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Surface Mining and the Continuing Battle between Surface and Subsurface Property Owners: A Look at *South Dakota Mining Association v. Lawrence County*

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SURFACE MINING AND THE CONTINUING BATTLE BETWEEN SURFACE AND SUBSURFACE PROPERTY OWNERS: A LOOK AT *SOUTH DAKOTA MINING ASSOCIATION V. LAWRENCE COUNTY*

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In the United States, land may be horizontally severed into surface and subsurface estates so that legal title to multiple land strata vests in different owners. Consequently, millions of acres of land are owned by parties who have no control or rights in the subsurface property estate.[1] For example, a mining company may obtain title to a subsurface estate while a private landowner, or governmental entity, retains ownership of the subsurface estate. This approach to property law is thought to provide efficiencies because the surface and subsurface owners can concentrate on attaining optimal use of the estates or properties.[2]

This article examines a conflict that occurs between the owners of these properties. The issue is whether a surface property owner can prevent surface mining by the subsurface property owner. Historically, courts have resolved this issue by designating the subsurface estate dominant and the surface estate subservient so that the mineral owner receives an easement encompassing as much of the surface estate as is reasonable to extract the minerals.[3] Even with the restriction of what is 'reasonably necessary,' surface property owners have historically had their estates substantially or completely destroyed.[4] In recent years,

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[1] *See* J. Stephen Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871, 872 (1980).

[2] *See* Cyril A. Fox, Jr., *Private Mining Law in the 1980's: The Last Ten Years and Beyond*, 92 W. VA. L. REV. 795, 818 (1990) (referring to the surface estate as a remainder interest because the surface estate will expand to encompass both the surface and subsurface estates once the mineral estate terminates, unless the parties have agreed otherwise).

[3] *See* 58 C.J.S. *Mines and Minerals* § 159 (1998); *see also* Getty Oil Co. v. Royal, 422 S.W.2d 591 (Tex. App. 1967) (explaining the traditional relationship between dominant mineral owner and the subservient surface property owner).

[4] *See* MacDonald v. Capital Co., 130 F.2d 311, 319-20 (9th Cir. 1942) (finding that a mineral owner's right to make reasonably necessary use of the subsurface property includes the right to wholly destroy the surface, if such destruction occurs as a result of usual or customary method of mining); Buchanan v. Watson, 290 S.W.2d 40, 42-43 (Ky. 1956) (allowing surface mining to go forward by focusing analysis on the dominance of the mineral estate rather that on the intent of parties to allow certain types of mining); Union Producing Co. v. Pittman, 146 So.2d 553, 555 (Miss. 1962) (agreeing that mineral estate owner's right to extract minerals by usual and customary methods exists even though the surface of the ground may be completely destroyed

through federal and state regulations, legislators have addressed this problem by giving surface property owners more control in an attempt to equalize the power of the two estates.[5]

This article will discuss some of the avenues that surface owners and local governments can explore to deter surface mining on their property. In *South Dakota Mining Ass'n v. Lawrence County,*[6] both the surface and subsurface property was owned by separate landowners.[7] Neither the surface nor subsurface estates were federally owned, managed or leased, so the Mining Law of 1872 did not apply.[8] The surface estate was owned by private citizens and the subsurface estate by various mining companies.[9]

In *South Dakota Mining*, the citizens of Lawrence County passed a zoning ordinance prohibiting any new surface mining within the county on both federally and privately owned land.[10] The section of the county involved in this case included parts of the Black Hills National Forest. The court in *South Dakota Mining* addressed the issue of the ordinance interfering with mining operations on federal lands in the national forest, but specifically refused to address the issue of the Lawrence County Zoning Ordinance's status as pertaining to privately owned land that is scattered within the national forest.[11]

The specific issue of the zoning ordinance's status pertaining to privately owned land raised in *South Dakota Mining Ass'n* will be addressed in this article, as well as the basic conflict between the

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as a result thereof); *see also* Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979) (establishing a reasonableness test).

[5]*See* Clyde O. Martz, *The New Model Surface Use and Mineral Development Accommodation Act*, 5 NAT. RESOURCES & ENV'T. 30, 31 (Winter 1991). *See, e.g.*, 16 U.S.C. § 460m-19(1998) (prohibits surface mining within boundaries of national rivers); 16 U.S.C. § 469 (1998) (preserving historical and archeological sites); Forest Service Organic Act of 1897, 16 U.S.C. §§ 475, 551 (1998) (giving the Forest Service authority to regulate mining activities to prevent undue degradation or damage to surface resources). The first Act to halt the depletion of certain resources was the Mineral Leasing Act of 1920. *See* 30 U.S.C. § 185 et. seq. (1998).

[6]155 F.3d 1005 (8th Cir. 1998).

[7]*See id.* at 1007.

[8]*See id.* at 1011, citing General Mining Law of 1872, 30 U.S.C. § 21 (1998). Federal land includes all classes of land owned by the federal government. The term 'public lands' means any land or interest in land owned by the United States. South Dakota is one of twenty states known as a public land state. Bureau of Land Management, U.S. Dep't of Interior, *Public Land Statistics 1990*, 128 (G.P.O.: 1991-573-003/42001).

[9]*See South Dakota Mining Ass'n*, 155 F.3d at 1007.

[10]*See id.*

[11]*See id.* at 1011 (stating the defendant did not raise the issue so the court would not answer this question).

surface and subsurface property owners concerning surface mining. Because the Court settled the issue of mining on federal lands in this case, this article will concentrate on the effect of the ordinance on the non-federally owned lands. The issue will certainly become more contentious as cities grow and mining moves off federal and public lands.

