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Mining Regulation(s) and Takings

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MINING REGULATION AND TAKINGS

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REGULATORY TAKINGS & RESOURCES: WHAT ARE THE CONSTITUTIONAL LIMITS

**Natural Resources Law Center
University of Colorado School of Law
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MINING REGULATIONS & TAKINGS

June 14, 1994

Lawrence G. McBride

I. THE MINERS' PERSPECTIVE--OPENING GENERALIZATIONS

A. There are no constitutional limits on regulatory takings. The title of the program itself carries a potentially misleading message! At this stage in the evolution of "Takings Clause" jurisprudence, there are not limits on governmental authority to take property by regulation. The actual operative obligation imposed on the government is that when it does take, it must provide just compensation. It can "take" whenever the force or scope of its legislative or regulatory action has that result.

The focus of inquiry is no longer on whether the regulatory action can be enjoined, or prohibited, by litigation in district court. Rather, the focus is nearly entirely on the Just Compensation clause--what regulatory actions require compensation to the landowner. Several things have redirected us to this focus, but one of the most powerful is the jurisdictional revolution completed by the Supreme court in Presault v. ICC, 494 U.S. 1 (1990). I'll return to its powerful lesson to legislative drafters, but let me generalize its message thus:

- federal district courts have no jurisdiction over takings-related Fifth Amendment Issues; and

- if you believe federal legislation (or regulatory action thereunder) constituted a regulatory taking, your only avenue is a suit in the court of Federal Claims under the Tucker Act for damages (i.e., just compensation).

B. Mining companies have no assets but property. This generalization applies to all resource industries, but it has particular resonance for miners. First, unlike renewable (or growing) resource industries, a potential mine operation cannot be moved. We must be where geology leaves us. Second, mineral land ownership involves specific and often limited estates in land, including severed mineral estates with differing contractual or

common law rights relative to the surface estate, the right of subjacent support,¹ and forms of leaseholds subject to conditions subsequent (such as the cessation of production). These have developed out of historical mining practices, and concepts of multiple uses of mineral property unique to the mining industry and to land potentially valuable for mineral development.

These unique rights can carry constitutional import under the Supreme Court jurisprudence, "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from independent sources such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984)(Missouri trade secrets law).

II. TAKINGS ISSUES IN CHANGING THE MINING LAW

A. Defining rights acquired and held under the Mining Law. The Mining Law (the Act of May 10, 1982, as amended, 30 U.S.C. 22 et seq.) grants certain rights to those who comply with its terms. Consistent with Monsanto Co. one must look to it to determine the nature of the rights and then apply Takings/Compensation jurisprudence to governmental impositions on those rights.

1. The right to go on the open public domain, explore for minerals and locate claims is granted by the Mining Law. 30 U.S.C. 22, 26. The right acquired during this activity is not a set of rights against the United States, but rather rights potentially exclusive against other locators, under the doctrine of pedis possessio. As established in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), absent "discovery" (see II.A.2. below) the United States can revoke the "invitation" or "license" to claimants and explorers, and dedicate the land to other public use without any obligation to compensate. See Skaw v. United States, 13 Cl. Ct. 7 (1987), aff'd, 847 F.2d 842 (Fed. Cir. 1988).

¹ This was the interest compromised, or "reallocated" to other property owners, in Pennsylvania Coal Co. v. Mahon, 260 U.S. (1922). This right, if held by the mineral owner, might be described as the right to subside.

2. When the explorer-locator makes a "discovery," however, rights against the United States do vest. The discovery standard is framed in the prudent person-marketability tests--there is a discovery when the claimant has discovered mineral of such quality and quantity "that a person of ordinary prudence would be justified in further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine," with the best evidence being economic evidence that the return from a projected operation on the property would exceed its costs. Coleman v. United States, U.S. (1968), referring to Chrisman v. Miller, U.S. (1917).

