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### Mining Regulation and Takings

Mark Squillace

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# **MINING REGULATION AND TAKINGS**

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**Regulatory Takings and Resources:**  
**What are the Constitutional Limits?**

**Natural Resources Law Center**  
**University of Colorado School of Law**  
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MINING REGULATION AND TAKINGS  
Mark Squillace

I. HISTORY OF CONFLICTS BETWEEN MINING REGULATION AND TAKINGS LAW

No discussion of the takings doctrine would be complete without a thorough review of its impact and relevance to the mining industry, for many of the most important takings law cases have involved mining operations. Perhaps the most famous of all of these was the decision by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) which ushered in the era of the regulatory takings law. *Pennsylvania Coal* involved a challenge to the Kohler Act, a state statute which forbade, in certain circumstances, the mining of coal which caused surface subsidence of the land overlying buildings and other structures. In striking down the Pennsylvania statute, Justice Holmes offered what is perhaps the most frequently cited passage of any takings law case: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Just how far is "too far" is a question which has perplexed courts and legal scholars alike for many decades.

The difficulty in answering this question is perhaps best illustrated by the Court's 1987 decision in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). The facts in *Keystone Bituminous* are remarkably similar to the facts in *Pennsylvania Coal*. That case involved another Pennsylvania state statute which was designed to limit surface subsidence from underground coal mining. In particular, coal operators were prohibited from removing more than 50% of the coal resources which were located under certain protected structures. A five member majority of the Court sustained the law, distinguishing the *Pennsylvania Coal* case in two important respects; first the Court found that the statute in *Keystone Bituminous* was clearly enacted under the state's police powers to protect broad public interests including preserving the property tax base, promoting public safety, and in protecting water resources. By contrast, the court characterized the statute involved in *Pennsylvania Coal* as having been enacted to promote private property interests. Second, the Court held that the 50% rule established by the state statute did not go "too far" since there was no evidence that coal mining became commercially impractical as a result of the rule. This contrasted with a contrary finding

in *Pennsylvania Coal*.

The Supreme Court had previously addressed the commercial impracticality issue in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). *Goldblatt* involved a town ordinance which prohibited excavations below the water table, thus effectively foreclosing Goldblatt's sand and gravel mining operation. Goldblatt argued that the ordinance effectively prevented it from continuing its business and thus constituted a taking. The Court conceded that the ordinance prohibited a beneficial use to which the property was previously devoted, but held that, where the ordinance is a valid exercise of the police power, a regulation that "deprives the property of its most beneficial use does not render it unconstitutional." *Id.* at 594. The Court noted that the fact that the use of the soil itself was precluded, as opposed to a use upon the soil, was not controlling, nor was the fact that the "use prohibited is arguably not a common-law nuisance." *Id.* The Court did, however, comment on common-law nuisance as a foundation for regulatory validity, thus foreshadowing the decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992): "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 593.

*Goldblatt* focused on the validity of the regulatory ordinance under the police power, applying the familiar standard of reasonableness. Moreover, the Court made clear that debatable questions of reasonableness should be left to the legislature. A similar rationale was used less than a month later in *Consolidated Rock Products Company v. City of Los Angeles*, 370 P.2d 342 (1962) *appeal dismissed*, 371 U.S. 36 (1962), to uphold a zoning ordinance that precluded Consolidated's sand and gravel operations. The trial court found the property had no appreciable economic value for any other purpose. There was testimony before the legislative body that other uses were practicable, however, it "determined that the prohibited use cannot be had without injury to others." *Id.* at 348. The California Supreme Court conceded that "the value of the property for any of the described uses is relatively small if not minimal" when compared with its value for gravel extraction but affirmed on the grounds that where reasonable minds might differ the courts should defer to legislative findings. Dismissing Consolidated's

reliance on *Pennsylvania Coal*, and other early takings cases, as inapplicable to current principles of comprehensive zoning, the court noted that "public welfare and public convenience do control and are in themselves terms constantly adjusted to meet new conditions." *Id.* at 352. *Goldblatt* and *Consolidated* emphasize that the regulatory takings doctrine is an evolving concept, where the reasonableness of the regulation and enforcement means are primarily determined by the legislative branch of government.