When any discussion about laws prohibiting mining occurs, one must address the issue of preemption. Section I of this article addresses that important aspect of property rights. It examines possible federal and state preemption issues. An equally important aspect of property rights is addressed in Section II -- the question of takings. In *South Dakota Mining Ass'n*, a taking could occur by the Lawrence County Zoning Ordinance. Section III discusses possible applications of private and public nuisance actions pertaining to surface mining. Finally, Section IV offers a conclusion of the issues presented in this article.

I. PREEMPTION

A. Federal Law

In *South Dakota Mining*, the court held that the Mining Act of 1872 preempted the Lawrence County Zoning Ordinance as it pertained to federally owned land.[12] The Mining Act of 1872 has imposed greater restrictions upon local governmental control of surface mining on federally owned land than on privately owned land. This is primarily due to two Constitutional requirements. First, the Property Clause gives Congress the power to dispose of, make rules for, and regulate the territory belonging to the United States.[13] The second requirement is the Supremacy Clause of the Constitution which gives Congress sole authority over the use of federally owned land.[14] In this case, the federally owned land in question is the Black Hills National Forest.[15]

Understanding that these two clauses work together in determining preemption issues is important. When Congress acts

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[12]*See id.* at 1010; 30 U.S.C. § 22 (1999) (stating "[Except as otherwise provided,] All valuable mineral deposits in lands belonging to the United States . . . are hereby declared to be free and open to exploration and purchase.").

[13]U.S. CONST. art. IV, § 3, cl. 2. *See* Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) (stating that Congress retains the power to enact needful legislation which protects, regulates, and respects public lands).

[14]*See* U.S. CONST. art VI, cl. 2.

[15]*See South Dakota Mining Ass'n*, 155 F.3d at 1007.

pursuant to the Property Clause, federal law will override conflicting state law under the Supremacy Clause.[16] Thus the Supreme Court has held that the power entrusted to Congress over the public lands is without limitation.[17] Congress' authority is complete even if those lands are within the boundaries of a local government like Lawrence County.[18]

The only avenue a local government has in regulating surface mining on federally owned land is passing a zoning ordinance that does not interfere with the purpose of the Mining Act of 1872.[19] If the local zoning ordinance goes too far, then the courts will deem it preempted. If the local government regulates surface mining on privately owned land, the Mining Act of 1872 is not applicable; however, other federal acts do apply.[20] Whether on federal or privately owned land, the same approach is used to determine whether a local or state law is preempted.

There are different approaches used by the courts to decide whether a local zoning ordinance or state law has hindered the purpose of the federal law. The leading type of preemption is conflict preemption. A conflict exists when the ordinance or state law stands as an obstacle to the purpose and objectives of the federal law.[21] Pursuant to the Supremacy Clause, local or state law is preempted when it interferes with or directly contradicts a federal law.[22] If a hindrance or conflict exists, the local ordinance is deemed to be "without effect."[23]

The lines of inquiry are identical whether a local zoning ordinance or state law is being scrutinized against the preemptive force.[24] Federal preemption will not only preempt a local or state law

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[16] *See Kleppe*, 426 U.S. at 543.

[17] *See id.* at 529.

[18] *See* Kenneth E. Barnhill & Diane Sawaya-Barnes, *The Role of Local Government in Mineral Development*, 28 ROCKY MTN. MIN. L. INST. 221, 235 (1983).

[19] *See* JOHN D. LESHEY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1986) (discussing in detail mining on federal lands).

[20] *See South Dakota Mining Ass'n*, 155 F.3d at 1011.

[21] *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 284 (1995); ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986); Hines v. Davidowitz, 312 U.S. 52, 62 (1941); *See also* Boundary Backpackers v. Boundary County, 913 P.2d 1141 (Idaho 1996) (declaring ordinances that attempted to challenge the federal authority to manage public lands were preempted).

[22] *See* Hankins v. Finnel, 964 F.2d 853, 861 (8th Cir. 1992)(quoting Hayfield N. R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627 (1984)).

[23] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)(citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

[24] *See* Texas Manufactured Hous. Ass'n v. City of Nederland, 905 F.Supp. 371, 377 (E.D. Tex. 1995)(citing City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973); Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1499, 1504 n.4 (10th Cir.

when the two are plainly contradictory, but also when the incompatibilities between the laws are discernable through inference.[25] In *South Dakota Mining Ass'n*, the court declared the Lawrence County Zoning Ordinance to be in direct conflict with the purpose of the Federal Mining Act of 1972 as pertaining to the federally owned land. Therefore the local ordinance was preempted.[26] The court did not, however, answer the question of preemption of the Lawrence County Zoning Ordinance as it pertained to privately owned land.[27]

When a local government tries to regulate strip mining on privately owned land, the local government must determine if the Surface Mining Control and Reclamation Act of 1977 ("SMCRA")[28] has preempted their action. When determining whether SMCRA preempts local or state law, a court should examine the text and structure of the law to determine if it is the clear purpose of Congress to preempt an area of state or local law.[29] In addition, a court must look to the federal law as a whole as well as the law's objectives and motivations.[30] Congress enacted SMCRA to protect citizens and the environment from the harmful effects of surface mining, and to encourage efficient and ecologically sound surface mining.[31] These protections include assuring surface landowners that they are fully protected from such mining operations.[32]

If local governments have the power to control post mining land uses, then logically they also must have the power to control the initial location of the mining. Since in *South Dakota Mining* property was not disturbed, the more appropriate issue becomes the protections afforded to surface property owners before mining operations begin.