3. With a discovery come three things: (a) a right to mine; (b) an ownership, exclusive of others, in the discovered ore body so long as the claim is maintained; and (c) a right to apply for patent. (This last is discussed in II.A.4 below.) The right to mine is clear upon examination of the case law and the regulatory standards applied by the two federal land management agencies, BLM and the Forest Service, in their action on plans of operation submitted for mine development on unpatented claims. BLM may act to prevent "unnecessary and undue degradation of public lands." 43 U.S.C. 1732(b); 43 CFR 3809.0-5(k). The Forest Service acts to "minimize adverse environmental impacts". 36 CFR 228.8.² The discovery standard requires the operator to show that the operation will meet (can bear the expenses of compliance with) all generally applicable environmental laws (see 43 CFR 3809.2-2).

These permitting standards are reflective of the discovery standard and the right to mine established by discovery. And if these permitting standards are met, BLM and the Forest Service have not in their regulations reserved any residual discretion or authority to disapprove the mining operation. As the case law has said for over a century, a claim validated by discovery is "property in the highest sense of the term." Belk v. Meagher, 104 U.S. 279, 283 (1887). The government holds title "in trust for the claimant" who has earned this set of exclusive possessory rights by compliance with the law. Noyes v. Mantle, 127 U.S. 348 (1887).

² See United States v. Richardson, 599 F.2d 290 (9th Cir. 1979) (action to enjoin unnecessarily destructive conduct of otherwise allowed operations).

The ownership of the claim(s) and the ore body are subject to maintenance obligations: annual assessment work (30 U.S.C. 28); and annual filing requirements (federal filings prescribed in 43 U.S.C. 1744).

In Skaw v. United States, *supra*, and in other Court of Federal Claims cases involving unpatented mining claims,³ the Court has applied these property rights definitions, citing Monsanto Co., *supra*. It has proceeded to adjudicate the validity of the mining claims under these standards, on the premise that valid claims will require analysis of the governmental regulation under the takings jurisprudence, while claims not supported by discovery cannot be the basis of a just compensation assertion.

4. The right to patent is an option, or election, the Mining Law gives the holder of a valid, unpatented claim. 30 U.S.C. 29, 35. The "patent" (initial U.S. quitclaim for land never before in private ownership, and which initiates the chain of private title) will be issued to the claimant, with a discovery, who complies with the other procedural requirements for patenting (chiefly the cadastral survey of the claim(s) and payment of the 1872 purchase price--\$2.50 or \$5.00 per acre.

The former Claims Court has adjudicated an inverse condemnation case arising out of a Congressional termination of the right to patent valid claims in a certain area. In Freese v. United States, 639 F.2d 754 (Ct. Cl. 1981), the locator sought compensation for his inability to patent his claims in the Sawtooth National Recreation Area. Freese had not applied for patent prior to the Sawtooth Act's prohibition on further patenting in the Area. The Claims Court found that Freese's rights were essentially intact because he still had the right to mine the unpatentable claims. It also found the patent right to be somewhat in the nature of an option which he had not elected to seek prior to the Congressional withdrawal of the option. He had not taken the actions necessary to vest a right to patent.

B. The legislative invasion of rights. One of the big issues in proposed changes to the Mining Law is the insistence of the House of Representatives on new "rights to say no" to mining. These have been put into detailed mine permitting requirements and into

³ E.g., Clawson v. United States, Ct. Cl. , No. 90-3829L (Oct. 25, 1991).

a proposed "unsuitability" system for reviewing public land that might be mined. The unsuitability provisions involve classes of resource values, from wildlife habitat to water resources to esthetics. The BLM or Forest Service land manager would be required to disapprove of mining operations proposed for lands given an "unsuitable" designation under the section's procedures for any of these reasons.

H.R. 918 (and S. 433) in the 102d Congress had unsuitability provisions that authorized land managers to disapprove mining for an open-ended (since new categories could be established by rule) list of reasons, including operations proposed for claims already validated by discovery under current law on the date the new law was enacted. I presented a paper (Chapter 7 of the 1992 Rocky Mountain Mineral Law Institute proceedings) arguing why implementation of this authority would give rise to compensation awards under existing takings case law, especially as explicated by the newly-decided Lucas v. South Carolina Coastal Council, U.S. , 112 S. Ct. 2886 (1992). I suspect my paper had less impact of the course of legislation than another paper prepared by the Justice Department on the same issue. This never-final, never-officially-released analysis of how the unsuitability and claim conversion provisions worked apparently also concluded that its enactment risked significant liability for the United States.

