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Designating Areas Unsuitable for Surface Coal Mining

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Citation Information

Mark S. Squillace, Note, *Designating Areas Unsuitable for Surface Coal Mining*, 1978 Utah L. Rev. 321, available at <https://scholar.law.colorado.edu/articles/1092/>.

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Citation:

Mark S. Squillace, Designing Areas Unsuitable for
Surface Coal Mining, 1978 Utah L. Rev. 321, 346
(1978)

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Designating Areas Unsuitable for Surface Coal Mining

*Then the coal company came with the world's largest shovel
And they tortured the timber and stripped all the land
Well, they dug for their coal till the land was forsaken
Then they wrote it all down as the progress of man*

*And daddy won't you take me back to Muhlenberg County
Down by the Green River where Paradise lay
Well I'm sorry my son, but you're too late in asking
Mr. Peabody's coal train has hauled it away**

The ravages wrought by the reckless employment of surface coal mining methods are a familiar chapter in our history. Landscapes were devastated and water systems irreparably damaged; yet for many years these problems were largely ignored. More recently the states began to accept responsibility for the control of surface coal mining within their boundaries,¹ and most have enacted legislation aimed at protecting land and water resources. Federal efforts to enact legislation for controlling the adverse impacts of surface coal mining date back almost forty years but were wholly unsuccessful until the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).² This comprehensive legislation has three primary goals: (1) to protect the environment from the adverse impacts of past, present, and future surface coal mining; (2) to encourage those states where there is or may be surface coal mining to establish their own regulatory authority that conforms with the requirements of the Act; and (3) to provide for research and development of economically viable coal extracting techniques that are less environmentally destructive than present methods.³

Recognition of the environmental problems caused by surface coal mining has encouraged the belief that surface mining should be absolutely banned on certain lands to preserve natural values.⁴

* John Prine, *Paradise* (copyright 1971, Cotillion Music, Inc.) (reprinted with the permission of the author).

1. See STATE SURFACE MINING LAWS: A SURVEY, A COMPARISON WITH THE PROPOSED FEDERAL LEGISLATION AND BACKGROUND INFORMATION, PREPARED FOR THE SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95th Cong., 1st Sess. (1977).

2. Pub L. No. 95-87, 91 Stat. 445 (1977) (to be codified in 30 U.S.C. §§ 1201-1328). The lengthy legislative history of the law is outlined in H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 140 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1622. For a more thorough analysis of the history of the federal surface coal mining legislation see, Dunlap, *An Analysis of the Legislative History of the Surface Coal Mining and Reclamation Act of 1975*, 21 ROCKY MTN. MIN. L. INST. 11 (1975).

3. A general statement of purposes is found at SMCRA § 102, 30 U.S.C.A. § 1202 (Supp. Nov. 1977).

4. Several states have experimented with the concept of designating certain areas as

The SMCRA strongly reflects Congress' adherence to this principle. This Note will examine those SMCRA provisions which mandate the prohibition of surface coal mining on certain lands. Primary attention will be accorded Section 522 of the SMCRA, entitled Designating Areas Unsuitable for Surface Coal Mining. Under this section there are two categories of lands designated as unsuitable for surface coal mining: those designated expressly by statute, and those designated by a regulatory authority. The latter category may be further separated into lands on which the regulatory authority must prohibit surface coal mining and lands for which the regulatory authority has some discretion in determining whether to prohibit surface coal mining. The following discussion considers what results can and should be expected from this system.

I. STATUTORY DESIGNATIONS

The SMCRA specifically precludes surface coal mining operations⁵ on certain lands. Easily identifiable among these are lands within the National Park System,⁶ the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System (including rivers under study for inclusion in this system), and National Recreation Areas.⁷ Conspicuous for their absence from this list are National Conservation Areas, National Lakeshores,⁸ and areas under study for inclusion in the National Wilderness Preservation System. It may be, however, that the laws and regulations presently governing these areas are sufficient in themselves to preclude surface mining.⁹

unsuitable for surface coal mining. *See, e.g.,* MONTANA REV. CODES ANN. § 50-1042(2) (Supp. 1975); N.D. CENT. CODE § 38-14-05.1 (Supp. 1977); S.D. COMPILED LAWS ANN. § 45-6A-9.1 (Supp. 1976); WYO. STAT. § 35.502.24(g)(iv) (Supp. 1975). These state provisions are now largely irrelevant since few are as strict as SMCRA and the SMCRA expressly supercedes less stringent state laws. *But see* MD. NAT. RES. CODE ANN. § 7-505(b) (1974). States can, however, pass more stringent standards than are required by the SMCRA. *See* SMCRA § 505, 30 U.S.C.A. § 1255 (Supp. Nov. 1977).

