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Linda M. Stowers
University of Kentucky

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Acid Mine Drainage — A Review of the *Barnes & Tucker* Case — Is the Requirement to Treat a “Taking” Under the Fifth or Fourteenth Amendment?

INTRODUCTION

The United States Department of the Interior describes the acid mine drainage problem as one of the most persistent industrial pollution problems in the United States.¹ The Bureau of Mines estimates that acid mine drainage affects over 5000 miles of the nation's streams and rivers.² Based on 1978-1980 data, only 77 miles of streams within the Kentucky Eastern Coalfields³ are actually acidic; however, more than 2100 miles of Kentucky streams and rivers have been affected by acid mine drainage.⁴

This Comment discusses the issue of whether perpetual treatment of acid mine drainage is a “taking” of private property without just compensation under the Fifth or Fourteenth Amendments.⁵ Specifically, this Comment reviews the decision in *Commonwealth of Pennsylvania v. Barnes & Tucker Com-*

¹ UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF MINES, CONTROL OF ACID MINE DRAINAGE, INFORMATION CIRCULAR 9027, PROCEEDINGS OF A TECHNOLOGY TRANSFER SEMINAR, (1985) [Proceedings].

² *Id.* at 2.

³ KENTUCKY DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION, DIVISION OF ABANDONED LANDS, THE EFFECTS OF MINING ACTIVITIES ON THE WATER QUALITY OF STREAMS IN THE WESTERN AND EASTERN COALFIELDS OF KENTUCKY, (1981). See *Id.* at 484 for a listing of the streams included in Kentucky's Eastern Coalfields.

⁴ UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF MINES, ACID MINE DRAINAGE: CONTROL AND ABATEMENT RESEARCH, INFORMATION CIRCULAR 8905, 3 [Research]. (The report provides the following data on surrounding states showing the lengths of waters affected:

Ohio	1075 miles
Tennessee	995 miles).

⁵ U.S. CONST. amend. V and U.S. CONST. amend. XIV, § 1. The Fifth Amendment's prohibition against taking private property without just compensation is applied to the states through the Fourteenth Amendment. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 481 (1987).

pany,⁶ in which the court required a coal company to indefinitely treat acid mine drainage from a closed mine. The Comment also compares the decision in *Barnes & Tucker*⁷ with current federal and state regulatory and judicial authority concerning the "takings" issue. The increasing number of environmental statutes and regulations places a significant burden on a landowner's ability to use his land as he desires, and raises the issue of whether a governmental unit has taken private property for public purposes without providing just compensation. As this Comment reveals, courts are reluctant to find a "taking" has occurred. Instead, they prefer to find a valid exercise of the government's police power.⁸

I. BACKGROUND INFORMATION

Water discharged from mines must be treated to a pH between 6 and 9 under the Federal Water Pollution Control Act⁹ passed in 1972. Controlling the pH requires expensive water treatment and handling facilities¹⁰ — at a cost to industry of over one million dollars per day in 1979.¹¹ Most acid mine drainage does not result from mines in current operation, but from discharges from unregulated, abandoned mines. Research indicates that eighty percent of the acid mine drainage comes from abandoned mines and pits.

Acid mine drainage forms when pyrite in the coal and overlying strata is exposed to oxygen and water, forming ferrous iron and sulfuric acid.¹² The ferrous iron then oxidizes, forming more acid and a hydrated iron oxide known as "yellow boy."¹³ The acid lowers the pH of the water, limiting the sustenance of aquatic life in the stream.¹⁴

⁶ *Commonwealth of Pennsylvania v. Barnes & Tucker Company*, 371 A.2d 461 (1977).

⁷ *Barnes & Tucker*, 371 A.2d at 461.

⁸ Nichols, *LAW OF EMINENT DOMAIN* § 6.17 at 6-114 (1989).

⁹ Federal Water Pollution Control Act. [hereinafter cited as FWPCA], Pub. L. No. 92-500, 62 Stat. 1155 (codified at 33 U.S.C. §§ 1251-1376 (1982 and Supp. V 1987)).

¹⁰ Research, *supra* note 4, at 3.

¹¹ Proceedings, *supra* note 1, at 2.

¹² Research, *supra* note 4, at 2.

¹³ *Id.* at 2. (The "yellowboy" forms an unsightly coating on the bottom of the stream).

¹⁴ *Id.*

Normally, pyrite is exposed to air and water during coal mining and cleaning processes.¹⁵ In abandoned mines, groundwater inundates the mine shafts and exposes the pyrite to water and oxygen, setting the stage for acid mine water formation. As the groundwater level rises in the abandoned shafts, water drains out through natural and manmade openings.

II. REVIEW OF *COMMONWEALTH OF PENNSYLVANIA V. BARNES & TUCKER COMPANY*

In 1977, the Supreme Court of Pennsylvania ruled that the Barnes & Tucker Company must continue to indefinitely operate a pumping and treatment facility to prevent acid mine drainage from entering the state's waters.¹⁶ The court held that the requirement to treat the drainage was a valid exercise of the state's police powers and therefore not a "taking" under the Fifth or Fourteenth Amendment.¹⁷ That decision ended extensive litigation between the Commonwealth of Pennsylvania and the Barnes & Tucker Company. The litigation began in 1970 when the Commonwealth filed suit against the Barnes & Tucker Company to enjoin the discharge of acid mine drainage into the state's waters from one of its closed mines.¹⁸

The water drained from Mine No. 15, a mine closed by Barnes & Tucker in 1969,¹⁹ when the company could no longer economically afford to pump and treat the volume of water necessary to continue operating the mine.²⁰ After the mine closed, its openings were sealed, equipment removed and an identification map was filed with the Department of Mines and Mineral Industries.²¹ Shortly after abandonment, groundwater inundated the mine, causing a breakout of acid mine drainage.^{21a}

