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Mining Regulation and Takings

L. Thomas Galloway

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Citation Information

Galloway, L. Thomas, "Mining Regulation and Takings" (1994). *Regulatory Takings and Resources: What Are the Constitutional Limits? (Summer Conference, June 13-15)*.
<http://scholar.law.colorado.edu/regulatory-takings-and-resources/8>

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in REGULATORY TAKINGS AND RESOURCES: WHAT ARE THE
CONSTITUTIONAL LIMITS? (Natural Res. Law Ctr., Univ. of
Colo. Sch. of Law 1994).

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MINING REGULATION AND TAKINGS

**L. Thomas Galloway
Attorney
Galloway & Associates**

**Regulatory Takings & Resources: What
Are the Constitutional Limits?**

**Natural Resources Law Center
University of Colorado School of Law
June 13-15, 1994**

MINING REGULATION AND TAKINGS

L. Thomas Galloway

I. INTRODUCTION

The field of mining regulation has over the years proved to be a rich source of "takings" jurisprudence. Indeed, several of the seminal takings pronouncements made by the Supreme Court in this century have involved issues related to mine regulation. See, e.g., *Pennsylvania Coal v Mahon*, 260 U.S. 393 (1922); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). It is very likely that mining regulation, whether of coal or hardrock mines, will continue to be a source of "takings" litigation and ultimately, takings jurisprudence.

It is not the purpose of this paper or my discussion today to dwell extensively on the existing case law of takings and past events in the field of mining regulation; rather, this paper will focus on significant regulatory events in Washington which raise in one form or the other takings concerns, and which, within due course, will almost certainly produce significant takings litigation.

The paper will first address various takings issues with regard to the Senate and House positions on reform of the 1872 Mining Law, and then turn to certain pending issues with regard to implementation of the Surface Coal Mining Reclamation Act of 1977, 30 U.S.C. 1201 et seq.

II. REFORM OF THE 1872 MINING LAW

As most are aware, Congress is currently considering significant reform of the 1872 Mining Law. Both the House and Senate have passed legislation to reform the Mining Law, albeit in radically different ways. The Conference between the two Houses is expected to begin shortly.

The two major vehicles which the Conference will likely consider are the House bill, H.R. 322, and a counter proposal developed by Chairman Johnston of the Senate Committee on Energy and Natural Resources, known as the "Chairman's Mark". While each bill unquestionably raises numerous possible takings issues, I would like to address here two of what I consider the most interesting.

During House consideration, the Clinton Administration proposed and the Committee on Natural Resources initially accepted as Section 422 a procedure to handle claims for just compensation. (Attached) Essentially, the Administration proposed to allow the Secretary of the Interior 120 days to rescind or modify any federal action that was found by a court of competent jurisdiction to constitute a taking within the meaning of the Fifth Amendment. The Secretary's decision to rescind or modify the federal action would not be subject to judicial review. The proposal also provided that to the extent that a court of competent jurisdiction found that any provision of the Act effected a taking on its face, the Secretary

was required to submit a report of the finding to the President, and within 120 days, the President was required to submit to Congress a report describing such action and advising Congress whether an amendment to the Act was necessary.

Among other notable features, the proposal required any person alleging a taking to bring such action within two years of the federal action and delayed payment of any award made by a court for 180 days to allow the Secretary time to make a decision whether to modify or rescind the federal action involved in the takings claim.

The proposal was ultimately rejected by the Committee based on objections by environmental organizations that the Secretary should not be given unfettered authority to lower environmental standards once a court has determined that application of a standard has been deemed a taking, either on its face or as applied. Aside from this basic objection, questions arose as to what environmental standard would apply in such circumstances. For example, if a permit were denied because of the likelihood that it would severely degrade or destroy a significant aquifer, and a court of competent jurisdiction found this federal action to be a taking, and the Secretary decided to rescind his action denying the permit, what environmental standard would then apply to the operation as far as groundwater protection was concerned?

These concerns resulted in the removal of the proposal from the House bill. However, if the Senate in conference raises takings concerns as is likely, the proposal or a variant of the proposal is likely to resurface. The proposal is important not only in the

field of mining regulation, but in the entire arena of environmental regulation, as the Administration made clear in the discussions over the proposal that they wished to include the provision in other environmental or land use statutes.

A second interesting takings issue has arisen with regard to the age-old question when a compensable right arises as a result of perfecting a claim under the 1872 Mining Law, and accordingly, when, if at all, the Secretary can deny the right to mine based on environmental concerns on federal lands. H.R. 322 takes what might be characterized as the traditional approach; it essentially leaves the issue to adjudication, and provides the Secretary with authority at various points in the regulatory process, including at the permitting stage, to bar mining. If the prospective miner believes that such action constitutes a taking, he or she would be free to litigate the issue. However, no mining would occur.

Chairman Johnston in the Mark now being considered by the Senate conferees has chosen a markedly different approach. While somewhat complex, Chairman Johnston is attempting through statute to determine when compensable rights vest at various stages in the regulatory process.

The Mark provides that the right to mine does not become compensable until a "mineral patent" is received. One cannot receive a "mineral patent" under the Mark until a "land use" decision is made. The "land use" decision must be made within one year of submittal of a complete exploration permit application.

Under the land use provisions of the Mark, the Secretary can

find lands unsuitable for mining only if the proposed mining activity would have "a substantial adverse effect on a significant water resource that cannot be mitigated" or would significantly degrade the values for which a National Conservation System unit located in close proximity to the proposed mineral activities (or within which the mineral activities would be conducted) was established. If the Secretary makes either finding, mining is prohibited, and at least in the Chairman's view, no compensable taking would occur.

Conversely, if the Secretary determines that neither of the two conditions exist, the applicant qualifies for the "mineral patent" and a compensable right is created. The patent holder then proceeds through the mining permit application process, but under the Chairman's Mark, the permit application cannot be denied, whatever the potential environmental impact of the mine. The Mark attempts to ameliorate adverse environmental impacts by requiring the applicant to use the best technology currently available to mitigate environmental damage, but under no circumstance can the permit be denied.

This issue will be one of the two or three most vigorously debated issues in Conference, and may well overshadow even the royalty debate.

III. SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

While various takings issues have arisen in the sixteen year effort to implement the Surface Mining Act, perhaps the most

perplexing and certainly the most difficult to resolve has been the definition of valid existing rights. Under Section 522(e) of the Surface Mining Act, mining is prohibited in certain defined areas, such as within the National Park System, National Wildlife Refuges, within one hundred feet of any public road, and within three hundred feet of occupied dwellings, public schools, churches and so forth. The prohibition on mining is subject to valid existing rights or "VER".

The Secretary of the Interior has for over fifteen years been attempting to define the term, without notable success. Secretary Andrus restricted VER to persons who had obtained permits to mine by the date of passage of the Act. This standard was essentially upheld by the United States District Court which broadened the standard slightly to include person who had made a good faith effort to obtain all required permits by the date of passage of the Act. ("good faith all permits test") While the issue was on appeal, President Reagan took office, and Secretary Watt withdrew the regulation, began new rulemaking and ultimately promulgated a standard that was coterminous with the "takings" test; that is, if prohibiting mining would constitute a taking, then the person had VER. This rule was struck down on procedural grounds. ("takings test") There then ensued various abortive attempts at rulemaking, none of which produced a final rule. During the course of the various attempts at rulemaking, a third alternative appeared- if a person owned the mineral or otherwise had the right to mine the mineral by the method the person was proposing, then that person

had VER. ("property test") The Administration coupled this definition with a determination that VER was transferable.

The Clinton Administration has recently announced that it plans to tackle the issue once more. It is not an enviable task. Under the good faith all permits test favored by the environmentalists, given the sixteen years that have gone by since the passage of the Act, no one, or almost no one, will have VER. Conversely, under the property test favored by the industry, everyone or almost everyone will have VER, at least as to privately owned coal. Almost all admit that the so-called "middle ground" takings standard is very difficult for state and federal mining agencies to administer.

The matter is made the more urgent and important in the field of mining regulation by a related issue- whether the section 525(e)(5) prohibition on mining within three hundred feet of occupied dwellings, churches and so forth applies to the surface effects of underground mining, i.e., subsidence. After much abortive litigation over this issue, the Solicitor of the Department of Interior issued an Opinion finding that it did not. This Opinion was struck down on procedural grounds by the United States District Court for the District of Columbia.

If section 525(e) is determined to apply to the surface effects of underground mining, the definition of VER will take on increased importance, and bring center stage whether such a prohibition constitutes a taking. The issue will have particular impact on the large long wall mining operations in the Eastern

United States.

CONCLUSION

This brief outline of a few of the current regulatory issues which raise takings questions illustrates that mining regulation is likely to retain its historic role as a major arena for the determination of the scope of the Fifth Amendment as it applies to regulatory takings.

15 **SEC. 422. CLAIMS FOR JUST COMPENSATION.**

16 (a) **FEDERAL ACTION IMPLEMENTING THIS ACT.—**

17 (1) To the extent a court of competent jurisdiction, after
18 adjudication, finds that Federal action undertaken pursu-
19 ant to this Act effects a taking under the Fifth Amend-
20 ment of the United States Constitution and enters a final
21 judgment against the United States awarding just com-
22 pensation, the Secretary of the Interior, or the Secretary
23 of Agriculture as appropriate, in his or her sole discretion
24 and notwithstanding any other provision of this Act, may
25 rescind or modify such Federal action, in whole or in part,

1 within 120 days after entry of the final judgment. The
2 Secretary's decision to rescind or modify the Federal ac-
3 tion shall not be subject to judicial review

4 (2) The United States, as a party in the action, shall
5 advise the court and the opposing party or parties in such
6 litigation of the Secretary's decision on or before 150 days
7 after entry of the final judgment.

8 (3) Notwithstanding the provisions of sections 2414
9 and 2517 of title 28 of the United States Code, the pay-
10 ment of any just compensation awarded in litigation de-
11 scribed in paragraph (1) of this subsection shall be de-
12 ferred for no more than 180 days after entry of the final
13 judgment, except that this 180-day limitation on deferral
14 of payment shall not apply if the judgment is reopened
15 as provided in paragraph (4)(A) of this subsection.

16 (4)(A) If the Secretary decides, pursuant to para-
17 graph (1) of this subsection, to rescind or modify the Fed-
18 eral action in whole or in part, and on motion of either
19 the United States or the opposing party or parties in the
20 litigation, the court shall reopen the final judgment to de-
21 termine the extent, if any, to which the Secretary's action
22 affects the finding of any taking, the award of any just
23 compensation, and the award of reasonable fees and ex-
24 penses to the extent provided by section 304 of the Uni-

1 form Relocation Assistance and Real Property Acquisition
2 Policies Act of 1970, as amended (42 U.S.C. 4654(c)).
3 -- -- (B) If the Secretary does not timely decide to rescind
4 or modify the Federal action in whole or in part, the just
5 compensation award shall include, when paid, appropriate
6 postjudgment interest for the period of deferred payment,
7 and appropriate reasonable fees and expenses to the extent
8 provided by section 304 of the Uniform Relocation Assist-
9 ance and Real Property Acquisition Policies Act of 1970
10 (42 U.S.C. 4554(c)).

11 (b) EFFECT OF THE TERMS OF THIS ACT.—(1) To
12 the extent a court of competent jurisdiction finds that the
13 terms of this Act on its face effect a taking under the
14 Fifth Amendment of the United States Constitution and
15 enters a final judgment against the United States award-
16 ing just compensation—

17 (A) the Secretary of the Interior, or the Sec-
18 retary of Agriculture as appropriate, shall submit to
19 the President a report describing such decision and
20 containing recommendations of the Secretary, if any,
21 for congressional action, including but not limited to,
22 amendment of this Act; and

23 (B) no later than 120 days after entry of the
24 final judgment, the President shall submit to the
25 Congress a report describing such decision and ad-

1 vising of his or her recommendations, if any, for
2 congressional action, including but not limited to,
3 amendment of this Act.

4 (2) The United States, as party in the action, shall
5 advise the court and the opposing party or parties in such
6 litigation of any action taken by Congress which might
7 affect such litigation on or before 330 days after entry
8 of the final judgment.

9 (3) Notwithstanding the provisions of sections 2414
10 and 2517 of title 28 of the United States Code, the pay-
11 ment of any just compensation awarded in litigation de-
12 scribed in paragraph (1) of this subsection shall be de-
13 ferred for not more than one year after entry of the final
14 judgment, except that this 1-year limitation on deferral
15 of payment shall not apply if the judgment is reopened
16 as provided in subparagraph (4)(A) of this subsection.

17 (4)(A) In the event that the Congress repeals or
18 modifies, in whole or in part, the terms of the Act found
19 to have effected a taking, and on motion of either the
20 United States or the opposing party or parties in the liti-
21 gation, the court shall reopen the final judgment to deter-
22 mine the extent, if any, to which the congressional action
23 affects the finding of any taking, the award of any just
24 compensation, and the award of reasonable fees and ex-
25 penses to the extent provided by section 304 of the Uni-

1 form Relocation Assistance and Real Property Acquisition
2 Policies Act of 1970 (42 U.S.C. 4654(c)).

3 -- --(B) The Congress does not timely repeal or modify,
4 in whole or in part, the terms of the Act found to have
5 effected the taking, the just compensation award shall in-
6 clude, when paid, appropriate postjudgment interest for
7 the period of deferred payment, and appropriate reason-
8 able fees and expenses to the extent provided by section
9 304 of the Uniform Relocation Assistance and Real Prop-
10 erty Acquisition Policies Act of 1970 (40 U.S.C. 4654(c)).

11 (c) EFFECT OF APPEAL.—The time limitations speci-
12 fied in subsections (a)(1), (a)(2), (a)(3), (b)(1)(B), (b)(2),
13 and (b)(3) of this section shall not apply for any period
14 during which an appeal of the court's final judgment is
15 pending.

16 (d) LIMITATIONS OF ACTIONS.—Notwithstanding the
17 provisions of sections 2401 and 2501 of title 28 of the
18 United States Code—

19 (1) any claim alleging a taking by reason of
20 Federal action implementing this Act shall be for-
21 ever barred if not brought on or before 2 years after
22 the date on which the cause of action accrues; and

23 (2) any claim alleging a taking by reason of the
24 effects of the terms of this Act itself shall be forever

- 1 barred if not brought on or before 2 years after the
- 2 effective date of this Act.