5. The statute defines this term to cover nearly all activities associated with surface coal mining. *See* SMCRA § 701(28), 30 U.S.C.A. § 1291(28) (Supp. Nov. 1977).

6. This system includes National Monuments, National Seashores, and several other types of specifically designated lands. *See* 36 C.F.R. pt. 7 (1976).

7. SMCRA § 522(e)(1), 30 U.S.C.A. § 1272(e)(1) (Supp. Nov. 1977).

8. These omissions should not present much of a problem at this time since these areas are relatively few in number and those presently designated do not contain any significant amounts of known strippable coal reserves. Still, the Congress should be aware of this loophole so that future designations of National Lakeshores and Conservation areas, such as may soon occur in Alaska, are drafted with a full appreciation of this omission.

9. For example, the stated purpose of the legislation designating the California Desert Conservation Area is "to provide for the immediate and future protection and administration of the public lands . . . and the maintenance of environmental quality." 43 U.S.C.A. §

Undoubtedly the most controversial statutory category of lands deemed unsuitable for surface coal mining is the national forest designation. Largely as a result of the controversy surrounding the protection of such a massive area of land, this prohibition became subject to a potentially emasculating loophole.¹⁰ Essentially, the SMCRA does maintain an outright ban in national forests east of the 100th meridian¹¹ and in the Custer National Forest in Montana¹² except under special circumstances where the surface mining is incidental to an underground mining operation. But surface coal mining is permitted on all other national forest lands

if the Secretary [of Interior] finds that there are no *significant* recreational, timber, economic or other values which may be incompatible with such surface mining operations and . . . where the Secretary of Agriculture determines with respect to lands which do not have *significant* forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple Use Sustained Yield Act of 1960, the Federal Coal Leasing Amendments

1781(b) (Supp. 1977). To achieve this goal the law provides for comprehensive, *long term* land use planning and, though mineral development is expressly permitted, it does not seem likely that activities as disruptive as surface coal mining would be found compatible with the required plan. Legislation governing other special lands omitted from the surface mining ban may be found at 16 U.S.C. §§ 460m-8, 460s, 460u, 460w, 460x, 460y (1976).

An even stronger case can be made for the proposition that surface coal mining is prohibited on at least some of those lands that have potential for inclusion in the National Wilderness Preservation System. Under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1976), all national forest lands classified by the U. S. Forest Service as "primitive" are administered in accordance with the regulations which prohibit such necessary concomitants of surface coal mining as roads and motorized vehicles. These regulations effectively preclude surface coal mining in national forest primitive areas. 36 C.F.R. § 293.17(a) (1976). The Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701-1782 (Supp. 1977), has broadened the scope of Wilderness Act type designations to all public lands, *id.* § 1702(e), and has significantly extended its protection to roadless areas having significant wilderness characteristics which have not yet been studied for inclusion in the National Wilderness Preservation System. It provides for management "so as not to impair the suitability of such lands for wilderness." *Id.* § 1782(c). This provision would clearly seem to prevent surface coal mining on public lands until the completion of a wilderness review.

10. SMCRA § 522(e)(2)(B), 30 U.S.C.A. § 1272(e)(2)(B) (Supp. Nov. 1977). At one point during its legislative history this provision established an absolute ban on all surface coal mining on national grasslands as well as national forest lands. As a compromise, and in recognition of the vast quantities of strippable coal on the national grasslands in northeastern Wyoming, the sponsors limited the ban to national forest lands. The House and Senate committees that put the final bill together further watered down this provision. *See* H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 69 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1557.

11. This line runs north-south, coincident with the eastern border of the Texas panhandle.

12. The Senate version of the bill would have included Alaskan national forest lands within the general ban, but the conference committee defeated this provision. *See* H.R. REP. NO. 95-493, 95th Cong., 1st Sess. 111 (1977).

Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act.¹³

This determination is thus reduced to findings by the Secretaries of Agriculture and Interior¹⁴ as to the "significance" of forest land resources for uses other than surface coal mining—a determination with potentially excessive discretion. Regulations are needed to confine this discretion. In developing these regulations, an effort should be made to eschew the mechanistic numerical approach to decision-making that often seems to characterize such determinations. The exclusive use of criteria such as fishing days, visitor days, board feet of timber, and animal unit months of grazing¹⁵ cannot satisfactorily reflect the quality of a particular resource or its potential future value. Certainly, numerical evaluations should be given some credence in reaching a decision as to the suitability of lands for surface coal mining, but excessive reliance on numbers tends to make the decision making process overly mechanical.