The Commonwealth filed suit against Barnes & Tucker to enjoin the discharge of acid mine water. In a stipulated agree-

¹⁵ *Id.*

¹⁶ Three decisions were written resolving the Barnes & Tucker Company's requirement to treat the acidic water: *Commonwealth of Pennsylvania v. Barnes & Tucker Company*, 371 A.2d 461 (Pa. 1977); *Commonwealth of Pennsylvania v. Barnes & Tucker Company*, 319 A.2d 871 (Pa. 1974); and *Commonwealth of Pennsylvania v. Barnes & Tucker Company*, 303 A.2d 544 (Pa. Commw. Ct. 1973).

¹⁷ U.S. CONST. amend. XIV, § 1, *Barnes & Tucker*, 371 A.2d at 467-468.

¹⁸ *Barnes & Tucker*, 303 A.2d at 545.

¹⁹ *Id.* at 551.

²⁰ *Id.* at 547.

²¹ *Id.* at 551-52.

^{21a} *Id.*

ment, Barnes & Tucker agreed to build a pumping and treatment facility and operate it for a period of at least 30 days. After operating the facility for three months, Barnes & Tucker turned the facility over to the Commonwealth. The Commonwealth promptly sued to compel Barnes & Tucker to continue operating the facility until the drainage met the pH limitations.²² The Commonwealth Court of Pennsylvania²³ ruled that Barnes & Tucker was not responsible for the abatement of the acid mine drainage under either common law or statutory public nuisance doctrines, nor under the state's clean water act.²⁴

The Commonwealth appealed the court's decision to the Supreme Court of Pennsylvania, which reversed the lower court's decision.²⁵ The Supreme Court held that a cause of action existed under both the statutory and common law doctrines of public nuisance. Accordingly, the court held Barnes & Tucker responsible for the nuisance abatement.²⁶ Further, the 1970 amendments to the Pennsylvania Clean Streams Act²⁷ applied since the abatement of the nuisance constituted a prospective action.²⁸

Regarding the "taking" issue, the court stated the general principle that the power to abate a nuisance "is an adjunct of the inherent police power of the Commonwealth,"²⁹ and agreed with the policy provided by the United States Supreme Court in *Lawton v. Steele*³⁰ on the use of police power: "[t]o justify the state in . . . interposing its authority in behalf of the public, it must appear — First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."³¹

The court found a public interest in abating the nuisance and concluded that the only reasonable means to abate the nuisance was to require Barnes & Tucker to treat the acid mine

²² *Id.* at 554.

²³ The Commonwealth Court of Pennsylvania is the lowest appeals court in the Commonwealth's judicial system.

²⁴ *Id.* at 572.

²⁵ *Barnes & Tucker*, 319 A.2d at 871.

²⁶ *Id.* at 880.

²⁷ 27 PA. STAT. ANN. tit. 35, §§ 691.1-760.2 (Purdon 1977 and Supp. 1989).

²⁸ *Barnes & Tucker*, 319 A.2d at 880.

²⁹ *Id.* at 885.

³⁰ 152 U.S. 133, 137 (1894).

³¹ *Barnes & Tucker*, 319 A.2d at 885.

drainage.³² Not addressing the “unduly oppressive” issue raised in *Lawton*³³ the court remanded the question to the lower court.³⁴

On remand, the Commonwealth Court ordered Barnes & Tucker to abate the nuisance by operating the pumping and treatment facility, finding that such operation was not oppressive considering the nature of the nuisance.³⁵ Barnes & Tucker appealed this decision to the Supreme Court of the Commonwealth³⁶ arguing that the requirement to pump and treat 7.5 million gallons of acid mine drainage per day was a “taking” under the Fourteenth Amendment.³⁷ The Company supported its argument with evidence showing that 6 million gallons of the water being treated was attributed to fugitive mine water³⁸ from mines not owned by Barnes & Tucker.³⁹ Citing the policy power as the inherent power of the state to “enact and enforce laws for the promotion of the general welfare,”⁴⁰ the court held that the source of the acid mine drainage was irrelevant; the source of the discharge of the drainage constituted the nuisance to be abated.⁴¹ Since the conduct of Barnes & Tucker in its mining operations created the nuisance (source of discharge), Barnes & Tucker should be held responsible for the abatement of the nuisance.⁴²

The court summarized its ruling by stating that Pennsylvania’s restrictions or obligations do not constitute a taking when they are imposed on the use or ownership of property to protect the public health, safety or morals from damages threatened.⁴³ The court failed, however to determine if such restrictions or obligations were unduly oppressive,⁴⁴ as required in the policy

³² *Id.* at 885.

³³ *Lawton v. Steele*, 152 U.S. 133 (1894).

³⁴ *Barnes & Tucker*, 319 A.2d at 886.

³⁵ *Barnes & Tucker*, 371 A.2d at 462.

³⁶ The Supreme Court is the highest court of appeals in the Pennsylvania judicial system.

³⁷ U.S. CONST. amend. XIV, § 1; *Barnes & Tucker*, 371 A.2d at 464.

³⁸ *Barnes & Tucker*, 371 A.2d at 465, n.8. Fugitive mine drainage is defined as “mine water entering a particular mine by gravity or pressure and adjoining subsurface mines.” *Id.*

³⁹ *Id.* at 465.

⁴⁰ *Id.*

⁴¹ *Id.* at 466.

⁴² *Barnes & Tucker*, 371 A.2d at 467.