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[25] *See* Hayfield No. R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627 (1984).

[26] *See South Dakota Mining Ass'n*, 155 F.3d at 1011.

[27] *See id.*

[28] 30 U.S.C. §§ 1201. (1998).

[29] *See* Peters v. Union Pac. R.R., 80 F.3d 257, 261 (8th Cir. 1996).

[30] *See* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987).

[31] *See* 30 U.S.C. § 1202(a), (f) (1999); 30 U.S.C. § 1201(j), (k) (1999). *But see* Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 288 (1981) (upholding SMCRA because it did not commandeer the states into regulating mining).

[32] *See* 30 U.S.C. § 1202(b) (1999). *See generally* Richard Roth et al., *Coal Mining Subsidence Regulation in Six Appalachian States*, 10 VA. ENVTL. L. J. 311, 324-42 (1991) (concluding that the treatment problems falling under SMCRA differ from state to state because of variations in political and economic clout of the mining industry to that of the surface owners).

It is argued that local governments should have the power to control the location of surface mines for several reasons. First, local ordinances or state laws that regulate the initial location of surface mines are not inconsistent with SMCRA. The Act declares that "existing state or local use plans or programs" must be consulted in determining which areas should be deemed unsuitable for mining.[33] Thus, SMCRA indicates that local zoning ordinances should be followed.

The Act states that more stringent state or local ordinances are not necessarily preempted.[34] If a local government enacts a zoning ordinance such as that in Lawrence County which controls the initial location of a surface mine, it should not be preempted by SMCRA.[35] South Dakota already prohibits new surface mining permits on private land in the Spearfish Canyon area of Lawrence County.[36] Third, there is no actual conflict between the Lawrence County Zoning Ordinance and SMCRA, because SMCRA is more of an environmental act than a land use act. Lastly, local governments should retain the power to control the location of surface mine placements because the location of a surface mine requires a balancing of uniquely local interests.[37]

Even with the provision mentioned above, there has been little discussion via case law about whether SMCRA or its state law counterparts preempt local governments from prohibiting surface mining. Furthermore, the responsibility of authorizing and enforcing regulations regarding surface mining rests with the state or local governments.[38] As a result, one may conclude that states, and thus local governments, can be more stringent in prohibiting surface mining without being preempted by SMCRA. In addition, the little authority that does exist indicates that local governments will not be preempted from enacting such ordinances in every situation.[39]

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[33] 30 U.S.C. § 1272(a)(3)(A) (1999).

[34] *See* 30 U.S.C. § 1255(b) (1999).

[35] *See* 30 C.F.R. §§ 901-950 (1998) (describing that when SMCRA was enacted, Congress looked at the various state laws and either pronounced them more stringent and allowable or preempted). *See e.g.*, 30 C.F.R. § 941.700 (1998) (describing South Dakota's laws in relation to SMCRA).

[36] *See* S.D. CODIFIED LAWS § 45-6B-104 (Michie 1999); *See also* S.D. CODIFIED LAWS § 45-6B-105 (Michie 1999) (describing the legal description of area).

[37] *See* Leslie E. Renkey, *Local Zoning of Strip Mining*, 57 KY. L.J. 738, 746-48 (1969).

[38] *See* 30 U.S.C. § 1201(f) (1999).

[39] *See* Laura A. Lane, Comment, *Local Land Use Policies in the Reclamation of Strip Mining Land*, 41 U. PITT. L. REV. 598-601, 604-19 (1980); *see also* Jonathan Belcher, *Exploring the Latitude of Lucas v. South Carolina Coastal Council: Local Control of Surface Mining*, 17

B. State Law Preemption

If SMCRA does not preempt Lawrence County from passing local zoning ordinances, then the last obstacles are any existing state laws that would prohibit local governments from enacting such legislation. The federal government permits a state to regulate surface mining, through SMCRA, on non-federal lands within its borders so long as it has an approved state program.[40] Twenty-four states have established state surface mining programs.[41] Only a few states that have enacted surface mining statutes preempt local governments from the regulation of surface mining. For example, Alabama's SMCRA provides that local, municipal and county regulation of surface mining is preempted.[42] Courts have upheld the abilities of local governments in Pennsylvania to enact only zoning regulations that control surface mining.[43] Consequently, even states that restrict local regulation still permit zoning restrictions like the one enacted in *South Dakota Mining Ass'n*.

The vast majority of state SMCRAs closely follow the language of the federal SMCRA. The surface mining acts of Kentucky and Virginia are good examples.[44] Kentucky and Virginia have not preempted local governments in these states from implementing land

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WM. & MARY J. ENVTL. L. 165, 173 (1993) (arguing the logic of local ordinances not being preempted by SMCRA).

[40] *See* 30 U.S.C. § 1253(a) (1998) (establishing seven requirements for a state program to receive Department of Interior approval: [1] state law must be in compliance with SMCRA, [2] state law providing sanctions for violations must be in accordance with SMCRA, [3] state has an agency competent to administer such law, [4] state has law authorizing permits, [5] law provides for identifying lands unsuitable for mining, [6] there are procedures for coordinating when multiple permitting agencies are involved, and [7] all rules and regulations are in accordance with SMCRA); 30 C.F.R. § 731.14 (1998) (identifying that information to be included in state programs). *See also* Power River Basin Resource Council v. Babbit, 54 F.3d 1477 (10th Cir. 1995) (detailing Wyoming's deficiency in its state program leading to the Department of Interior's disapproval).

[41] *See* C.F.R. §§ 901, 902, 904, 906, 913-18, 920, 924-26, 931, 934-36, 938, 943, 944, 948, 950 (1998).

[42] *See* ALA. CODE § 9-16-106 (1999).

[43] *See* Amerikohl Mining, Inc. v. Zoning Hearing Bd., 597 A.2d 219, 225-26 (Pa. Commw. Ct. 1991); McClimans v. Board of Supervisors, 529 A.2d 562, 566 (Pa. Commw. Ct. 1987).

[44] *See* KY. REV. STAT. ANN. §§ 350.010-.990 (Banks-Baldwin 1998); VA. CODE ANN. §§ 45.1-226 to 270.7 (Michie 1998).

use ordinances controlling the location of surface mines.[45] Local governments in Kentucky also may play a role in controlling post mining use of the land.[46]

The ability of a local government to regulate surface mining on privately owned land depends upon the text of its state's SMCRA. In states like Alabama and Pennsylvania, which have more restrictive preemption provisions, municipalities have less power to regulate. But in Kentucky and Virginia, the state surface mining acts essentially follow the language of the federal SMCRA, and do not expressly preempt local government regulation. In most states, local governments do not appear to be preempted from passing non-conflicting land use ordinances, particularly those which control the location of a surface mine.[47]

If the state has not enacted a surface mining act, like South Dakota, then the provisions of the federal SMCRA control.[48] In addition, this requires the Office of Surface Reclamation and Enforcement to develop a program for these states.[49] South Dakota is one of the states that has had a federal program developed.[50] These federal programs closely follow SMCRA.[51]

There is no indication from SMCRA that federal law has preempted local governments from controlling the initial location of surface mining activities on privately owned lands. Furthermore, there is no indication that SMCRA precludes local governments from controlling the regulation of post mining use of land, and it is likely that

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[45] *See* KY. REV. STAT. ANN. § 350.610(4) (Banks-Baldwin 1998); VA. CODE ANN. § 45.1-252(A)(4) (Michie 1998); *see also* Carolyn S. Bratt, *Surface Mining in Kentucky,* 71 KY. L.J. 7, 21-22 (1982) (discussing the Kentucky statute). In Kentucky, reservation of mineral rights does not include the right to surface mining. United States v. Stearns Co., 949 F.2d 223, 226 (6th Cir. 1991).

[46] *See* KY. REV. STAT. ANN. § 350.405 (Banks-Baldwin 1999).

[47] *See* ARDEN H. RATHKOPF, THE LAW OF ZONING AND PLANNING § 31.03[13] (Edward H. Zeigler, Jr. ed., 1991).

[48] *See* Zoning Ordinance for Mining Operation, Op. S.D. Att'y Gen. No. 86-04 (Mar. 3, 1986).

[49] *See* 30 U.S.C. §§ 1211(a), 1254(a) (1999); 30 C.F.R. § 730.12(a) (1999); *see also* In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981) (providing a framework for the Office of Surface Mining Reclamation and Enforcement's [OSM] general rulemaking ability).

[50] The states which have had a federal program developed for them are California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. *See* 30 C.F.R. §§ 905, 910, 912, 921, 933, 937, 939, 941, 942, 947 (1998).

[51] *See* 30 U.S.C. § 1254 (1999).

SMCRA would not deem these controls inconsistent if they were more stringent than the federal regulation.

If SMCRA, or any other state provision, has not preempted the Lawrence County Zoning Ordinance, then the courts should conclude that the ordinance should stand on the preemption issue. As previously mentioned, South Dakota has already enacted laws prohibiting surface mining in Lawrence County.[52] The next question is whether the zoning ordinance amounts to a taking.

II. TAKINGS: HOW FAR CAN A LOCAL GOVERNMENT GO?

As discussed in the previous section, local governments are able to regulate the activities of surface mining operations. This section will discuss how far local governments can go under the takings clause of the Fifth and Fourteenth Amendments and the similar clauses in the states' constitutions.[53]

There are several methods by which local governments can regulate surface mining. The most common way is by zoning. Local governments can prohibit some or all types of mining. In addition to zoning, local governments can regulate surface mining through licensing or post-mining reclamation. Finally, a local government can also enact "mineral ordinances" that guide the mining process; however, this type of ordinance is more susceptible to preemption than traditional zoning.[54]

An issue that the courts in *South Dakota Mining* did not address was whether the ordinance passed by Lawrence County voters was viewed as a zoning or a mineral ordinance.[55] Since the Lawrence County ordinance regulates zoning, its chance of survival increases. As a result, it seems likely the courts will, and should, take the view that the Lawrence County ordinance is a zoning ordinance. In other words, it should be upheld. The ability of local governments to control surface mining using zoning ordinances is discussed in the next section.

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[52] *See South Dakota Mining Ass'n*, 155 F.3d at 1007.

[53] *See* Concerned Citizens of Appalachia, Inc. v. Andrus, 494 F.Supp. 679 (E.D. Tenn. 1980) (stating that SMCRA does not violate the Fifth or Tenth Amendments 'reserved powers' provision).

[54] *See id.*

[55] *See South Dakota Mining Ass'n*, 155 F.3d at 1007 (stating the ordinance: "No new permits or amendments to existing permits may be issued for surface metal mining extractive industry projects in the spearfish canyon area.").

A. Zoning

The question is whether Lawrence County is permitted to enact zoning ordinances regulating the location of surface mining. This issue is separate from preemption, because even if a county ordinance is not preempted, it still must be authorized by the state. In *South Dakota Mining,* the voters passed the zoning ordinance, not Lawrence County itself.[56] This presents a slightly different issue, but the county still must be able to enact the ordinances regardless. In South Dakota, counties are permitted to enact zoning regulations.[57] All state zoning statutes are patterned after the Standard Zoning Enabling Act, which courts construe as implicitly authorizing zoning of natural resources, including coal. Some states have included express language authorizing such zoning.

Zoning ordinances that regulate surface mining have been challenged frequently as "takings" of private property without just compensation, especially where they prohibit surface mining from occurring anywhere within the locality.[58] The courts have long recognized surface mining as a legitimate use of land, and it generally cannot be constitutionally prohibited.[59] Zoning ordinances which prevent mining are invalid unless very serious consequences would result from the proposed mining.[60] The destruction of the surface owners' property may logically be considered a serious consequence. In addition, the Lawrence County Zoning Ordinance only prohibits surface mining, not subsurface mining operations.

Even local zoning ordinances that restrict but do not prohibit surface mining have also been heavily contested.[61] This is exactly what the zoning ordinance in *South Dakota Mining Ass'n* does.[62] It prohibits surface mining only on federally and privately owned land within

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[56] *See id.*

[57] *See* S.D. CODIFIED LAWS § 11-2-2 (Michie 1998).

[58] *See* East Fairfield Coal Co. v. Booth, 143 N.E.2d 309, 311 (Ohio 1957); Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 228 A.2d 169, 179-82 (Pa. 1967) (holding that municipal ordinances prohibiting rock quarrying were unconstitutionally exclusionary).

[59] *See* Lower Allen Citizens Action Group, Inc. v. Lower Allen Township Zoning Hearing Bd., 500 A.2d 1253, 1260 (Pa. Commw. Ct. 1985).

[60] *See* Silva v. Ada Township, 330 N.W.2d 663, 664 (Mich. App. 1983).

[61] *See* D.E. Ytreberg, Annotation, *Prohibiting or Regulating Removal or Exploitation of Oil and Gas, Minerals, Soil, or Other Natural Products within Municipal Limits,* 10 A.L.R. 3d 1226 (1998).

[62] *See South Dakota Mining Ass'n*, 155 F.3d at 1007.

40,000 acres of the county.[63] Surface mining may not, however, be prohibited where it will do no harm, or where it is shown that the value of the land will be greater if mined.[64] A successful challenge to the Lawrence County Zoning Ordinance must show the existence of valuable amounts of coal on the land, and prove that no serious consequences would result from the surface mining of coal.[65] Serious consequences do not include generated truck traffic, attendant noise, or decreased property value in the area.[66] Nevertheless, as mentioned above, substantial damage to the surface owners' property would be taken into consideration.[67]

Unless the severance of the surface from the subsurface estates included the right of the subsurface property owner to significantly damage the surface estate, courts will not permit the destruction of the surface estate.[68] Even if the subsurface property estate has the explicit right to destroy the surface estate, courts may require whichever mining method best preserves the surface estate.[69]

In addition to considering the damage to the surface estate, if Lawrence County were planning residential development in the area, the zoning ordinance might be upheld to protect that planned use of the land.[70] On its face, the Lawrence County Zoning Ordinance is permissible as a zoning ordinance, and surface property owners may prohibit the surface mining. But does this zoning ordinance completely devalue the subsurface property?

B. The Takings Claim

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use without just

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[63] *See id.* (referring to the fact that ninety percent of the area in question is part of the Black Hills National Forest, with the remaining ten percent being privately owned land mixed within the national forest).

[64] *See* Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275, 287 (Ill. 1953).

[65] *See* American Aggregates Corp. v. Highland Township, 390 N.W.2d 192, 198 (Mich. Ct. App. 1986).

[66] *See id.*

[67] *See* People v. Hawley, 279 P. 136, 144 (Cal. 1929).

[68] *See* Stewart v. Chernick, 266 A.2d 259, 263 (Pa. 1978).

[69] *See* Columbia Gas Transmission Corp. v. Limited Corp., 951 F.2d 110, 113-114 (6th Cir. 1991) (stating the dominant estate is liable to the subservient estate for action known or expected to cause damage).

[70] *See* Harbucks v. Board of Supervisors of Nockamixon Center Hill, 560 A.2d 851, 854 (Pa. Commw. Ct. 1989).

compensation."[71] In *South Dakota Mining,* a regulatory taking is implicated.[72] Initially, the Takings Clause was construed only as a protection against the physical appropriation of private property by the government. However, the Supreme Court has come to recognize that government regulations can have the same effect. The question then becomes whether the regulation goes so far as to render the owner's property useless. If so, then a taking has occurred and the private landowner will most likely lose the property, with just compensation.