The final mining case which bears review is the 1981 decision in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981). *Hodel* is important for a simple proposition: takings claims are "ad hoc" factual inquiries. In *Hodel*, the Mining Association had argued that the steep slope provisions of the federal Surface Mining Control and Reclamation Act (which established strict standards for mining operations on slopes greater than 20°) violated the takings clause since coal operators simply could not meet the Act's strict standards. The Court treated the claim as a "facial challenge" requiring the Court to determine whether mere enactment of the law constituted a taking. The Surface Mining Act easily survived such scrutiny. In its decision, however, the Court made clear that closer scrutiny might be afforded where the law was applied to "particular property" where parties produced "particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Id.* at 295.

## II. THE *LUCAS* DECISION AND PROSPECTS FOR FUTURE CONFLICTS BETWEEN MINING REGULATION AND TAKINGS LAW

It is fairly easy to document the significant impact that mining regulation has had on the takings doctrine, and the reasons for this impact are not particularly surprising. Mining tends to displace other uses of land both on and off-site. Such displacement often results in government restrictions on the location and manner of mining -- restrictions which in turn lead to takings claims.

Although it does not itself concern mining, the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992) has special relevance to the displacement issue which so often arises in mining cases, and thus offers important insights into how the Court may resolve future takings disputes which arise in the context of mining operations. In 1988, the South Carolina legislature enacted the Beachfront Management Act.

In enacting this law, the legislature had found, among other things, that the beach/dune system "provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue" and that development too close to the beach "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." *Id.* at 2897, n.10. The Act prohibited Mr. Lucas from developing two lots which he had purchased on a barrier island along the South Carolina coast in 1986. The South Carolina Supreme Court denied Lucas's takings claim, believing itself bound by the uncontested findings of the legislature "that new construction in the coastal zone--such as petitioner intended--threatened this public resource." *Id.* at 2890.

The Court reiterated "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint: ... [1] regulations that compel the property owner to suffer a physical 'invasion' of his property ... and [2] where the regulation denies all economically beneficial or productive use of land." *Id.* at 2893-94. (The Court did not address partial regulatory takings in *Lucas* but reiterated that an "ad hoc factual inquiry" is required where a partial taking is claimed. *Id.* at 2893, (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).)

In *Lucas*, the Supreme Court abandoned the harmful or noxious uses principle relied on in prior cases as a "touchstone to distinguish regulatory 'takings' -- which require compensation -- from regulatory deprivations that do not require compensation." *Id.* at 2899. Justice Scalia noted "that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis." *Id.* Instead the Court looked to traditional nuisance law to aid in its analysis. Nuisance law offers a balancing test that looks to the "degree of harm to public lands and resources, or adjacent private property, ... the social value of the claimant's activities and their suitability to the locality in question, ... and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government ..." *Id.* at 2900.

While the Court stressed "that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is

presently found” (*Id.* at 2902, n.18) it left open the possibility that “changed circumstances or new knowledge may make what was previously permissible no longer so.” *Id.* at 2901

The Court’s “total taking” inquiry does not appear to preclude a total ban on mining activity, such as that upheld in *Consolidated Rock Products*, where a nuisance can be established; however, *Lucas* signals an emerging reluctance to defer, without question, to legislative findings. Additionally, the Court intimated that the antecedent inquiry must be into the nature of the owner’s estate and its relevant entitlement (*Id.* at 2899), an inquiry closely related to the owner’s “investment-backed expectations” which “are keenly relevant to takings analysis generally.” *Id.* at 2895. Thus, where the subsurface estate is segregated, or theoretically may be segregated, from the surface estate, a takings claim may be more likely to succeed. Furthermore, in a footnote, the Court appears to suggest that where the economically beneficial use of a substantial portion of a large holding is precluded by regulation, the property interest against which the loss may be measured may not include the entire holding. *Id.* at 2894, n.7.

### III. CONTEMPORARY PROBLEMS RELATING TO MINING REGULATION AND TAKINGS LAW

A. *Hard rock mining*: Takings law poses significant issues for those concerned about hard rock mining reform. Among other things, issues have been raised with respect to taking away from mining claimants the right of patent, and limiting all mining in certain areas which are deemed unsuitable, or which cannot meet stringent regulatory standards. The government’s authority to withhold from mining claimants the right to patent has been sustained in at least one case before the U.S. Court of Claims. *Freese v. United States*, 639 F.2d 754 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 827 (1981). According to that court, a vested right to the issuance of a patent does not arise until there has been full compliance with procedures set out in the mining laws.

The closest examples of how regulatory requirements might infringe upon mining rights come from analogous situations under the federal Surface Mining Control and Reclamation Act. As the *Hodel* case suggests, however, it may be difficult for a person to show that the reform law, on its face violates the takings clause, whatever that law might say. A contemporary



example of how the debate over mining restrictions is likely to take shape comes from the New World Mine proposed by the Crown Butte Mine Company, at a location just outside Yellowstone National Park.<sup>1</sup> Should the proposed mining operation be disapproved, as some have advocated, or should the regulatory burdens be too onerous for a viable mining operation, Crown Butte may well claim a taking of its property.

A final issue that will be discussed in the context of mining law reform concerns the proposed imposition of mineral royalty payments. If royalty payments are imposed on what is already a marginal mining operation, the added cost might well force the operator out of business. In this situation, the operator may well claim that the imposition of royalty payments effected a taking of his property.

B. *Coal Mining*: The debate over takings under the federal Surface Mining Control and Reclamation Act has matured well beyond that in the hard rock area, and undoubtedly offers some insight into how those issues will be resolved. Some key takings issues under the federal Surface Mining Act remain, however. These include a longstanding debate over the definition

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<sup>1</sup> In 1987, Crown Butte Resources Ltd. applied to Montana for a hard-rock mining permit to mine Henderson Mountain, just outside of Yellowstone National Park, where it discovered 1.7 million ounces of gold, 11 million ounces of silver and 65,000 tons of copper. If the permit is approved, 350 construction workers would work on the facilities for two years and 175 miners would be employed for 12 to 15 years. Yellowstone Park's resource management specialist, Stu Coleman, says it would be "foolish to allow this." He notes that the tailings impoundment would be on Fisher Creek, a tributary of the only federally designated wild and scenic river in Wyoming, the Clark's Fork of the Yellowstone River. (Gary Gerhardt, *West's New Battleground Crown Butte's Plan for a Mine Sets Off White-Hot Environmental Battle Around Yellowstone Park*, Rocky Mountain News, Oct. 3, 1993. Although Crown Butte spokesperson Mark Whitehead says that "[o]ur mine poses absolutely no risk to Yellowstone National Park," and the company proposes to use mechanical milling instead of cyanide leaching to extract the metals, critics believe the burial of 5.5 million tons of acid-bearing mine tailings could threaten the Clark's Fork. Louis Sahagun, *Battle Lines Drawn in the Sands Over Mining Near Yellowstone*, Los Angeles Times, Nov. 16, 1993. Crown Butte says the tailing impoundment would be state-of-the-art, able to withstand a 500-year flood and major earthquakes. *Id.* EPA engineer Wes Wilson said "[t]here's certainly no good site" for the tailings impoundment and the EPA has "urged" officials to consider other sites. *EPA Urges Mining Firm To Change Plan Company Needs Better Place for Tailings Than One Proposed Drainage Near Yellowstone*, Rocky Mountain News, May 1, 1994. The EPA wants more time to finish work on the environmental impact statement for the mine, delaying the estimated completion of the document until late 1995. *EPA Wants Further Study of Mine Plan Agency Wants Time To Weigh Each Proposal for Montana Gold Operation*, Rocky Mountain News, Jan. 14, 1994.

of "valid existing rights" (VER). This phrase was used by Congress in SMCRA in an attempt to avoid legislative takings of private property in those circumstances where lands are designated as unsuitable for mining. 30 U.S.C. §1272(e). Since the first efforts were made to define the term in 1979, however, controversy has raged over the proper construction of the term.<sup>2</sup> The panelists will review the history of the debate, and suggest the likely direction of the current efforts which have been initiated by the new Director of the Office of Surface Mining, Robert Uram.

The panelists will also review the question left open by the *Hodel* decision referenced above; that is, the extent to which specific applications of the restrictions contained in the federal law might lead to valid takings claims. For example, if an operator can demonstrate that her mineral estate has lost all value because it cannot be extracted in accordance with environmental standards established by the law, has a taking occurred for which compensation is owed? The panelists will consider this issue both generally, and in the context of particular areas where it is likely to arise, as for example with the stringent steep slope and prime farmland provisions of the law.

Finally, the panelists will discuss the fallout from the *Whitney Benefits* case. Whitney Benefits is the owner of 1,327 acres in the Powder River Basin of Wyoming, including the appurtenant mineral rights. A substantial portion of the Whitney Benefits coal reserves lie

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<sup>2</sup> The Office of Surface Mining (OSM) adopted its first VER rule in 1979. Robert Uram, *A Critical Review of Valid Existing Rights Under SMCRA*, 5-WTR Nat. Resources & Env't 19 (1991) [hereinafter *Review*] Under the rule "(1) all existing mining operations, (2) all mining operations which had applied for and received 'all permits' needed to mine by August 3, 1977, and (3) lands on which coal was both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977" were considered valid existing rights. *Id.* The rule, along with hundreds of other regulations, was challenged in *In re Permanent Surface Mining Regulation Litigation*, 14 E.R.C. 1083 (D.D.C. 1980). The court held that "a good faith attempt to obtain all permits before the August 3, 1977 cutoff should suffice for meeting the all permits test." *Id.* at 1090-92. In 1983, the "all permits rule was abandoned and replaced with a fifth amendment takings standard which was also challenged and remanded because it failed to comply with the public notice requirements of the Administrative Procedures Act. *Review*. In December 1988, the OSM proposed yet another version of VER which was formally withdrawn in July of the following year. *Review*. Finally on Thursday, April 28, 1994, the OSM invited comments on the revision of an environmental impact statement "which analyzed the environmental impact of the alternatives for rulemakings that would (1) define the term Valid Existing Rights (VER)." 59 Fed Reg. 21996 (1994). Final action on this new effort will not likely occur before 1995.

beneath an alluvial valley floor (AVF). SMCRA precludes most surface mining within AVFs in the West. After an initial effort to work out an exchange of its coal lands for other federal coal lands, Whitney Benefits filed a takings claim in the United States Claims Court. The Claims Court initially denied the claim; on remand, however, the court found that a taking had indeed occurred and awarded more than \$140 million to Whitney Benefits. (*Whitney Benefits II*), 18 Cl.Ct. 394 (1989). (The award included prejudgment interest from the date of the taking--enactment of SMCRA--and attorney's fees.) The Court of Appeals for the Federal Circuit affirmed and the Supreme Court denied certiorari. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed.Cir. 1991), *cert. denied*, 112 S.Ct. 406 (1991). In February 1994, the Court of Federal Claims held that Whitney was entitled to receive interest compounded annually, rather than simple interest, as just compensation for the taking. *Whitney Benefits Inc. v. United States*, 30 Fed.Cl. 411 (1994). Finally, in April 1994, the government was denied its motion for a new trial, which alleged that evidence proffered in the apportionment proceeding cast doubt upon the fairness and accuracy of the court's valuation. *Whitney Benefits Inc. v. United States*, 1994 WL 163855.

The substantial encroachment on the federal purse that is supported by the *Whitney Benefits* decision suggests another important takings law issue: To what extent should the government or the claimant be able to choose the remedy -- invalidation of the regulation or compensation -- for a violation of the takings clause. In the *Whitney Benefits* case, given the costs involved, the federal government might well have preferred to allow mining to go forward rather than enforcing the regulation that otherwise applied. But in most takings cases, neither the government nor the private party likely have much choice as to the remedy. This conclusion follows from the Supreme Court's decision in *Preseault v. ICC*, 494 U.S. 1 (1990). *Preseault* involved the constitutionality of the federal "rails to trails" statute. The Court refused to address the merits of *Preseault's* takings claim, instead holding that *Preseault's* remedy, if any, was in the Federal Claims Court under the Tucker Act. In so holding, the Court appears to have relegated most takings cases into that forum. Under *Preseault*, the Claims Court is the sole forum for resolving takings claim unless the relevant statute specifically withdraws the Tucker Act remedy. *Id.* at 12 Since few enactments mention the Tucker Act, or the appropriate

remedy in an alleged takings situation, virtually all takings claims appear destined for the Claims Court. Aside from the policy implications of this rule, the *Preseault* decision may pose problems for persons challenging the imposition of government regulations.