⁴³ *Id.* at 467-468.

⁴⁴ Rogers, *Acid Coal Mine Drainage—The Perpetual Treatment Problem*, 1 E. MIN. L. FOUND. 6-1 (1980).

established by the United States Supreme Court in *Lawton v. Steele*,⁴⁵ on the use of police power.

III. THEORIES OF LIABILITY

Suits to abate water pollution resulting from acid mine drainage may arise from both statutory and common law remedies.⁴⁶ Under both common law doctrines of nuisance,⁴⁷ one may bring an action for injunctive and damage relief.⁴⁸ Other common law doctrines that create a possible cause of action include negligence,⁴⁹

⁴⁵ 152 U.S. 133, 137 (1894).

⁴⁶ See *West Kentucky Coal Co. v. Rudd*, 328 S.W.2d 156 (Ky. 1959) (common law action for injunction); *Chapman v. Beaver Dam Coal Co.*, 327 S.W.2d 397 (Ky. 1959) (denied a cause of action for trespass & injunction); *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720 (Ky. 1953) (established a statutory-based common law action for prescriptive use).

⁴⁷ BARRON'S LAW DICTIONARY 319 (2nd ed. 1984) defines nuisance as the "defendant's interference with plaintiff's interests." PROSSER, LAW OF TORTS 571 (4th ed. 1971) defines nuisance as "anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable. It extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency or obstructs the reasonable and comfortable use of property."

Kentucky courts have rarely addressed the issue of acid mine drainage. In *W.G. Duncan Coal Co. v. Jones*, 254 S.W.2d 720, the Kentucky Court of Appeals, then Kentucky's highest court, held that the use of a stream for drainage from mines for the statutory period of 15 years permitted the coal mine operator to acquire a prescriptive right to continue the private nuisance, as long as the same conditions and circumstances prevailed. *Id.* However, a party may not use that defense in a public nuisance abatement suit since the extent or scope of the injurious effect was greater in a public nuisance because the public at large was affected while a private nuisance affected an individual or a limited number of individuals only.

The Kentucky Court of Appeals, in *Chapman v. Beaver Dam Coal Co.*, 327 S.W.2d 397, found that the plaintiff had to prove actual damage to his property before the court would hold the defendant liable for the acid mine drainage. The court noted that water polluted with acid mine drainage could injure land being used for agricultural purposes, but the court refused to determine when the productivity of the land would decrease. *Id.* at 400.

⁴⁸ Where the plaintiff proved actual damage to the land, the coal companies were held liable for the damage. In *Western Kentucky Coal Co. v. Rudd*, 328 S.W.2d 156, the court held that the damage resulted from the method of mine operation, not the mine itself, and constituted a private nuisance. *Id.* at 160. In dicta, the court recognized that any statute requiring water to be drained as directly as possible into an adjacent stream for mining purposes did not give the operator permission to pollute the stream with acid mine drainage. The court affirmed an order for a permanent injunction preventing the mine operators from allowing acid mine drainage to enter the stream. *Id.*

⁴⁹ Negligence occurs when the plaintiff is injured by defendant's breach of duty. See generally RESTATEMENT (SECOND) OF TORTS §§ 281-282 (1965).

riparian water rights,⁵⁰ and trespass.⁵¹ Some state⁵² and federal statutes may afford relief in civil suits.⁵³

Under the Surface Mining Control and Reclamation Act,⁵⁴ the Office of Surface Mining and Reclamation Enforcement⁵⁵ has promulgated rules⁵⁶ providing for the termination of regulatory jurisdiction upon the final release of the performance bond⁵⁷ for a completed surface coal mining and reclamation operation.⁵⁸ In operations requiring no bond, regulatory jurisdiction is terminated when all reclamation has been successfully

⁵⁰ The lower riparian landowner has the right to the uninterrupted flow of the same purity, rate and flow as the upper riparian landowner enjoys. *See* 54 AM. JUR. 2D *Mines and Minerals* §§ 206-209.

⁵¹ *See generally* RESTATEMENT (SECOND) OF TORTS § 161 (1965).

⁵² The Kentucky General Assembly, under its police power, has enacted several statutes that prevent the drainage of acid mine water into the streams of the Commonwealth. In the Surface Coal Mining Statutes, KY. REV. STAT. ANN. § 350 (Baldwin 1983 and Supp. 1988) [KRS], the state enacted several bans against water pollution resulting from acid mine drainage. *See* KRS § 350.421 (Protection of water resources); KRS § 350.590 (Power to administer provisions of abandoned mine lands program); KRS § 350.090 (Methods of operation, grading, backfilling and reclamation plans); KRS § 350.085 (Denial of permits and operations and deletion of land areas).

Kentucky's statutory scheme contains machinations to provide protection to the waters of the Commonwealth from acid mine drainage. *See generally* KRS § 350 and KRS § 224. The statute also protects the right of a private citizen to bring suit to enforce or protect his interest in water resources affected by a surface coal mining operation. *See* KRS § 350.421.

⁵³ 30 C.F.R. § 520(a)(1)(e) and (f). 30 C.F.R. § 520(a)(1) allows a person to bring a civil action to compel compliance with the regulations. 30 C.F.R. § 520(e) preserves the common law and statutory remedies while 30 C.F.R. § 502(f) establishes a right to damages. Other federal statutes that may provide a cause of action for the abatement of the acid mine drainage include: Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9657 (Supp. V. 1981); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1976 and Supp. V 1981); and FWPCA, 33 U.S.C. §§ 1251-1376 (1976 and Supp. V 1981). *See also* Dallmeyer, *A New Legislative Approach to Acid Mine Drainage*, 17 GA. L. REV. 969 (1983).

⁵⁴ 30 U.S.C. §§ 1201-1328 (Supp. IV 1980) [SMCRA].

⁵⁵ *Id.* at 161. The Office of Surface Mining Reclamation and Enforcement (OSMRE) is a part of the Department of the Interior, having regulatory authority and responsibility for inspections of coal mines.

⁵⁶ 53 Fed. Reg. 44, 356 (1988) (effective December 2, 1988 to be codified at 30 C.F.R. § 700).

⁵⁷ A performance bond is required to be posted by the coal mine operator for a period of five to ten years after the first year of vegetation reclamation.

⁵⁸ Under the permanent program, the bond was released at the end of the five to ten year period if, when inspected by the OSMRE or appropriate state agency, all reclamation activities had been complete and the site met with agency approval. A performance bond was not required to be posted under the initial program or for any coal exploration activities.

completed. In applying the regulations to post-closure drainage situations that could continue in perpetuity, the Office of Surface Mining Reclamation and Enforcement provides these guidelines:

This rule does not affect the standard required for full bond release which requires full compliance with the applicable performance standards. In order for a release to be appropriate under such circumstances, it should include assurances which are provided through a contract or other mechanism enforceable under other provisions of law to provide, for example, long term treatment of an alternative water supply or acid drainage. When such assurances are provided, the failure of such maintenance following bond release is not sufficient reason to reassert regulatory jurisdiction under the regulatory program. If, subsequent to bond release, a problem occurs related to inadequate maintenance, the contract or agreement would be enforceable through other provisions of law. Should such contract or agreement prove unenforceable, then the bond release would have been based on misrepresentation and jurisdiction should be reasserted.⁵⁹

The statutory program in place would cover any drainage prior to the 1977 enactment of SMCRA by either the abandoned mines program⁶⁰ or litigation brought during the period to require treatment of the drainage.⁶¹ After 1977, up to bond release, the jurisdictional authority of the Office of Surface Mining Reclamation and Enforcement and the State Department of Mines could enforce treatment of acid mine drainage.⁶² Any mine draining acid water prior to bond release would have adequate protective measures in its plans to insure protection of the waters from acid mine drainage.⁶³ However, any mine drainage occurring after release of the performance bond must be addressed

⁵⁹ 53 Fed. Reg. 44,356 (1988), commentary at 44,362.

⁶⁰ KRS § 350.590.

⁶¹ The Barnes & Tucker case is a good example of a state claiming both common law and statutory causes of action against a coal company in its attempts to have a nuisance abated.

⁶² 53 Fed. Reg. 44,356 (1988), commentary at 44,357. (Jurisdictional authority is not terminated until a written determination has been made that all requirements of the regulatory program have been successfully completed and the permanent bond has been released. (The bond is not released until after the five to ten year period of extended liability has expired)).

⁶³ 53 Fed. Reg. 44,356 (1988), commentary at 44,359. (Inspections are made during the period of reclamation). 30 C.F.R. § 540.11 requires regular and frequent inspections.

under the civil common law remedies provided by Congress.⁶⁴

The Office of Surface Mining Reclamation and Enforcement and the Kentucky Department of Mines will not reassert jurisdiction in those situations absent a showing of fraud, collusion or misrepresentation of a material fact at the time of bond release.

IV. REVIEW OF POLICE POWER AS A "TAKING"

A. Introduction

Legislation designed to promote the general welfare commonly burdens some individuals more than others. The Fifth Amendment⁶⁵ guarantees that private property shall not "be taken for public use without just compensation."⁶⁶ The determination that a particular governmental action constitutes a taking essentially means that the public at large, rather than a single owner, must bear the burden of an exercise of state police power in the public interest.⁶⁷ "The question necessarily requires a weighing of public and private interests."⁶⁸

The United States Supreme Court in *Penn Central Transportation Co. v. New York City*⁶⁹ stated that "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."⁷⁰ In the opinion, the Court summarized several factors that should be considered in determining whether the governmental action in question is a "taking" without just compensation or a legitimate exercise of the government's inherent police power:⁷¹

- 1) economic impact of the law on the claimant;
- 2) extent to which the regulation has interfered with the

⁶⁴ 30 C.F.R. § 520(a)(1), (e) and (f). See *infra* note 88.

⁶⁵ U.S. CONST. amend. V. (The 5th Amendment is a prohibition directed to the federal government from taking property without just compensation. The 14th Amendment is a similar prohibition against state action of the same nature).

⁶⁶ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1970).

⁶⁷ *Id.*

⁶⁸ *Id.* at 261.

⁶⁹ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977).

⁷⁰ *Id.* at 124.

⁷¹ BARRON'S LAW DICTIONARY 350 (2nd ed. 1984) defines police power as the "inherent power of a governmental unit to impose upon private rights those restrictions that are reasonable related to the promotion and maintenance of the health, safety, morals and general welfare of the public."

investor's expectations;

- 3) the "character" of the governmental action;
- 4) specific uses authorized by the regulation;
- 5) any degree of arbitrariness or unreasonableness in including the protected property; and
- 6) availability of judicial review.⁷²

The Supreme Court in *Penn Central*⁷³ stated it did not adopt the proposition that a "taking" can never occur unless the governmental unit has assumed physical control over a portion of the property. The Court did note that whether a particular act or restriction was a "taking" depended largely upon the circumstances of the case.⁷⁴

In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court held state action constituted a "taking" where the statute had the effect of completely destroying the rights reserved by the landowner;⁷⁵ the government's destruction of a materialman's lien in certain property;⁷⁶ height restrictions making the property wholly useless;⁷⁷ and governmental actions characterized as acquisitions of resources to permit or facilitate uniquely public functions.⁷⁸

In analyzing an allegation of a "taking," the Court in *Penn Central*⁷⁹ stated that "taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely destroyed. Instead, the Court must focus on the character of the action and the nature and extent of the interference with rights in the parcel as a whole.⁸⁰

When a "taking" has occurred without just compensation, a citizen may institute a suit against the government to recover

⁷² *Penn Central*, 438 U.S. at 104, 124-28.

⁷³ *Penn Central*, 438 U.S. at 104.

⁷⁴ *Id.* at 123-124, n.25.

⁷⁵ 260 U.S. 393, 413 (1922).

⁷⁶ *Hudson Water Co. v. McCarter*, 109 U.S. 349, 355 (1908).

⁷⁷ *Armstrong v. U.S.*, 364 U.S. 40 (1960).

⁷⁸ *See U.S. v. Causby*, 328 U.S. 256 (1946).

⁷⁹ *Penn Central*, 438 U.S. at 104.

⁸⁰ *Id.* at 130. The Supreme Court has adopted the reasonable-beneficial use test as explained in *Nichols*, 6 LAW OF EMINENT DOMAIN 6-114 (1983). This test was used by the U.S. Supreme Court in *Penn Central* upholding the constitutionality of New York City's Landmark Preservation Law. The restrictions imposed must be substantially related to the general welfare while still permitting a reasonable beneficial use of the land. If those requirements are met, there is no "taking."

the fair market value of the property at issue.⁸¹ A "taking" must be distinguished from the state's exercise of its police power.⁸²

B. Discussion of Penn Central Factors in Determining a "Taking"

In determining whether the requirement of perpetual treatment of acid mine drainage is a "taking," this Comment discusses each of the factors identified by the Supreme Court in *Penn Central*⁸³ as applied to the *Barnes & Tucker* decision⁸⁴ and recent Supreme Court decisions on point.

1. Economic Impact of the Law on the Claimant

The *Barnes & Tucker*⁸⁵ court never fully reviewed the economic impact on the Barnes & Tucker Company of the requirement to perpetually treat the acid mine drainage. In deciding that a state could require a mine operator to indefinitely treat acid mine drainage from its abandoned mines, the court had to determine that such a requirement would not be oppressive. Yet, the court provided no guidance when it held that the requirement to treat acid mine drainage indefinitely did not unduly burden the claimant.

In *Ruckelshaus v. Monsanto Co.*,⁸⁶ the Court held that the right to exclude others was an essential property right protected

⁸¹ A suit against the government to recover the fair market value of the property is called an inverse condemnation.

⁸² See *supra* note 71 and accompanying text. In *Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, the Supreme Court of Kentucky held that a valid exercise of police power that results in expense or loss of property is not a "taking" of property without just compensation. The Court held that the enforcement of the Wild Rivers Act prohibiting the planned development of the land did not constitute a "taking." In making this determination, the Court applied the factors pointed out in *Penn Central*, 438 U.S. at 104 to the fact situation of Stearns.

⁸³ *Penn Central*, 438 U.S. at 104.

⁸⁴ *Barnes & Tucker*, 371 A.2d at 461.

⁸⁵ *Id.* at 468. The court noted that Barnes & Tucker made no effort to show alternate ways to abate the nuisance or the economic impact the requirement to treat the acid mine drainage would have on the company. The court concluded that on the record before it the requirement to abate the nuisance was not unreasonable or unduly oppressive.

⁸⁶ 467 U.S. 985.

by the Fifth Amendment.⁸⁷ The Court was faced with the question of whether EPA had "taken" Monsanto's property when it had provided trade secrets submitted by Monsanto in support of a pesticide application to others in the industry. The court held that the right to exclude others with respect to a trade secret "is central to the very definition of the property interest The economic value of that property right lies in the competitive advantage over others that Monsanto enjoys by virtue of its exclusive access to the data, and disclosure or use by others of the data would destroy that competitive edge."⁸⁸

The Court has indicated that the economic impact of the governmental action on an entity is an important consideration in "takings" issues but that only those interests involving property rights, which have been created by law, compel compensation for their invasion.⁸⁹ When the United States attempted to create a public right of access to a body of water made accessible by Kaiser-Aetna the Court held that the United States' actions amounted to a "taking." Creation of a public right of access would have a significant economic impact on Kaiser-Aetna's plans for the body of water it created since the right to exclude others made the land surrounding the body of water much more valuable.⁹⁰

2. Extent to Which the Regulations Have Interfered with the Investor's Expectations

The Barnes & Tucker Company never indicated that it had planned alternative uses for the property. This gap in the *Barnes & Tucker* case⁹¹ prevents a determination of the impact the decision had on the site's future. However, in the "takings" jurisprudence it seems that the Court is more concerned with how the regulation or governmental action affects the actual profit-making activity. The Court found in *Keystone Coal Association v. DeBenedictis*,⁹² that there was no showing that a statute prohibiting coal mining that caused subsidence damage made it impossible for the petitioners to profitably engage in

⁸⁷ U.S. CONST. amend. V.

⁸⁸ 467 U.S. at 985, 1012.

⁸⁹ *Kaiser-Aetna v. United States*, 444 U.S. 164, 178.

⁹⁰ *Id.* at 180.

⁹¹ *Barnes & Tucker*, 371 A.2d at 461.

⁹² *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470 (1984).

their business or that there had been undue interference with their investment-backed expectations. Since they could continue to make a profit and only one part of their bundle of property rights was taken no compensation was required to be paid.⁹³

For regulatory takings, the court applied a test that compared the value taken from the property with the value remaining in the property but stated that the critical inquiry in applying the test was determining how to define the remaining unit of property.⁹⁴ In *Keystone*, the Court held that since only 75 percent of the underground coal could be profitably mined in any event, the petitioners' reasonable "investment-backed expectations" could not be materially affected by the additional duty to retain the small percentage that must be used to support the structures protected under the statute; therefore no "taking" occurred.⁹⁵ Barnes & Tucker made an economic decision to discontinue mining in Mine No. 15, because it was no longer profitable to pump the water from the shaft.⁹⁶ So the investors' reasonable investment-backed expectations were not affected while mining operations were in existence. It was only when the mine was no longer profitable that the problem arose and the requirement to pump and treat the water became a burden. It then became a question of whether it was reasonable for an investor to believe that he had no responsibility to correct nuisances created by his investments. The timing of the "taking" issue makes it difficult to compare Barnes & Tucker's situation with other cases in "takings" jurisprudence since most cases decided by the Supreme Court affect the actual profit-making activity,⁹⁷ while *Barnes & Tucker*⁹⁸ involves a "takings" issue that occurs after all profit-making activities have ceased.

Further, a mine operator with an acid mine drainage problem remains in possession and control of his land. But the land can only be used to pump and treat the acid mine drainage, depriving the operator of any other beneficial use of his land. Such deprivation may possibly have a significant impact on an investor's expectations since the operator probably has plans to sell the

⁹³ *Id.* at 497.

⁹⁴ *Id.*

⁹⁵ *Id.* at 499.

⁹⁶ See *supra* note 20 and accompanying text.

⁹⁷ *Penn Central*, 438 U.S. at 104; *Kaiser-Aetna*, 444 U.S. at 164; *Agins*, 447 U.S. at 255; *Monsanto*, 467 U.S. at 1012; *Keystone*, 480 U.S. at 470.

⁹⁸ *Barnes & Tucker*, 371 A.2d at 461.

property after mining activities cease. Installation and operation of pumping and treatment facilities on the land places undue burden on the operator, forcing him to incur expenses for property that is no longer providing a stream of income. Investors interested in purchasing the land would be wary of buying property so burdened.⁹⁹

3. Character of the Governmental Action

As stated earlier, the Supreme Court has not adopted the proposition that finding a "taking" requires a physical entry or possession of the property by the government.¹⁰⁰ In *Barnes & Tucker*,¹⁰¹ Pennsylvania did not seek possession of the property or of the treatment and pumping facility; rather, the state required Barnes & Tucker Company to abate the nuisance.¹⁰² Under the reasonable-beneficial use theory adopted by the Supreme Court,¹⁰³ a "taking" does not occur so long as the restrictions imposed are substantially related to promoting the general welfare and the restrictions permit a reasonable, beneficial use of the land.¹⁰⁴ The *Barnes & Tucker* court,¹⁰⁵ in deciding that no property had been "taken," may have rationalized its decision by finding the most beneficial and reasonable use in which Barnes & Tucker could utilize the land would be in operating a pumping and treatment facility, at least until the nuisance had been abated.¹⁰⁶

In contrast, the Court held in *Kaiser-Aetna*¹⁰⁷ and in *Monsanto*¹⁰⁸ that the governmental action was an invasion of the

⁹⁹ See Rogers, *Acid Coal Mine Drainage—The Perpetual Treatment Problem*, 1 E. MIN. L. FOUND. 6-24-25 (1980).

¹⁰⁰ See *supra* note 74 and accompanying text.

¹⁰¹ *Barnes & Tucker*, 371 A.2d at 461.

¹⁰² *Id.*

¹⁰³ *Penn Central*, 438 U.S. at 104, 138. See *infra* note 80 and accompanying text for an explanation of the reasonable-beneficial test.

¹⁰⁴ See generally Note, *From Zoning to Landmark Preservation: The Grand Central Decision Signals a Shift in Land Use Regulations*, 25 N.Y. L. REV. 39 (1979).

¹⁰⁵ *Barnes & Tucker*, 371 A.2d at 461.

¹⁰⁶ See generally Nichols, 2 LAW OF EMINENT DOMAIN § 6.17 (3d. ed. 1989). Where regulation restricting the use of wetlands to their natural uses are upheld as legitimate exercises of the police powers.

¹⁰⁷ *Kaiser-Aetna*, 444 U.S. at 180. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land. . . ." *Agins v. Tiburon*, 447 U.S. at 260.

¹⁰⁸ *Monsanto*, 467 U.S. 1012.

property right of exclusion and compensation must therefore be paid.

4. Specific Use Authorized by the Regulation

Most environmental regulations permit some property use. "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land' "¹⁰⁹

In *Penn Central*¹¹⁰ and *Agins v. Tiburon*,¹¹¹ the Supreme Court indicated that its holdings did not prohibit all uses of the property at issue.¹¹² In *Barnes & Tucker*,¹¹³ the use of the land was restricted to the installation and operation of a pumping and treatment facility. Although the opinions mention no attempt by the Barnes & Tucker Company to propose alternative methods of abating the nuisance, any proposals would probably have been considered by the state and the court.¹¹⁴

In *Keystone*,¹¹⁵ the Court found that the governmental actions did not preclude the petitioners from mining coal; the statute required only that some coal be left to support the surface and prevent subsidence. Since 25 percent of the coal is normally left in the ground the statute did not affect the petitioner's operations to a significant degree.¹¹⁶

5. The Degree of Arbitrariness and Unreasonableness in Including the Protected Property

The Barnes & Tucker Company did not allege that the requirement to treat acid mine drainage was arbitrary or unreasonable. The Pennsylvania Clean Streams Act¹¹⁷ clearly designated acid mine drainage as a concern and empowered the state to

¹⁰⁹ *Keystone*, 480 U.S. at 495.

¹¹⁰ *Penn Central*, 438 U.S. at 104.

¹¹¹ 447 U.S. 255 (1970).

¹¹² In *Penn Central*, the plaintiff was free to develop other plans that would not affect the aesthetic view of the building. In *Agins*, the plaintiff was free to build up to five houses on the lots.

¹¹³ *Barnes & Tucker*, 371 A.2d at 468.

¹¹⁴ See *supra* note 85 and accompanying text.

¹¹⁵ *Keystone*, 480 U.S. at 470.

¹¹⁶ *Id.* at 495.

¹¹⁷ PA. STAT. ANN. tit. 35, §§ 691.1-760.2.

take appropriate action against such polluters.¹¹⁸ The statute was upheld as a valid exercise of the state's police power and would be per se reasonable.

Congress has placed control of acid mine drainage under SMCRA,¹¹⁹ which has as its stated purpose the environmental protection of the land from the harms of mining.¹²⁰ Both the case law and the statutes place the power to protect the environment in the state's inherent police power. Therefore, a court must decide each environmental case involving the issue of a "taking" on the case's particular facts.¹²¹ The facts of each case will disclose whether there has been an arbitrary or unreasonable inclusion of the landowner's property in the regulation's grasp.

The state is free to restrict a private individual's use of his property under its police power in a manner which the owner's neighbors could not.¹²² Modern law continues to adhere to the common law rule stated "[f]or the Commonwealth a man shall suffer damage."¹²³ All property rights are subject to the exercise of the police power and have been since constitutional limitations were created.¹²⁴

6. Availability of Judicial Review

In *Barnes & Tucker*,¹²⁵ the Supreme Court of Pennsylvania reviewed the decision of the agency to require perpetual treatment of the acid mine drainage on two occasions. In both decisions, the Court found the exercise of police power reasonable. Kentucky also provides judicial review of any final decisions of the NREPC¹²⁶ as well as any exercise of eminent domain or "taking."¹²⁷

¹¹⁸ The objective of the Clean Streams Law is to "not only prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean unpolluted condition every stream in Pennsylvania that is presently polluted." *Barnes & Tucker*, 319 A.2d at 875 (citations omitted).

¹¹⁹ 30 U.S.C. §§ 1201-1328 (Supp. IV 1980).

¹²⁰ *Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 563 S.W.2d 471, 473.

¹²¹ See *infra* note 74.

¹²² *Nichols*, *supra* note 106, at § 6.20[1].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 371 A.2d at 461.

¹²⁶ KRS § 350.255.

¹²⁷ KRS § 416.620.

C. Analysis

The “taking” issue, as witnessed by the above discussion, is a very complex one. In *Patten v. North Central Railroad Co.*,¹²⁸ the Pennsylvania court commented on the complexity of the issue:

As in man, himself, so in man’s title to land there are two necessary elements, the individual and the social. Private rights and public rights, individual property and eminent domain are perfectly consistent elements of one thing, property in land. Those who are engaged in a contest for damages to land caused by the construction of public improvements are prone to forget the social element that is involved in all private titles . . . Individual property is exclusive against individuals, but not as against society.¹²⁹

Under English common law,¹³⁰ when a private owner suffered necessary damage from a public improvement, but his land was not actually entered on or taken, it was *damnum absue injuria*.¹³¹ The Supreme Court and other lower courts follow this doctrine, holding that where the owner continues to possess and use the land as before, the governmental action does not result in a true constitutional “taking”, however much the land depreciates in value.¹³²

This well-established doctrine may superficially resolve the *Barnes & Tucker*¹³³ “taking” issue in that Barnes & Tucker planned to construct the pumping and treatment facility on the land prior to any abatement order requiring such a facility. Noting the timing of construction, the *Barnes & Tucker* court¹³⁴ may have reasoned that the land was being put to the same use

¹²⁸ Nichols, *supra* note 106, at § 6.20[1], n.11.

¹²⁹ *Id.*

¹³⁰ BLACK’S LAW DICTIONARY 251 (5th ed. 1979) defines common law as “all the statutory and case law background of England and the American colonies before the American revolution.”

¹³¹ Nichols, *supra* note 106, at § 6.20[1]. BLACK’S LAW DICTIONARY 354 (5th ed. 1979) defines *damnum absue injuria* as “[a] loss which does not give rise to an action for damages against the person causing it”.

¹³² 438 U.S. at 104, 131.

¹³³ 371 A.2d at 461.

¹³⁴ *Barnes & Tucker*, 303 A.2d at 544, 550. (On October 17, 1967, Barnes & Tucker filed an application for a mine drainage permit for Mines No. 15 and 24. Attached to the application was an engineering report that showed Barnes & Tucker was contemplating the construction of a treatment plant.)

as it was prior to the abatement order.¹³⁵ Clearly the trend in the law upholds regulations restricting a private owner's use of his property for the protection of the environment as a lawful exercise of the police power.¹³⁶

V. THE EFFECT OF BANKRUPTCY ON POLICE POWER

In determining whether a state may proceed with an action without causing a "taking"¹³⁷ a court should consider the economic effect of the requirement on the claimant. At first glance, bankruptcy emerges as a way for a mine operator to escape perpetual treatment of acid mine drainage. However, existing case law indicates that bankruptcy courts favor allowing federal and state environmental penalties and requirements first priority.¹³⁸

The key issues are whether and to what extent the filing of a bankruptcy petition may serve to relieve the debtor of his regulatory, remedial action or penalties payment obligations.¹³⁹ The filing of a bankruptcy petition, either for liquidation under Chapter 7¹⁴⁰ or for reorganization under Chapter 11,¹⁴¹ vests the Bankruptcy Court¹⁴² with jurisdiction over the property of the debtor. While the filing of the petition acts as an automatic stay of the commencement or continuation of actions or proceedings against the debtor the statute is expressly not applicable to the actions or proceedings "by a governmental unit to enforce police or regulatory power."¹⁴³

¹³⁵ 371 A.2d at 461.

¹³⁶ Nichols, *supra* note 106, at § 6.17. The Kentucky Surface Mining Statutes clarify that under the abandoned mines lands programs, Kentucky has the power to enter the land to abate a nuisance. Accordingly, such power is a legitimate exercise of the police power for the protection of the public health, safety and general welfare and not an act of condemnation or trespass. As for mines currently operating, the state can take action under the Surface Mining Statutes or the state water pollution control provisions to abate any water pollution nuisance.

¹³⁷ Stever, 1 LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE § 5.10[8], 5-154 (1988).

¹³⁸ *Id.* at 5-153.

¹³⁹ 11 U.S.C.A. § 503 (West Supp. 1988).

¹⁴⁰ *Id.*

¹⁴¹ Stever, *supra* note 137, at § 5.10[8], 5-154 n.775 (granting bankruptcy courts exclusive jurisdiction over all case arising under the Bankruptcy Code).

¹⁴² 11 U.S.C. § 362(b)(4) (West Supp. 1988).

¹⁴³ See Stever, *supra* note 137, at § 5.10[8], § 6.03[2][d][iii], and Collier, 3 BANKRUPTCY § 503 (providing a more detailed examination of the relationship between bankruptcy and environmental regulations).

A series of Supreme Court cases show a trend in favor of protection of the environment, regardless of the financial condition of the owners. This trend affirms the proposition stated earlier that "[f]or the Commonwealth a man must suffer."¹⁴⁴ For example, the Supreme Court affirmed the decision reached in *Mid-Atlantic Bank v. New Jersey Department of Environmental Protection*¹⁴⁵ that held the trustee's duty to dispose of any part of the debtor's property burdensome or of inconsequential value to the estate inapplicable to property that threatened the public's health and safety and that violated state and federal laws.¹⁴⁶ The Supreme Court stated:

The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety . . . a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.¹⁴⁷

Further, that where imminent and identifiable hazards exist, the priorities of the Bankruptcy Court must be subservient to the environmental laws designed to protect the public safety.¹⁴⁸

In *Ohio v. Kovacs*,¹⁴⁹ the Supreme Court held that anyone in possession of the site or property of the debtor, including but not limited to, the owner, trustee or vendee, must comply with the environmental laws.¹⁵⁰ Further, the person may not maintain a nuisance, pollute the waters of the state or refuse to remove the source of such conditions.¹⁵¹

CONCLUSION

Surrounding states suffer more water pollution from acid mine drainage than Kentucky.¹⁵² Statutes enacted under the Fed-

¹⁴⁴ See *supra* note 123.

¹⁴⁵ *Mid-Atlantic Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

¹⁴⁶ *In re Stephens*, 16 C.B.C. 253, 256 (1987).

¹⁴⁷ 474 U.S. at 505 (footnote omitted).

¹⁴⁸ *In re Stephens*, 16 C.B.C. at 260.

¹⁴⁹ *Ohio v. Kovacs*, 469 U.S. 274 (1985).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See *supra* note 3 and accompanying text.

eral Water Pollution Control Act¹⁵³ and the SMCRA¹⁵⁴ provide protection for the nation's streams by giving both governmental agencies and private citizens the power to abate nuisances.

The Supreme Court dealt with the complexities of determining whether an action constitutes a "taking" by a set of factors to be applied to each fact situation.¹⁵⁵ These factors and the three-pronged police power test¹⁵⁶ must be used to determine whether or not the state validly exercised its police power or exceeded its authority, resulting in a "taking" of property without just compensation.¹⁵⁷

Mine operators seeking the protection of the bankruptcy courts will rarely find a safe haven. Those operators planning to abandon their duties under environmental regulations or legitimate governmental actions will usually find that the actions or proceedings will not be stayed and will, in fact, receive first priority from the court.

The trend clearly allows any abatement of pollution to be an exercise of police power.¹⁵⁸ When it comes to the public right versus the individual right, the courts consistently find that the private individual must bear the burden of protecting the public.¹⁵⁹ In a situation similar to that in *Barnes & Tucker*,¹⁶⁰ where the nuisance results from the owner's past mining operations, courts will probably have little sympathy for complainants who argue that the requirement to abate the nuisance constitutes a "taking."

-Linda M. Stowers

¹⁵³ 33 U.S.C. §§ 1251-1376 (1976 and Supp. IV 1980).

¹⁵⁴ 30 U.S.C. §§ 1201-1328 (Supp. IV 1980).

¹⁵⁵ See *supra* notes 83-127 and accompanying text.

¹⁵⁶ 371 A.2d at 465 (the test is that the interests of the public generally require interference, the means proposed are reasonably necessary and the means are not unduly oppressive upon the defendant).

¹⁵⁷ U.S. CONST. amend. V and U.S. CONST. amend. XIV, § 1.

¹⁵⁸ Nichols, *supra* note 106, at § 6.17.

¹⁵⁹ See *Agins*, 447 U.S. at 255.

¹⁶⁰ 371 A.2d at 461.