An alternate method of evaluating forest lands that would allow more critical scrutiny of actual resource values would be an adversary proceeding such as the following: Regulations would establish a rebuttable presumption that all national forest lands are unsuitable for surface coal mining. Any interested person who desired to challenge this presumption could petition both the Secretaries of Interior and Agriculture through their designated representatives to open certain forest lands to surface coal mining. The petition would describe the lands involved and include evidence affirmatively demonstrating that the values referred to in the above section of the SMCRA were not adversely affected, and that compliance with all applicable laws could be achieved. Other interested persons who might be affected by the proposed opening would be given the opportunity to bolster or refute the submitted evidence. If deemed necessary, an oral hearing would be held. On the basis of the record thus gathered, the Departments of Interior and Agriculture would issue separate written decisions addressing those factors they are required to consider. An adverse decision by either Department

13. SMCRA § 522(e)(2), 30 U.S.C.A. § 1272(e)(2) (Supp. Nov. 1977) (emphasis added).

14. Although the responsibilities of the Secretary of Interior will frequently be addressed in this article, it is the Director of the new Office of Surface Mining Reclamation and Enforcement (OSM) who will have the primary responsibility for implementing the new Act. See *id.* § 201, 30 U.S.C.A. § 1211 (Supp. Nov. 1977).

15. Such criteria are commonly incorporated into evaluations in environmental impact statements prepared under the authority of Section 102(2)(C) of the National Environmental Policy Act of 1969. 42 U.S.C. § 4332(2)(C) (1970). See, e.g., IDAHO STATE OFFICE, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR FINAL ENVIRONMENTAL IMPACT STATEMENT CHALLIS UNIT GRAZING PROGRAM, 1-1, 2-109, -116, 3-53, -54, 4-1 (1977).

would require the denial of the petition. The decisions would, of course, be subject to judicial review,¹⁶ and would be catalogued, made available to the public, and used as precedents for future decisions. This approach would be compatible with the ostensible congressional intent to recognize surface coal mining on national forest lands as exceptions to the general rule.¹⁷

The SMCRA specifically precludes surface coal mining operations on three other kind of lands. These include lands

(1) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic sites;

(2) within one hundred feet of the outside right-of-way line of any public road . . . ; or

(3) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, [or] within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.¹⁸

The most intriguing of these provisions is the first, given the broad interpretation that might be accorded the "adversely affect" language. Under a reasonable interpretation, the necessary approval must be acquired not only where a public park or historic site is directly affected, but also where surface mining on other lands has an indirect impact on these lands. Thus, even mining located many miles from a park that adversely affects its air or water quality would have to be approved by the agency having jurisdiction over the park. This interpretation would substantially alleviate fears that Secretary of Interior Andrus¹⁹ expressed during the hearings on the bill. Recognizing the fact that impacts of surface coal mining extend far beyond the site itself, Secretary Andrus sought an amendment that would have banned surface coal mining on federal lands in critical areas adjacent to National Parks, National Recreation Areas, and other such lands designated in Section 522(e)(1) of the SMCRA.²⁰ Where critical non-federal lands are adjacent to National Parks and Recreation Areas, Secretary Andrus proposed

16. Judicial review of final agency actions must be permitted under the Administrative Procedures Act § 10(c), 5 U.S.C. § 704 (1976).

17. The law suggests such an intent on its face by first announcing a general ban on surface coal mining in national forests and then setting out exceptions. See SMCRA § 522(e)(2), 30 U.S.C.A. 1272(e)(2) (Supp. Nov. 1977).

18. *Id.* §§ 522(e)(3)-(5), 30 U.S.C.A. §§ 1272(e)(3)-(5).

19. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 162 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1643.

20. See text accompanying notes 6-8 *supra*.

that the Interior Department be required to petition to have them designated as unsuitable for surface coal mining. Although the suggestion of Secretary Andrus was not adopted, the interpretation discussed above may give him a large part of the authority that he sought, at least for lands near public parks. Furthermore, since the proposal of Secretary Andrus seems consistent with the intent of the law it might be reasonably anticipated that the Secretary can accomplish by regulation what he was unable to persuade the Congress to do expressly by statute.