No matter which paper had the impact, H.R. 322 as passed by the House in the 103d Congress last November has incorporated grandfathering that avoids much (but by no means all) of these inverse condemnation risks. Its section 209(d)(4) grandfathers those who have made "significant investments . . . to explore . . . [such as] exploration activities to delineate proven or probable ore reserves." This recognizes the case law that exploration expenditures that establish the commercial nature of the mineralization qualify as the "investment" giving rise to reasonable investment-backed expectations (RIBEs) for purposes of just compensation analysis. E.g., United Nuclear, Inc. v. United States, 912 F.2d 1432 (Fed. Cir. 1990), aff'g 17 Cl. Ct. 768 (1989); Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), cert. denied, 112 S. Ct. 406 (1991), aff'g 18 Cl. Ct. 394 (1989), subsequent proceedings at 30 Fed. Cl. 411, and Fed. Cl. , 1994 WL 163855 (1994).

C. Royalty. The imposition of a royalty on existing operations on unpatented claims is another contentious issue in the legislation. Clearly this imposition, especially in a "gross value" form, would diminish the value of all existing operations, but one of the mantras of takings case law is that "mere diminution" in value does not constitute a compensable regulatory imposition. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Florida Rock Ind., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), rev'g 21 CL. Ct. 161 (1990), on remand from 791 F.2d 893 (Fed. Cir. 1986). See also Atlas Corp. v. United States, 895 F.2d 745, 758 (Fed. Cir. 1990)(appellant did not show that its new financial obligations under UMTRCA made its operations "unprofitable").

If the property is rendered unmineable by the royalty, however, the inquiry proceeds. Clearly the imposition is for public use (the royalty is paid to the United States and is dedicated to a new abandoned hardrock mine reclamation fund). Also, the mine's very operation based on its current economics (ore grade, mining cost, financing burdens, etc.) must constitute RIBEs. And if the mine must close in the face of the royalty demand, it has not been merely diminished in value, rather the owner has lost all economic use of the property. Under the conventional "three inquiries" in takings case law (the nature of the government action, its economic impact on the property, and RIBEs, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)), there is a good claim for compensation.

The bills mitigate this risk with royalty relief provisions, but they generally vest discretion in the Secretary to deny reductions operators may seek. Presumably an operator will have to go through the procedures for seeking relief before filing a compensation action. A common suggestion for the legislation, however, is that royalties for existing operations should be based on net profits, so that the new federal royalty itself should never be the basis for the mine closure because of unprofitability.

D. New claims. The preceding discussion has focused on the transition to a new mining law, i.e., how the new law could give rise to compensation claims as applied to rights acquired and vested under current law. The bills of course establish afresh what rights a locator would have in a claim newly located under the new law. In each case the drafts establish rights less secure and less clear than under current law. Compare the

current-law "right to mine" with H.R. 322 section 102 (as passed in November 1993): rights in a new claims are "subject to the rights of the United States under this Act" These rights include the obligation--"shall deny" in section 204(d)(1)--to disapprove operations that do not meet seven specific approval criteria, including one that the land was found "suitable" in the unsuitability review described above.

The government's exercise of these rights vis-a-vis new claims raises no compensation questions--the very definition of the claimant's property rights will be limited and a locator can have no RIBEs greater than the limited expectations the new Act allows. The question is different here--will this system give enough security of title and interest, or incentive to invest, that there will continue to be investment in domestic exploration and development of the minerals subject to this public land regulatory system. The Senate "Chairman's Mark" (draft of May 20, 1994), which was prepared for possible use in conference, recognizes the disincentive problem by providing for a land use review (the parallel to the House's "unsuitability" review provisions) prior to approval of exploration, so that there will be better expectation that exploration investment that results in discovery of a potentially commercial ore body will yield a right to mine. (See Mark section 308(a)(1); and section 701, which appears to leave the law of discovery intact with respect to exploration conducted after the land use review clearance, subject to a new mine permitting regime).

III. SMCRA ISSUES/COAL

A. SMCRA legislative takings. There was, I believe, a common view that enactment of the Surface Mining Control and Reclamation Act of 1977 would give rise to significant takings litigation. In the main this possibility was defused by Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), which dismissed as unripe a facial challenge to the constitutionality of the "steep slopes" coal mining limitations in the Act.

If there were any legislative takings in SMCRA, of course, seeking compensation for them would now be time-barred under the six-year statute of limitations applicable to Tucker Act, Court of Federal Claims, actions. 28 U.S.C. 2501. The exception that

proves the rule is Whitney Benefits, *supra*. Whitney sued in the Claims Court just days before six years after SMCRA's enactment, and the size of its judgment is based on the Court's finding that the alluvial valley floor prohibition against Whitney's mining was legislative. The Court relied on legislative history specific to Whitney's property along the Bighorn River that was part of the explanation of the alluvial valley floor mining prohibition in section 510(b)(5) of SMCRA, 30 U.S.C. 1260(b)(5). The government argument, relying on Hodel v. VSMRA, that Whitney had no claim until the State of Wyoming had rejected Whitney's mine permit application, was rejected. The 1977 property appraisal gave Whitney the multi-million dollar judgment it still has not collected; later dates of taking would have resulted in significantly lower values for the coal that could not be mined.

Even though most cases of possible inverse condemnation would arise on permit application rejection, such actions now would give rise to interesting RIBEs issues in the litigation. If an owner had RIBEs in property in 1977, would that owner not have sought to develop that property before now? On the other hand, the right to develop is what is at issue; there is no obligation to develop at any specific time inherent in the takings jurisprudence. This issue may arise in connection with future cases under the mining prohibitions in section 522(e) of SMCRA, 30 U.S.C. 1272(e). This is because, rarely among SMCRA provisions, section 522(e) is a straight prohibition against mining the described lands, without reference to the operator's ability to meet performance or reclamation standards, and without reference to the rights to undertake the prohibited operations the operator may have acquired by grant or contract.

B. VER RULEMAKING. Someone who holds "valid existing rights" is exempt from the coal mining prohibitions in section 522(e). Interior's original regulatory definition of VER required the operator to have obtained all relevant mining permits prior to the date of SMCRA (or the later date that the land acquired its section 522(e) prohibited status) in order to be exempted. Under court review, that standard was "relaxed" to allow VER status to an operator who did not have all permits, but who had made a good faith effort to get all relevant permits by the magic date.

Interior's next regulatory definition equated VER to a takings test--one had VER

if denial of the right to mine would constitute a taking (or more correctly put, would require just compensation). That definition was stricken on procedural grounds; its promulgation did not comply with the Administrative Procedure Act. In subsequent proposals, Interior has suggested yet another alternative--a property rights test focussing on whether the owner had the right to mine the coal by the method proposed as of the magic date. Interior has recently published a revised draft environmental impact statement on this rulemaking, and extended the comment period on it. In the absence of final rulemaking, state regulatory agencies struggle with these determinations using their regulatory approaches in effect under Interior's suspended rules. See Belville Mining Co. v. United States, 999 F.2d 989 (6th Cir. 1993).

The all permits test, and even the good-faith all permits test, would result in a class of owners who do not have valid existing rights under section 522(e) and are therefore prohibited from mining, even though they may then have inverse condemnation claims against the permitting agency that refuses to allow them to mine. The takings test puts the permitting agency in the interesting role of pre-adjudicating the compensability of a permit denial in order to determine whether the owner is exempted from the permit denial provision. The right to mine provision, if I understand it, would exempt even owners who might not have a right to compensation were they denied the right to mine, in that they might fail the case-by-case, fact-intensive inquiry that is required to determine the right to compensation. Specifically, such an owner might have a hard time showing RIBEs (although under the case-by-case, no bright line directive by which these cases are tried, that may not preclude recovery).

IV. LITIGATION PITFALLS UNDER CURRENT LAW.

A. "Taken" property is not yours. As the Supreme Court has said, once a taking has occurred it cannot be undone, it can only be compensated for. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In the case of a permanent taking, the successful litigant must convey the taken property to the United States. In fact, the award of compensation will not come out of the Judgment Fund except in exchange for the conveyance of the property to the United States.

Technically, the proof in the case is of the litigant's title and interest as of the time of the taking. Since this date may itself be a disputed issue (date of legislative enactment, of regulation, or permit rejection) the proof may have to cover different periods.

This requires recognition that the Justice Department regards inverse condemnation claims as subject to the statutory prohibition against the assignment of claims. 31 U.S.C. 3727 (formerly 31 U.S.C. 203); see Cooper v. United States, 8 Cl. Ct. 253 (1985). The government can interpose this provision as a bar to recovery by anyone but the owner of the interest at the time of the taking.

B. The no-two-courts rule. Another trap in the jurisprudence of the Court of Federal Claims is 28 U.S.C. 1500, with its "no-two-courts" rule. That section says, "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." In UNR Ind., Inc. v. United States, 962 F.2d 1013 (Fed. Cir. 1992), aff'd sub nom. Keene Corp. v. United States, 113 S. Ct. 203 (1993), the Federal Circuit concluded that a declaratory judgment action in district court and a monetary damages case in the Court of Federal Claims arising out of the same fact situation are the same "claim" for purposes of 28 U.S.C. 1500. Any litigant seeking to challenge the permit denial itself, or to attack whether the statute requiring the permit authorizes this denial, must forego this suit for money judgment until that action is completed.

C. In Presault v. ICC, 110 S. Ct. (1990), aff'g on other grounds 853 F.2d 145 (2d Cir. 1988), the Supreme Court reviewed a challenge to the federal statute creating the Rails to Trails program. The Court of Appeals had held the provision under challenge (which interposed the public "trail" use on unused railroad rights of way before the ICC could declare the right of way abandoned, as abandonment would trigger reversion of the right of way to the original owner from whom it had been condemned) to be constitutional. The Supreme Court said that issue was premature, as the Presaults had not exercised their existing right under the Tucker Act to assert inverse condemnation and a right to compensation from the Court of Federal Claims.

The Supreme Court said that the inquiry is "whether Congress has in the [Rails to Trails or other statute] withdrawn the Tucker Act grant of jurisdiction to hear a suit"

alleging an inverse condemnation arising out of the operation of the statute. You can bet that never happens in any federal land or natural resource regulatory statute; amending the jurisdiction of the Court of Federal Claims would require the Judiciary Committees of both houses of Congress to be involved in the passage of the law.

Two lessons need to be drawn from Presault. First, it is essentially a waste of time to litigate an inverse condemnation question in the district court. District courts cannot award money damages for inverse condemnation. Equally important, the Court of Federal Claims will not, so far as I can tell, be bound by any declaratory judgment secured in district court. To it, the question whether inverse condemnation (a compensable taking) has occurred is a matter arising under the Tucker Act, over which it has exclusive jurisdiction.

Second, legislation which solemnly declares that the regulatory agency may not take private property without compensating the landowner is merely feel-good language. Such language simply does not alter existing law; the statement is already true. And if the same law does not "withdraw" the Tucker Act grant of jurisdiction, the only place and the only method of getting that compensation remains an inverse condemnation action in the Court of Federal Claims.

May we all work on drafting laws, and promulgating regulations, that do not force the litigation of these matters, as litigation is an arduous and often unsatisfactory approach both for the landowner and the United States. Whitney Benefits has not recovered the value of its property 17 years after it was "taken," and 11 years after it initiated litigation. That is an extreme example, but Whitney is not alone in suffering both the uncertainties of the substantive standards for recovery, and the jurisdictional morass involved in vindicating its property rights.