As held in *Lucas v. South Carolina Coastal Council*[73] and other cases, property owners should expect their property to be regulated to a certain degree. To determine when a regulation has gone too far, but has not completely devalued the property, some courts have applied a balancing test. Others use a harm/benefit analysis. In recent years, the Supreme Court and a growing number of states and federal courts have come to favor a two-part test if the property in question had been completely devalued of all economic use.[74] Under this two-part test the private property owner must show either (1) that the zoning ordinance does not substantially advance a legitimate state interest, or (2) that it denies the owner all economically viable use of his or her land.[75]

In order to meet the first prong of the test -- showing a legitimate state interest -- the subsurface estate owner must prove that the zoning ordinance is not related to the public's safety, health, morals, or general welfare.[76] Put simply, the zoning ordinance must serve the public interests which it purports to promote. Courts have repeatedly upheld zoning ordinances prohibiting surface mining when such ordinances relate to preserving safety, health and the general welfare.[77] These zoning ordinances are upheld even if the property owner suffers economic hardship or loss of profits.[78] The critical determination is whether the prohibition on surface mining furthers legitimate public safety, health, or general welfare issues.[79] Cases on this issue suggest that a court will uphold a zoning ordinance if it bans surface mining

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[71] U.S. CONST. amend. V.
[72] *See South Dakota Mining Ass'n*, 155 F.3d at 1007.
[73] 505 U.S. 1003 (1992).
[74] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
[75] *See id.*
[76] *See* Keystone Bituminous Coal Ass'n v. DeBenedicits, 480 U.S. 470, 487-88 (1987).
[77] *See* Ytreberg, *supra* note 59.
[78] *See id.*
[79] *See* McClimans v. Board of Supervisors, 529 A.2d 562, 568 (Pa. Commw. Ct. 1987).

near populated areas.[80] On the other hand, if the ordinance bans surface mining in relatively unpopulated areas, where little possibility of danger exists, it is less likely to be upheld.[81]

In *South Dakota Mining Ass'n*, the court did not define the public interests. If the Mining Association succeeded in proving the Lawrence County Zoning Ordinance is unrelated or insufficiently related to public interest, the ordinance would be defined as a "taking" of the Mining Association's property. On the other hand, if the ordinance were supported by legitimate public interest, it would be a valid exercise of the police power. The ultimately determinative factor will most likely be the fact that the Black Hills National Forest is primarily unpopulated and far from any populated areas.

If Lawrence County can satisfy the first prong of the test by demonstrating legitimate state interests, the zoning ordinance may still be a "taking" if it denies the Mining Association all economic use of the property. To be a taking under *Lucas*, the Supreme Court held that the private landowner must be left undeveloped.[82] But *Lucas* did not alter any earlier Supreme Court decisions concerning government regulations on the use of property that diminishes the value of that property, but did not totally eliminate its value. When a local government deprives the property owner of some of the value of his property but the action does not constitute a total elimination of the value of the property, the question of whether the government action constitutes a taking requiring compensation must be examined under

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[80] *See* Consolidated Rock Products Co. v. City of Los Angeles, 307 P.2d 342, 345 (Cal. 1962) (upholding an ordinance prohibiting rock and gravel operations that would create appreciable quantities of dust which could injure the health of the immediate population); Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1383-86 (N.J. 1992) (upholding an ordinance prohibiting quarries that would pose dangers to the public safety and environment); G.M.P. Land Co. v. Board of Supervisors, 457 A.2d 989, 995 (Pa. Commw. Ct. 1983) (upholding an ordinance prohibiting surface mining in areas where drinking water contamination and erosion were possible); Amerikohl Mining Inc. v Zoning Hearing Bd., 597 A.2d 219 (upholding the denial of a special exception for a surface mine operation that would create air, noise and water pollution affecting contiguous residential areas).

[81] *See* East Fairfield Coal Co. v. Booth, 143 N.E.2d 309, 312 (Ohio 1957) (striking down an ordinance that prohibited surface mining on run-down farm land adjacent to an existing surface mine); Frelk v. County of Kendall, 357 N.E.2d 1325, 1330 (Ill. App. Ct. 1976) (reversing the denial of a special exception to a surface mine in agricultural area as unrelated to safety, health or welfare); *see also* Herman v. Village of Hillside, 155 N.E.2d 47, 53 (Ill. 1959) (invalidating a zoning ordinance that prohibited expansion of a quarry which was adjacent to an existing quarry).

[82] *See* 505 U.S. at 1019.

other decisions of the Supreme Court.[83] In *South Dakota Mining,* the Lawrence County Zoning Ordinance prohibited only surface mining, but permitted all other forms of mining.[84]

If the Lawrence County Zoning Ordinance is not a complete devaluation of the Mining Association's property estate, cases such as *Keystone Bituminous Coal Association v. DeBenedictis*[85] become substantially determinative. In *Keystone,* the Supreme Court applied a balancing test to determine whether the regulation constituted a taking of property.[86] A court must balance the extent to which the zoning ordinance advances a legitimate state interest and the extent to which the ordinance denies the property owner any economically viable use of the subsurface estate.[87] In *Keystone,* the court held that fifty percent of the subsurface coal left to support the surface estate was not a taking for which just compensation was due.[88] The Supreme Court reasoned that the requirement that mining operators leave a certain percentage of coal in the ground and take further steps to prevent damage to the surface was designed to protect a wide variety of public and private uses of the surface estate.[89] In addition, even with the mining operator taking only fifty percent of the coal reserve, it was still profitable for the company to remove the coal.[90] The Court refused to find that a statute requiring a percentage of coal to remain in the ground was a physical appropriation of coal.[91] In *Keystone,* the Supreme Court held that the test for regulatory taking requires the Court to compare the value of the property that can be taken to the value of what is left in the ground.[92] The Court concluded that the statute promoted a significant public interest and resulted in only a slight diminution in value of the mining operator's operations, and thus no taking had occurred.[93]

The question for Lawrence County was therefore whether the Mining Association could obtain the coal by other economically feasible means. If the Mining Association cannot access their minerals

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[83] *See id.* at n.8.

[84] *See South Dakota Mining Ass'n*, 155 F.3d at 1007.

[85] 480 U.S. 470 (1987).

[86] *See id.* at 485 (adopting the balancing test proscribed in Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[87] *See id.*

[88] *See id* at 498.

[89] *See id.* at 495-97.

[90] *See id.* at 496.

[91] *See id.* at 498.

[92] *See id.* at 501-505.

[93] *See id.*

through the surface and have no other way to access the estate, then the property right becomes a nullity and hence a taking.[94] If other means of extraction are possible, then the courts will weigh all of the public and private interests involved. Furthermore, the court could consider the amount of coal the Mining Association may obtain with what would be left in the ground.

III. NUISANCE LAW

There are two distinct types of nuisances: private and public.[95] They have many similar aspects in that each causes an inconvenience to someone. However, private nuisance is narrowly restricted to the invasion of interests in the use or enjoyment of land as it pertains to the individual landowners or a small group of people.[96] A public nuisance incorporates this same principle, but the number of people affected by the proposed nuisance must be greater.[97] The courts have not said exactly how many people are needed to constitute a 'public'; thus, it is often determined judicially. The remedy for a private nuisance rests in the hands of the private landowners in Lawrence County whose rights have been disturbed. The remedy for public nuisance rests in the hands of the state or the segment of the public that is directly affected by the proposed nuisance. Whether a public or private nuisance, nothing happens until a landowner brings this type of action.[98]

Other jurisdictions have already declared that the possibility of future injury to property is enough to bring a nuisance action.[99] South Dakota has not addressed this possible nuisance action in state or district court; however in *Kuper v. Lincoln-Union Elec. Co.*,[100] the court

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[94] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n.8 (1992). Congress has attempted to remedy the all-or-nothing approach. H.R. 9, 104th Cong. § 203 (1995).

[95] A third type of nuisance is absolute nuisance which exists in situations that result from abnormal and unduly hazardous activities. *See* Northwest Water Corp. v. Pennetta, 479 P.2d 398, 401 (Colo. Ct. App. 1970).

[96] *See* Cox v. Ray M. Lee Co., 111 S.E.2d 246, 248 (Ga. 1959); Allison v. Smith, 695 P.2d 791, 793-94 (Colo. App. 1984); *see also* S.D. CODIFIED LAWS § 21-10-1 (Michie 1999) (describing nuisances).

[97] *See* S.D. CODIFIED LAWS § 21-10-3 (Michie 1999) ("A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons").

[98] *See* RESTATEMENT (SECOND) OF TORTS § 821(F) cmt. c (1965).

[99] *See* Cook v. Rockwell Int'l Corp., 181 F.R.D. 473, 485 (D. Colo. 1998); Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 720 (1992).

[100] 557 N.W.2d 748 (S.D. 1996).

specifically made reference to a jury instruction describing a nuisance as an act which "renders other persons insecure in life, or in the use of property."[101] From this case, it could be inferred that South Dakota courts view future nuisance as a legitimate cause of action.

Even if the Lawrence County Zoning Ordinance deprives the Mining Association of all beneficial use of the property, a taking will not necessarily be found. The inquiry of whether the zoning ordinance has the effect of depriving the subsurface property owners of all beneficial use of their land must be case specific.[102] If the proposed use is one which the Mining Association has no legal right to make in the first place, for example, it amounts to a nuisance. Thus the local government need not pay compensation. This reasoning originates from the common law expression *sic utere tuo ut alienum non lædas*, which means "property may not be used in a manner injurious to the property of another."[103]

Although in certain cases courts have held that surface mining constitutes a common law nuisance, more often courts have seen surface mining as a legitimate business and have not viewed it as a nuisance per se.[104] It is well established that mining is a lawful and necessary business and a reasonable use of property. However, surface mining may become a nuisance by reason of the manner in which it is carried out.[105]

If the mining is executed in an injurious manner, then it is a nuisance. This injurious manner must be an interference that is substantial, unreasonable, and offensive or inconvenient to a reasonable person. Any disturbance of the enjoyment of the property may amount to a nuisance. Land use ordinances, such as the Lawrence County Zoning Ordinance, may in this respect legitimately circumscribe an activity that amounts to a public nuisance.[106]

Public nuisance extends to virtually any form of annoyance or inconvenience interfering with common public rights. This could include not only tourism in the Black Hills National Forest but also the public that drives along the roads within the area. The remedy for

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[101] *Id.* at 763. *See also* S.D. Codified Laws § 21-10-1 (Michie 1999) (stating that acts or the failure to perform certain acts, which render other persons insecure in life or in the use of their property, constitute nuisances).

[102] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

[103] *See* Canfield v. United States, 167 U.S. 518, 522 (1897).

[104] *See* 53A AM. JUR. 2d *Mines and Minerals* § 338 (1997).

[105] *See id.*

[106] *See* DANIEL R. MANDELKER, LAND USE LAW § 4.16 (2d ed. 1988).

public nuisances rests in the hands of the public at large, whose rights have been inconvenienced.

The private surface landowners in *South Dakota Mining* may bring a private nuisance action before the surface mining has begun. A threat of future injury may be enough to constitute an interference with the enjoyment of land.[107] In addition, depreciation in the value of the property because of such conditions or activities may constitute sufficient present damage upon which an action may be based.[108] The private landowners in Lawrence County living in close proximity to the potential surface mines may use the private nuisance action against the Mining Association before surface mining begins in the Black Hills National Forest.

If private landowners in Lawrence County try to stop surface mining on grounds of nuisance, and the zoning ordinance denies all economically productive use of the land by the Mining Association, then courts will sustain the action only if "background principles of nuisance and property law" would proscribe the use.[109] With surface mining declared off limits, the Mining Association must receive just compensation unless they could have been enjoined in a state common law public or private nuisance action.[110]

Courts have established that surface mining operations can rise to the level of common law nuisances if excessive smoke, fumes or dust are produced, or if noise and vibrations from equipment or blasting disturb the peace.[111] Other factors include water pollution, erosion, landslides, and the release of noxious gases.[112] Surface mining may also be prohibited as a security risk if it gets close to houses or

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[107] *See* Cumberland Torpedo Co. v. Gaines, 255 S.W. 1046 (Ky. 1923) (referring to stored explosives as a nuisance); Richardson v. Murphy, 259 P.2d 116 (Or. 1953) (calling an inflammable building a nuisance).

[108] *See* Romano v. Birmingham Ry., Light & Power Co., 62 So. 677 (Ala. 1913).

[109] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992). Three justices disapproved the Court's narrowing of the nuisance exception to common law only. Justice Kennedy was troubled because only common law, not legislatively declared nuisances now come under the exception. *See id.* at 1017 (Kennedy, J., concurring).

[110] *See id.* at 1016.

[111] *See* Consolidated Rock Prods. Co. v. City of Los Angeles, 370 P.2d 342, 345 (Cal.1962) (holding that dust created by rock and gravel operation could be a nuisance); *see also* 53A AM. JUR. 2d *Mines and Minerals* § 339 (1997).

[112] *See* Amerikohl Mining, Inc. v. Zoning Hearing Bd., 597 A.2d 219, 223 (Pa. Commw. Ct. 1991) (holding water, noise, and air pollution caused by coal surface mining constituted a nuisance); *see also* 53A AM. JUR. 2d *Mines and Minerals* § 339 (1996).

schools.[113] Furthermore, the extensive state and federal environmental controls, to which surface mines are often subject, do not determine whether a mine is a nuisance or are merely additional factors in the equation.[114]

Most people familiar with the process would agree that surface mining is ugly, and most do not want to live anywhere near such operations. Not only is it disturbing to residential plans, but also to tourism. For example, there are currently movements to prohibit surface mining based on the argument that tourism will be adversely affected.[115] Critics compare the cost of losing tourism dollars to the cost of losing mining dollars. This can be a highly effective means of prohibiting surface mining - if the economics are balanced, then the chances of strip mining being considered a nuisance are greatly increased.

To reiterate, the common law principle of nuisance can be utilized to deter surface mining, but it should be used only as a last resort. Nuisance is, at best, a piecemeal remedy to a problem. Who is likely to win will largely depend upon the economics of the area.[116] The very existence of a private nuisance depends on a balancing of the rights of the persons involved. Relief of an injunctive nature always involves a further balancing of equities to determine whether an extreme remedy is justified.[117]

IV. CONCLUSION

In order to determine whether the Lawrence County Zoning Ordinance will stand, the first question to be addressed is that of federal preemption. It can conclusively be established that federal law will not preempt the zoning ordinance. As the laws in South Dakota indicate, state law will not preempt the Lawrence County Zoning Ordinance. In fact, South Dakota state laws seem to agree with and support the zoning ordinance. Thus the Lawrence County Zoning Ordinance is likely to survive the preemption question.

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[113] *See* Bernardsville Quarry, Inc. v. Borough of Bernardsville, 608 A.2d 1377, 1384 (N.J. 1992); Kane v. Kreiter, 195 N.E.2d 829, 832 (Ohio 1963).

[114] *See* 53A AM. JUR. 2d *Mines and Minerals* § 338 (1996).

[115] *See* Charles Winfrey, *Citizens Fight Strip Mine*, THE PROGRESSIVE, Dec. 1998 at 16.

[116] *See* Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527, xx (1996).

[117] *See* PROSSER, LAW OF TORTS 602-06 (4th ed. 1971).

The next question is if the Lawrence County Zoning Ordinance survives preemption, does it amount to a taking of the Mining Association's subsurface mineral estate? Lawrence County's Zoning Ordinance restricts surface mining but not subsurface mining, so one must study the options available to the Mining Association, including any additional costs of subsurface mining. If the subsurface mining option is impractical, the Lawrence County Zoning Ordinance might rise to the level of a taking for which the Mining Association could seek compensation. Conversely, if the Mining Association can retrieve a portion of the coal by using subsurface mining techniques, then there would be no taking. No matter if there is a partial or complete diminution of property value to the Mining Association, the state must show some legitimate interest in discontinuing the surface mining.

The final question presented is, in the event the Lawrence County Zoning Ordinance does arise to the level of a taking and is struck down, whether the private landowners can use the common law action of nuisance to prevent their land from being surface mined. Nuisance is always a risky action, but as a last resort it could save the landowners' property. Based upon the political and economic climate of the area, the nuisance action would probably fail.

The Lawrence County Zoning Ordinance is symbolic of the change in society's attitude toward mining companies. Society is becoming more concerned with environmental protections, against not only governments but also powerful companies. As time passes, it will become more difficult for mining companies to mine on land that is not federally owned, unless they are willing to pay higher and higher prices to obtain the surface estates.