The statutory designation provisions thus far addressed are inapplicable to surface coal mining operations extant as of August 3, 1977, and are further "subject to valid existing rights."²¹ This latter clause was intended to prevent incursions on those property rights presently protected by law,²² but to go no further. The legislative history of the Act cited the case of *United States v. Polino*²³ as illustrative of the statutory intent. There, a private owner conveyed the surface rights on a parcel of land to the United States expressly reserving mining and mineral rights. The land was acquired for a part of the Monongahela National Forest. The court held that the deed did not reserve the right to conduct strip mining operations. The apparent upshot of *Polino*, and consequently of the statutory language, is to make all private mineral reservations subject to the statutory designation provisions unless the deed expressly reserved or clearly implied the right to surface mine. Several efforts to change the SMCRA to recognize the surface mining rights in deeds similar to that involved in the *Polino* case were unsuccessful.²⁴

21. SMCRA § 522(e), 30 U.S.C.A. § 1272(e) (Supp. Nov. 1977).

22. H.R. REP. NO. 95-218, 95 Cong., 1st Sess. 95 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 1543, 1581, which states:

[I]t is not the intent, nor is it the effect of the provision to preclude surface coal mining on private inholdings within the national forests. The language "subject to valid existing rights" in section 522(e) is intended, however, to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights. . . . The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

23. 131 F. Supp. 772 (1955).

24. *Surface Mining Control and Reclamation Act of 1977: Hearings on S.7 Before the Subcomm. on Public Lands and Resources of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. 991, 1158 (1977) [hereinafter cited as *1977 Senate Hearings*].

II. ADMINISTRATIVE DESIGNATIONS

A. *The Regulatory Machinery*

1. *Federal-State Relationships under the SMCRA*— Under the SMCRA, the states have the first opportunity to establish a program for regulating surface coal mining within their boundaries.²⁵ But, if a state fails to submit such a program to the Secretary of Interior by January 3, 1979, or to resubmit an acceptable program within sixty days after the disapproval of a submitted program, or to enforce an approved program, then the Secretary of Interior must impose a federal program on that state.²⁶ Among other things, a state program must include “a process for designation of areas as unsuitable for surface coal mining in accordance with section 522”²⁷ and the manpower and money to carry out this process.²⁸

The designation process required by the SMCRA essentially mandates that the state conduct comprehensive land use planning for those lands that have potential for surface coal mining.²⁹ The Act requires that the state provide for:

(A) a State agency responsible for surface coal mining lands review;

(B) a data base and inventory system which will permit proper evaluation of the capacity of different land areas to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation. . . .³⁰

In addition, the Act requires that “[d]eterminations of the unsuit-

25. This provision includes the opportunity to regulate surface coal mining on federal lands within a state. SMCRA § 523(c), 30 U.S.C.A. § 1273(c) (Supp. Nov. 1977). It apparently does not, however, include the power to designate federal lands as unsuitable for surface coal mining. *Id.* § 503(a)(5), 30 U.S.C.A. § 1253(a)(5).

26. *Id.* §§ 503, 504, 30 U.S.C.A. §§ 1253, 1254.

27. *Id.* § 503(a)(3), (5), 30 U.S.C.A. § 1253(a)(3), (5).

28. Federal lands within a state are, however, designated by the Secretary of Interior after consultation with the state. *See id.* §§ 503(a)(5), 522(b), 30 U.S.C.A. §§ 1253(a)(5), 1272(b). *But see note 25 supra.*

29. The land use planning provisions of Section 522 of the SMCRA were roundly criticized by industry representatives at the committee hearings on the bill. One spokesman called them a “backdoor approach to the establishment of [state] land use programs.” *See 1977 Senate Hearings, supra note 24*, at 1031, 1139-40. Observations such as these overstate the result since the designation provisions in the Act are perforce germane only to those lands where surface coal mining is potentially feasible—a small percentage of land even in the most heavily impacted states. *See SMCRA* § 522(a), 30 U.S.C.A. § 1272(a) (Supp. Nov. 1977).

30. SMCRA § 522(a)(4), 30 U.S.C.A. § 1272(a)(4) (Supp. Nov. 1977).

ability of land for surface coal mining . . . shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State and local levels.”³¹

This last provision is subject to a variety of interpretations. A crucial question concerns its intended scope. Since the applicability of the section is limited to “determinations of the *unsuitability* of land for surface coal mining,” it is uncertain whether the drafters intended that this provision include determinations that land is suitable for surface coal mining (as when a petition to designate land as unsuitable is denied) as well as determinations that land is unsuitable for such mining. A strict reading of the statutory language would seem to favor the narrower interpretation. Such a reading, however, makes little practical sense. