversy developed following World War II, when science and technology introduced larger and more efficient machinery for biting into the mountain slopes of Eastern Kentucky in order to meet the increased consumer demand for low cost electricity.¹ Many coal seams neglected for years because of their poor quality, or because they were too thin to deep mine, were suddenly in demand as a source of energy for the coal burning utilities. Moreover, in the mountains of Eastern Kentucky, hundreds of miles of outcrop coal, the interior of the seams having been deep mined many years ago, now became profitable sources for strip mining operations. Year after year the number of acres disturbed by strip mining in Kentucky continues to grow. With demand for electricity at a record high in 1970, accompanied by predictions of "black outs" and "brown outs" for many areas of the nation, the production of coal, spurred

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¹ Grim, *Kentucky's Reclamation Program*, KENTUCKY ENGINEER, November, 1967, at 11.

on by a significant increase in its price, can be expected to continue its upward spiral. This means that more and more Kentucky soil will be disturbed, and that the impact on the environment will be greater than ever before.² Whether the soil, streams and mountains of Kentucky can survive this foreseeable onslaught depends to a large degree on the attitude of the Kentucky citizens, the legislature and the courts toward new concepts of environmental law being developed in our nation today.

But to understand the role that new concepts could play in meeting this challenge, we must of necessity be cognizant of existing case law and legislation in Kentucky relating to the problems of strip mining. It is the purpose of this article to review our previous progress and failures, and then to submit proposals for needed revisions to the existing strip mining laws.

The mere passing of new laws, however, will not solve strip mining problems in Kentucky. No law regulating strip mining activities will be even remotely effective, unless it is fairly and firmly enforced. And good enforcement depends largely upon the attitude of the landowners most closely involved, the attitude of the strip mine operators towards complying with the spirit of the law, and the attitude of the state administration charged with enforcing the law, from the Governor down to the field inspector in his day-to-day inspection activities.

KENTUCKY COURTS AND SURFACE OWNERS: THE BROAD FORM DEED

Any treatment of strip mining in Kentucky must necessarily include a discussion of the so called "broad form" mineral deeds³ and the distinctive interpretation given to such deeds by the Ken-

² Kentucky is the only state in the nation with two separate and distinct coal fields. The Eastern field is part of the Appalachian Region and covers approximately 10,200 square miles in 31 counties. The Western field covers about 6,400 square miles in 14 counties. According to facts collected by the U. S. Forest Service in 1966, some 55,000 acres had been disturbed by strip mining in Eastern Kentucky, and 66,700 acres in Western Kentucky. When compared to the areas that possibly could be mined, only about 1% of the potential acreage has been disturbed to date.

³ The "broad form" or "long form" mineral deed is a name applied to various forms of mineral conveyances, wherein the mineral estate is severed from the surface estate. One particular version is the "Mayo" form of mineral lease, which was prevalent in Kentucky in the early 1900's. The "Mayo" form of lease provides that the mineral owner has the right to "use and operate the same and surface thereof . . . in any manner that may be deemed necessary or convenient for mining" and it contains a release by the surface owner of any claim for damages in the use of the land and the surface.

tucky courts. Mineral deeds severing the mineral estate from the surface estate are not peculiar to the mountains of Eastern Kentucky. Such mineral deeds are common throughout the coal fields of Pennsylvania, West Virginia, Ohio and other states. It is significant, however, that of all the coal states ruling on mineral deeds loosely classified as the "broad form" type, only Kentucky has reduced the property rights of the surface owner to a mere license to occupy the surface, until such time as the mineral owner elects to destroy the surface in order to remove the coal.

The Kentucky interpretation of "broad form" mineral deeds was first announced in 1956 in the landmark case of *Buchanan v. Watson*.⁴ The trial judge held that under the mineral deed in question, the coal could be removed by the strip mine method, but damages had to be paid for the destruction of the surface owner's interest in the surface and the timber thereon. Both the mineral owner and surface owner appealed this decision. The original unreported decision of the Kentucky Court of Appeals affirmed the trial court's ruling. After granting a Petition for Rehearing, the Kentucky Court of Appeals reversed its original decision and held: (a) that the mineral owner could remove coal by the strip mining process which would result in destruction of the surface, and (b) that the mineral owner was not liable to the surface owner for destruction of the surface rights, in the absence of arbitrary, wanton or malicious destruction.

On numerous occasions,⁵ since the *Buchanan* decision, the Kentucky court has declined to change its view, even though Kentucky surface owners were placed in a singular position when compared to the court decisions in other states. The latest challenge to the "broad form" mineral deed interpretation was made in *Martin v. Kentucky Oak Mining Company*.⁶ While the Kentucky Court of Appeals again declined to overrule *Buchanan v. Watson*, many people were encouraged by the split decision and the very strong dissent of Judge Edward P. Hill. Judge Hill, expressing his dismay, stated:

⁴ 290 S.W.2d 40 (Ky. 1956).

⁵ *Croley v. Round Mountain Coal Co.*, 374 S.W.2d 852 (Ky. 1964); *Blue Diamond Coal Co. v. Campbell*, 371 S.W.2d 483 (Ky. 1963); *Wright v. Bethlehem Minerals Co.*, 368 S.W.2d 179 (Ky. 1963); *Ritchie v. Midland Mining Co.*, 347 S.W.2d 548 (Ky. 1961); *Blue Diamond Coal Co. v. Neace*, 337 S.W.2d 725 (Ky. 1960); *Kodak Coal Co. v. Smith*, 338 S.W.2d 699 (Ky. 1960).

⁶ 429 S.W.2d 395 (Ky. 1968).

I am shocked and appalled that the court of last resort in the beautiful state of Kentucky would ignore the logic and reasoning of the great majority of other states and lend its approval and encouragement to the diabolical devastation and destruction of a large part of the surface of this fair state without compensation to the owners thereof.⁷

Judge Hill supported his position by citing a long list of cases from six other states that take a view contrary to the Kentucky decisions.⁸

Perhaps even more significant than the contrary view taken by the other states is the fact that the Kentucky court itself has followed the reasoning of the other state courts where drilling for oil rather than strip mining of coal was involved. As Judge Hill noted:

Not only is the majority opinion contrary to the laws of sister coal states, such as West Virginia and Pennsylvania, as I shall point out later, but the majority opinion is inconsistent with other opinions of this court in similar situations. This court decided in *Wiser Oil Company v. Conley*, Ky., 346 S.W. 2d 718 (1960), that the owner of oil and gas rights had no right to use the water-flooding method of recovering oil without the consent of the owner of the surface. This court said in *Wiser* at page 721, "Even though appellants assert that the water-flooding process was known prior to March 10, 1917, the date of execution of the lease, and was employed to some extent in other states before that time, we conclude it was the intention of the parties that oil should be produced by drilling in the customary manner that prevailed when the lease was executed. Any exemption from liability would therefore be limited to the damages which might be caused by this contemplated means of bringing oil to the top."⁹

Commenting on the above situation, Judge Hill added, "*Wiser* and *Buchanan* are as inconsistent as sin and salvation."¹⁰

Many Kentuckians, particularly the surface owners most di-

⁷ *Id.* at 402.

⁸ *See, e.g.* *West Virginia-Pittsburgh Coal Co. v. Strong*, 42 S.E.2d 46 (W. Va. 1947); *Rochez Bros. Inc. v. Duricka*, 97 A.2d 825 (Pa. 1953); *and Franklin v. Callicoa*, 119 N.E.2d 688 (Ohio 1954).

⁹ 429 S.W.2d 395, 401-02 (Ky. 1968).

¹⁰ *Id.* at 402.

rectly involved, likewise cannot reconcile the Kentucky Court's interpretation of the "broad form" mineral deed with the decisions from other states and the Kentucky Court itself. Even the mineral owners and strip operators themselves do not in actual practice follow the *Buchanan* ruling. It is a matter of common knowledge that land agents for the operators generally approach the surface owners and seek to obtain written consents to strip mine, along with complete releases for any damage to the surface to be done by strip mining activities. Whether the payment offered is the traditional 25¢ or 50¢ per lineal foot of property measured along the coal seam, or 10¢ per ton as has developed in Pike County, the transaction is completely one-sided. If the landowner refuses to sign and accept the payment, the operator strips the land anyway under the protective cloak of the *Buchanan* decision. This "take it or leave it" approach forces many surface owners to sign the releases against their will. Such daily activity in the coal areas of Eastern Kentucky only adds to the general distrust the people of the area have toward placing their faith in the process of law to protect their property from the ravages of strip mining. Many people of the area feel strongly that the courts and judicial system exist only to protect the rights of the wealthy mineral owners and strip mine operators. As Judge Hill so appropriately commented:

With this further compliment, I leave *Buchanan* to the strip and auger operators. They [the operators] have shown in actual practice such little regard for the justice and fairness of *Buchanan* that they have not had the heart to take advantage of their legal windfall safeguarded and guaranteed by the rule in *Buchanan* and have in many cases been compensating the surface owner for "oppressive" damages done the surface owner.¹¹

Supporters of the *Buchanan* decision will argue that it represents sound property law, and that it is easily distinguished from the decisions of the other states holding for the surface owners. There is a wide-spread feeling, however, that the economic condition of the coal industry in 1955 was the determining factor for the *Buchanan* decision. One needs only to read the many briefs

¹¹ *Id.* at 403.

submitted by representatives of the coal industry on the petition for rehearing in the *Buchanan* case to understand the problem facing the Court. Yet, statistics relating to the value that the sale of a ton of coal has to the coal industry and the economy of Kentucky, should not have been a factor in a declaratory judgment proceeding on the interpretation of a "broad form" mineral deed. But obviously, such economic arguments must have had an effect, for as the Court stated in *Buchanan*:

To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow.¹²

Judge Hill's reaction to the *Buchanan* Court's economic concern was as follows:

I would point out that in *Buchanan*, supra, this court shed great crocodile tears for the coal industry when the opinion said: 'To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow.' Obviously the court was grieving for the coal industry.¹³

Whether the reader feels that the Kentucky Court of Appeals was correct or in error in first holding and then refusing to abandon the ruling of the *Buchanan* decision, he cannot deny that the ruling has adversely affected the attitude of a large number of Kentuckians toward strip mining operations. In determining what role the rule of law can be expected to play in the future control of strip mining in Kentucky, the existing case law, and attitude of the people toward such decisions, obviously will remain an important factor.

STRIP MINING LEGISLATION

The history and effectiveness of existing strip mining legislation must also be reviewed in determining whether increased public concern for the environment will result in new legislation to save Kentucky from additional ravages of strip mining.

For example, the 1972 session of the Kentucky General As-

¹² 290 S.W.2d 40, 44 (Ky. 1956).

¹³ 429 S.W.2d 395, 403 (Ky. 1968).

sembly will undoubtedly see the introduction of bills calling for the outlawing of strip mining operations on mountain slopes. Whether the legislature can totally prohibit the removal of coal by the strip mining method is an issue of some controversy. Two basic and sometimes conflicting constitutional rights must be considered in this regard. First, are the guarantees of the United States Constitution¹⁴ and Kentucky Constitution¹⁵ that a person's property shall not be taken except by due process of law and that he is entitled to equal protection of the law. Owners of the mineral resource loudly proclaim these rights whenever legislation is introduced to prohibit or regulate a method of mining. But into this area of constitutional rights of the individual enters the police power as the inherent right of governmental units to provide for the public health, welfare, safety and morals of their citizens. And thus, the police power is relied upon by opponents of strip mining to prohibit or regulate certain acts which may be deemed detrimental to the safety, health and welfare of society. Keeping these basic constitutional rights in mind, let us briefly review early attempts at strip mining legislation.

The first strip mining legislation was adopted in West Virginia¹⁶ in 1939. Thereafter the states of Indiana (1941), Illinois (1943), Pennsylvania (1945) and Ohio (1947) enacted strip mine laws. Where challenged, these early statutes were usually upheld under the police power.¹⁷ Only in Illinois was a strip mining statute declared unconstitutional,¹⁸ and there it was done on the basis that the act discriminated against coal strip operators and did not apply to other operations which removed or disturbed the earth to remove a mineral. In no other state has strip mining legislation been defeated by the courts. A subsequent Illinois statute was successfully enacted in 1961.¹⁹

It must be remembered, however, that most of this early legislation was in the form of a permit and bonding procedure with very little effective reclamation controls. Kentucky's first step in strip mine legislation was taken in 1954.²⁰ Little or nothing

¹⁴ U. S. CONST. amend. XIV, § 1.

¹⁵ KY. CONST. §§ 13 and 242 (1891).

¹⁶ W. VA. ACTS 1938, ch. 84.

¹⁷ *Dufour v. Maize*, 56 A.2d 675 (Pa. 1948), annot. 1 A.L.R.2d 563 (1948).

¹⁸ *Northern Illinois Coal Corp. v. Medill*, 72 N.E.2d 844 (Ill. 1947).

¹⁹ ILL. LAWS [1961], 3113.

²⁰ Ky. Acts ch. 8 at 19 (1954).

was accomplished from a reclamation standpoint during the first six years under this act, the main requirements being to cover the face of the coal and "grade spoil banks where practicable." Thousands of acres of "orphan areas" created under this law stand today as evidence to the fact that grading spoil banks was not very practicable at the time.

Moreover, the average operators' attitude toward the initial Kentucky law was evidenced by the fact that when Governor Combs took office in 1960, he discovered that only a handful of operators in all of Eastern Kentucky had even bothered to obtain a permit from the State as required by the law. Administrative hearings and litigation gradually resulted in all operators being placed under the permit and bonding procedure. Subsequent amendments to the law in 1962²¹ and 1964²² closed certain loopholes in relation to enforcement, required additional material to be placed over the coal seam and augur holes, and added certain grading requirements which in practice only applied to flat areas. Thus, where the 1954 law required grading spoil banks "where practicable," the 1964 amendment now required the overburden to be graded "to a rolling topography to be defined by regulation." The resulting regulation required grading of the disturbed area so that it could be traversed by farm machinery.

Understanding the impact of the regulation requires a brief explanation of the different methods of strip mining.

Area Strip Mining is practiced on gently rolling to relatively flat terrain, commonly found in Western Kentucky. A box cut is made through the overburden to expose the coal seam which is then removed. This cut extends to the limits of the property or the deposit. As each succeeding parallel cut is made, the spoil (overburden) is deposited in the cut just previously excavated. The final cut may be a mile or more from the starting point of the operation and may be several miles in length. Viewed from the air, area stripping resembles a plowed field or the ridges of a gigantic washboard.

Contour Strip Mining is practiced in steep or mountainous country, such as is found in Eastern Kentucky. This method consists of removing the overburden above the coal seam by

²¹ Ky. Acts, ch. 105 at 400 (1962).

²² Ky. Acts, ch. 51 at 228 (1964).

starting at the outcrop and proceeding along the hillside. After the exposed coal is removed in the original cut, additional cuts are made until the ratio of overburden to coal produced brings the operation to a halt. Contour mining creates a shelf, or bench, on the hillside. On the inside it is bordered by the highwall, which may range from a few feet to more than 100 feet in height. The opposite side is a precipitous slope that has been covered by spoil material cast down the hillside. Unless stabilized this spoil material can cause severe erosion and landslides.²³

Thus even a novice to strip mining control would realize that regulations on the grading of the stripped area would only apply to the area type method of strip mining as is commonly practiced in the flat or rolling areas of Western Kentucky. In truth, there was no control on removing coal by the contour method; the size of the cut into the Eastern Kentucky mountain and resulting highwall and bench or table portion of the cut were only limited by the law of economics and machinery available. The operators cut as deep into the mountain side as was economically feasible, and halted their gouging only when the cost of removing the overburden even deeper into the hillside became prohibitive. As larger and more efficient machinery was developed, the cuts into the mountain side gradually became larger. Fifty to one hundred foot highwalls and five hundred foot wide benches were not uncommon. As larger and more efficient equipment was developed, it soon became feasible to remove the entire top of a mountain. The tragedy of all this apparent productivity for Kentucky was that the dirt removed was disposed of in the most convenient fashion—it was generally bulldozed down the mountain sides. Hundreds of miles of strip mine benches were produced in this fashion. Landslides became commonplace, and sediment from erosion soon choked and killed the mountain streams.

In response to the ever increasing damages from strip mining, Governor Edward T. Breathitt in the spring of 1965 instructed the Division of Reclamation to draft new regulations to control for the first time the method of operation on steep mountain

²³ Grim, *supra* note 1, at 11-12.

slopes. Under the direction of Director of Reclamation Elmore Grim, and with the cooperation of specialists from the U. S. Forest Service at Berea, regulations were drafted and public hearings held. In essence, the regulations proposed were designed to limit the cut into the mountain side in relation to the steepness of slope, so that the weight of the resulting dirt placed down the slope would not tend to create landslides. Thus, mathematical and physical principles were employed to determine the volume and weight of the overburden that could safely be placed down the mountain side in order to prevent slides. The regulations also provided that on slopes above 33°, no overburden or dirt could be placed downhill below the operation. On slopes between 30° and 33°, the maximum bench width allowed was originally set at 45 feet. As the slope decreased in steepness, the bench width or cut into the mountain was allowed to become progressively larger, (e.g. 120 feet on a 25° slope) since spoil material placed on slopes of a lesser degree was theoretically more stable from the standpoint of preventing landslides. The 1965 regulations also established for the first time specific vegetative planting requirements designed primarily to achieve quick cover and soil stabilization.

In November, 1965, after hearings had been completed, Governor Breathitt signed an emergency proclamation placing the proposed regulations into immediate effect. At the same time he instructed the Department of Natural Resources and Attorney General's Office to draft comprehensive strip mining legislation for submission to the 1966 General Assembly. The bill that was introduced into that session of the legislature and subsequently adopted is the basic law that is in effect in Kentucky today.²⁴ In relation to the contour method of operation as applied to the mountain sides of Eastern Kentucky, the legislation specifically authorized the adoption of regulations to limit the size of cuts into a mountain side and to "prohibit any overburden from being placed beyond the solid bench on precipitous slopes as defined by the Commission."²⁵ In essence, the legislation elaborated on and gave statutory blessing to the administrative regulations adopted in November, 1965.

The most dramatic change created by the 1966 law was the

²⁴ Ky. Acts ch. 4 (1966).

²⁵ Ky. REV. STAT. [hereinafter K.R.S.] § 350.093(2)(f) (1966).

requirement for grading in relation to the area type of mining. Where the former law originally called for grading "where practicable" and then required grading "to a rolling topography" accomplished by rounding off the peaks of the parallel spoil piles, the new legislation as applied to area strip mining called for complete backfilling of the disturbed area "to the approximate original contour of the land, with no depressions to accumulate water."²⁶

Endowed with the above controls, the 1966 Kentucky strip mine law was hailed by conservationists and referred to by *Life Magazine* as "probably the strongest" reclamation law in the nation.²⁷

The results after some four and one-half years of operation under the 1966 law are both pleasing and disturbing. In Western Kentucky, on the rolling or flat areas, the results are truly amazing. The contrast between rounding off parallel spoil ridges and grading the land back to the original contour is like the difference between night and day. Some difficulty remains in achieving stable vegetative cover, but in general, everyone is pleased with the results.

In Eastern Kentucky, the story is quite different. J. O. Matlick, former Commissioner of Natural Resources, and one of the wisest and most dedicated officials ever to serve the people of Kentucky, has frequently articulated the obvious observation that "Once you cut into the side of a mountain, you can never put it back together again." As applied to contour strip mining, the 1966 law and regulations were an honest attempt to minimize the damages from strip mining in the mountains by using the best possible techniques known at the time, short of total prohibition. The general attitude adopted by those who worked on the 1966 legislation was that if this method of regulatory control did not achieve satisfactory results, then total prohibition of strip mining in the mountains might be the only alternative.

Looking back now, I see that our hope that the legislation would minimize damages from mountain strip mining was wishful thinking. In general, the operators in Eastern Kentucky made an attempt to comply with the letter of the law, but the spirit of

²⁶ K.R.S. § 350.093(1) (1966).

²⁷ *Three Murdered Old Mountains*, LIFE, Jan. 12, 1968, at 66.

the law was violated day in and day out in their constant drive to produce coal to meet ever increasing demands. While the new law restricted the amount of dirt that could be pushed down the hill, it was silent on how much dirt could be stacked on the bench. Many of the operators tried to produce just as much coal on a given area as they had before the new regulations went into effect, even though the law now required much more restrictive bench width limitations. In short, instead of "pushers" operating with a bull-dozer, the larger operators became "stackers" using front-end loaders and other equipment to keep the dirt piled on the bench, so as not to push the dirt over the side and thereby create larger benches in excess of the new bench width limitations. The end result was that this added weight on the bench created just as many mudslides as under the older methods of operation.

For this reason, and as new experience was gained in the first year of operation under the 1966 law, it was determined that further restrictions for contour strip mining were necessary if damages in the mountains were truly to be minimized. Public hearings were held on proposed amendments to the regulations in the late summer and early fall of 1967. One of the last official acts that Governor Breathitt performed before leaving office in December, 1967, was to sign these amended strip mining regulations into law. These regulations, which are in effect today, provide that on slopes 27° and above, measured downhill from the coal seam where the spoil or dirt will be placed from the operation, only augur mining can be practiced. The method of strip mining whereby all of the overburden is uncovered before picking up the exposed coal seam is thereby restricted to original slopes of 26° or less. Moreover, on all operations, no dirt may now be stacked on the outer one-third portion of the fill bench. The primary purpose of December, 1967 amendments to the regulations was to close loopholes in the 1966 law and to incorporate experience gained during the first year of operation under the 1966 law.

One must always remember however that the 1966 law and subsequent regulations were directed primarily at preventing landslides and stabilizing the outslopes resulting from contour strip mining. Erosion and sediment damage to streams, even

under the best grading conditions cannot be prevented. Freshly disturbed earth placed on a downhill slope, even where stable, invites erosion. Particularly during the first six months to one year after the soil is disturbed, heavy rain and snowfall, along with freezes and thaws, will cause large deposits of sediment to choke and fill the nearby creeks and streams.

Thus from a conservationist's viewpoint, even if the 1966 law and subsequent regulations were a success in preventing landslides, serious damage to the environment still occurs daily. As people begin to realize the full impact that strip mining has on the adjacent watershed, wildlife and natural resources, more and more are convinced that strip mining should not be allowed to continue in the mountain areas of Kentucky.

As discussed in the introduction to this article, the demand for coal has increased during the past year in alarming proportions and the land disturbed by strip mining grows significantly each year. When viewed from the standpoint of future damage to our Kentucky hills, streams, forests, parks, and recreational and tourist areas, one wonders how long the exploitive philosophy that has characterized the removal of coal, timber and other natural resources in Kentucky over the past one hundred or more years will be allowed to continue. And, one wonders whether the traditional common law concepts in relation to property and water rights are adequate to meet the challenges of our environment created by monster equipment brought into the hills of Kentucky to tear away the good earth in the relentless search for coal. Perhaps the answers lie in the filing of environmental lawsuits, now being utilized more than ever before throughout the nation in an attempt to prevent vested interest groups from destroying the land, air and water. But, the legislative role is also important. As the elected representatives of the people, the Kentucky General Assembly has an obligation to reflect the desires of the majority rather than serving the will of special interest groups. As more and more citizens are appalled by the damage to the environment from strip mining in the mountains and they make their views known, it is hoped that the legislators will enact such additional strip mining legislation as will truly protect the people of Kentucky and our natural resources for generations yet to come.

SOLUTIONS AND RECOMMENDATIONS

By reviewing the strip mining story in Kentucky, including case law, legislation and observations from my own experience with strip mining operations, I have attempted to set the stage for what I feel are needed additions and revisions to the strip mining and reclamation laws of Kentucky. Some of the suggestions are attainable in the 1972 session of the Kentucky General Assembly. Others may take longer to achieve. For whatever merit they may have, I submit the following proposals for consideration.

A. Total Prohibition

As the damage from increased strip mining activity becomes more widespread and severe in Eastern Kentucky, more and more discussion is heard concerning the need for the total prohibition of strip mining in mountain areas. Since the existing Kentucky law and regulations²⁸ differentiate between area type strip mining and contour strip mining, it has been suggested that contour strip mining, or more specifically any type of strip mining activity on slopes above 20°, be prohibited. A bill to this effect was introduced in the 1970 General Assembly but died in committee. Similar legislation is being advocated by many conservation groups and individuals for the 1972 legislative session.

Whether the legislators enact such a bill or not, it is clear that any law relating to prohibition of strip mining can only come from the General Assembly itself. Previous attempts by local fiscal courts to outlaw strip mining on a county basis have been unsuccessful. For example, in June, 1970 the Knott County Fiscal Court²⁹ adopted a resolution prohibiting strip mining in that county as a public nuisance contrary to public policy. On this question, the Attorney General released an opinion stating in essence that Kentucky's counties lacked authority under the prevailing statutes to prohibit strip mining as a public nuisance.³⁰

Since counties are creatures of the General Assembly and can only exercise those powers specifically delegated to them by the

²⁸ K.R.S. § 350.093 (1966).

²⁹ A fiscal court in Kentucky is the county legislative body composed of the County Judge (the county's executive) and three elected Commissioners as members.

³⁰ OP. ATTY. GEN. 70-286, reaffirmed in OP. ATTY. GEN. 70-563.

legislature,³¹ perhaps an alternative to direct prohibition of contour strip mining by the General Assembly would be for the Kentucky legislature to grant counties and local governmental bodies, such as fiscal courts and city councils, the authority to determine for themselves whether the strip mining process was consistent with the best interest of the local citizens. And when viewed from the idea that it is the local property owners who suffer the most direct damage from strip mining operations, a good argument may be made for placing the ultimate decision for the continuance of strip mining operations in the hands of local officials, rather than elected representatives from the entire state, the majority of whom are elected from areas of the state where strip mining will never be practiced. Section 60 of the Kentucky Constitution would appear to authorize such a procedure, since it would be a regulation of their local affairs.

Others have suggested that the question of strip mining be placed on the ballot in each county on a local option basis in much the same manner as provided for the sale of alcoholic beverages in Chapter 242 of the Kentucky Revised Statutes. I am fearful, however, that such a statutory scheme would be in violation of Section 60 of the Kentucky Constitution, and that it would take a constitutional amendment to authorize a local option election on strip mining similar to that provided for the sale of alcoholic beverages.³²

I do not believe however that Section 60 of the Kentucky Constitution would prevent the General Assembly from empowering or authorizing fiscal courts or city councils to determine under their police powers whether strip mining operations constituted a danger to the public health, safety and welfare within their jurisdictions.

However, whether the legislature enacts direct prohibitory legislation, or whether it delegates such authority to county and local governmental units, serious questions still exist relating to the validity of any such attempted legislation. In my opinion, a statute flatly prohibiting all strip mining operations in Kentucky would undoubtedly be ruled unconstitutional as a violation of due process and a taking of property without just compensation.

³¹ KY. CONST., § 144 (1891).

³² KY. CONST., § 61 (1891).

B. Prohibition on Slopes of Certain Steepness

While flat statutory prohibitions are generally unfavorably accepted by the courts, a regulation of the manner of conducting the activity could be sustained, if reasonable, even where the practical effect of such a regulation amounts to a prohibition of the activity.³³ In fact, the Kentucky strip mining regulations now follow this concept for slopes in excess of 27° by providing that, on slopes of such a degree, strip mining is prohibited. The regulation further provides that on slopes between 28° and 33°, only augur mining is permitted. Above 33° no dirt whatsoever may be placed down the mountainside below the coal seam.³⁴ Thus, there is a regulation of the manner of conducting the activity which in effect prohibits strip mining activity on many mountain slopes. Because of increasing damage to the watersheds in mountain areas, it is the opinion of this writer that sufficient evidence exists to justify enacting legislation further restricting strip mining operations to slopes of 20° or less, and that such a regulation of the manner of conducting the mining activity could be upheld under the police power of the state.

Whether the Kentucky Court of Appeals would uphold such a statute remains to be seen. But at least one member of the court, Judge Edward P. Hill, has spoken in favor of such restrictions. In the *Martin* case, he stated:

I recognize that the regulation of strip mining is not for the courts but for the Legislature. However, I would go further and say as a matter of law that any deed, whether it be "broad form" or otherwise, that attempts to grant strip mining (when the grade is approximately 20 degrees or more) is illegal and unenforcible as against public policy and detrimental to the present and succeeding generations.³⁵

C. Zoning

Another approach to prohibiting or limiting strip mining activity is through the zoning process. That a governmental unit through zoning could prohibit the use of property without com-

³³ *Gladblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

³⁴ Kentucky Administrative Regulation Service, S.M.R., Rg. 6 (F)(1969).

³⁵ *Martin v. Kentucky Oak Mining Company*, 429 S.W.2d 395, 402 (Ky. 1968).

compensation, and without justifying it as being a common law nuisance or creating a risk of imminent injuries was recognized for the first time by the United States Supreme Court in the 1926 decision of *Village of Euclid v. Ambler Realty Co.*³⁶ Since that time, judicial acceptance of zoning legislation has broadened considerably, and today there is a definite trend in support of the proposition that aesthetic considerations alone may justify the exercise of the zoning power.

In Kentucky, there exists planning and zoning legislation sufficiently broad to enable counties to reasonably regulate strip mining by planning and zoning. The law specifically grants to planning units the right to plan and zone "to protect . . . natural resources, and other specific areas of the planning unit which need special protection by the planned unit."³⁷

The Attorney General has ruled on at least two occasions that counties have the authority to reasonably regulate strip mining by proper planning and zoning regulations.³⁸ Because of Kentucky's increased reliance on the growing tourist industry, this writer is of the opinion that areas surrounding state parks and reservoirs such as Buckhorn, Fish Trap, Carrs Fork and Dewey Lake, should be zoned recreational to the exclusion of strip mining and other detrimental activities. Similar zoning restrictions would be appropriate for scenic or historical areas. Aesthetics alone would be grounds for excluding strip mining operations in these areas.

There are cases from other jurisdictions which would seem to substantiate this position. For example, in *Consolidated Rock Products Co. v. City of Los Angeles*,³⁹ the land in question was only suitable for a gravel pit operation. A zoning ordinance prohibiting the gravel pit operation and allowing only agricultural or residential uses not only prevented a desired use, but also prevented the only economical use of the property. Nevertheless, the Court upheld the zoning restriction as a valid exercise of the police power. The rationale of this case is important in answering

³⁶ 272 U.S. 365 (1926).

³⁷ K.R.S. § 100.201; For an excellent discussion of the power to control strip mining by zoning, see note, *Local Zoning of Strip Mining*, 57 Ky. L. J. 738 (1969).

³⁸ 66 Op. Att'y Gen. 95 (1966) and 70 Op. Att'y Gen. 563 (1970).

³⁹ 57 Cal. Rptr. 515, 370 P.2d 342 (1962).

those who would argue that strip mining for coal is the only economical use for much of Kentucky's mountain areas.

Other citations can be given for cases upholding zoning ordinances on aesthetic considerations⁴⁰ and tourist considerations.⁴¹ In *Blancett v. Montgomery*,⁴² the Kentucky Court of Appeals upheld the constitutionality of a city zoning ordinance prohibiting the exploration for oil and gas within the residential areas of the city as a valid exercise of the city's police powers. I believe counties should likewise prohibit strip mining and other detrimental practices from areas reasonably zoned, taking into consideration recreational and tourist objectives, including aesthetic, scenic and historical considerations, along with the preservation and protection of the natural resources of an area. In line with such thinking, at least one state has already enacted legislation related to the creation of conservation zones.⁴³

D. Watershed Regulations and Preplanning

In the event that the General Assembly fails to act in prohibiting the contour method of strip mining on slopes above 20°, or in the event that such mining activity is not curtailed in certain areas through the zoning process, then additional restrictive regulations are needed immediately to further minimize the damage from strip mining in Kentucky's mountain areas. The most pressing need is for additional regulations to prevent the damage being done to the creeks and streams below the strip mining operations. Several changes are needed at once.

First, detailed preplanning of the mining operation is the key to minimizing the damage in a specific watershed. Little or no preplanning from a reclamation standpoint is being done in the mountain areas today. While operations are preplanned for eight and ten years in advance in Western Kentucky, with maps submitted to the Reclamation Commission showing the overall objectives and plans for a given area, the contour operations in the mountains of Eastern Kentucky are usually planned and permitted

⁴⁰ *Town of Burlington v. Dunn*, 61 N.E.2d 243 (Mass. 1945) *cert. denied*, 326 U.S. 739 (1945).

⁴¹ *Miami Beach v. Ocean and Inland Co.*, 3 So.2d 364 (Fla. 1941); *see also* 8 McQUILLAN, MUNICIPAL CORPORATION, § 25.31 (3d. ed. 1965).

⁴² 398 S.W.2d 877 (Ky. 1966).

⁴³ HAWAII REV. LAWS, § 98.11-.12 (1965).

only several months ahead of the actual operation. And, it is common practice for an operator to obtain four or five supplements⁴⁴ to the original permit in any given year, as he winds around the mountain slopes in the same watershed. Such lack of planning does not allow for the proper protection and development of all of the natural resources in the area, and many times results in recovering only the most easily obtainable coal, while leaving much of the resource in the mountain. This may be good economics for the operator, but it is poor conservation.

If the General Assembly allows contour strip mining to continue in mountain areas, it should at least require regulations emphasizing protection of the total watershed and all of the natural resources within the affected area. First, any marketable timber should be recovered before allowing the strip mining operation to proceed. Next, the operator would be required to construct earthen dams, with concrete stand pipes and adequate spillways in designated locations within the watershed. The dams would be for the purpose of containing sediment damage to the areas immediately adjacent to the mining operation. All dam construction and locations would be with the approval of the Kentucky Division of Water and the Soil Conservation Service. Additional measures to control water run-off and sediment control would be installed as needed. Only after all such installations were completed could strip mining begin within the watershed area.

The area of water quality control is almost non-existent under the current Kentucky reclamation laws. A continuous check on the quality of water running off of the strip mine operation should be required. If acid water is found being allowed to enter a stream, the operator should be required to add neutralizing chemicals for such a period of time as the condition exists. And augur mining of areas previously deep-mined should be restricted to mountain slopes containing the high side of the coal seam in order to prevent mine water pressure from bursting through augur holes on the tilted or lower side of the seam. The State of Pennsylvania has made much progress in these areas of water quality control and their experiences should be followed in Kentucky. Moreover, where areas or seams have caused acid prob-

⁴⁴ K.R.S. § 350.070 (1966).

lems in the past, the operator should be required to drill and submit core samples proving the acid will not be a problem in the new area before a permit could be granted by the Division of Reclamation.

And finally, once an area is strip mined, graded and planted to seeds and trees, no further disturbance of the area, such as strip mining, deep mining or logging, should be permitted for at least twenty-five years. Such a practice would encourage total recovery of the natural resources within an area, while providing adequate time for the disturbed area to recover, if at all possible, from the damage already done.

E. Research

Looking fifty to one hundred years ahead, people will be amazed at the barbaric practice of ripping coal from the earth and then burning it for energy. Not only are we despoiling our environment, but we are forever destroying a complex and valuable chemical substance. If coal is so valuable to the economy of Kentucky today, one wonders how much more valuable it will be for future generations. I raise this point in answer to those who would claim that I am opposed to the coal industry. My real opposition is rather to the methods being employed and to those persons seeking to get rich quick with total disregard for the human and natural resources around them. In this day and age of astounding scientific achievements and space exploration, is it asking too much for the development of a technique for recovering the mineral resource without disturbing the soil and vegetation above the coal seam? Converting the solid matter into a liquid or gaseous state might be the answer, or perhaps development of feasible underground devices utilizing television cameras or sensor devices might provide mechanized underground mining devoid of disasters killing several miners. Whatever the answer, we cannot continue to destroy the land and the people, without suffering the consequences after the years of greed and exploitation.

CONCLUSION

As Stewart L. Udall wrote in *Surface Mining and Our Environment*:

This preoccupation with short-term gain too frequently has ignored the long-term social costs involved—the silted streams, the acid-laden waters, the wasteland left by surface mining. . . . We are an affluent society; but we can no longer tolerate (or afford) either prodigal waste of natural resources or cumulative degradation of our environment.

Each generation has only a temporary rendezvous with the land; despite fee titles and documents of ownership we are no more than brief tenants on this planet.⁴⁵

Yet in Kentucky, the “broad form” mineral deed continues to be a license to destroy, and elected officials still serve the vested interests of the coal owners rather than the good of the people. If the people of Kentucky, its public officials, and members of the judiciary, fully realized the impact of strip mining in mountain areas, the practice would have been halted many years ago. It can only be hoped that with the increased concern being shown today for the protection of our environment, that proper action will be taken by the Kentucky legislature and courts before it is too late.

⁴⁵ U.S. DEP'T. OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT (1967).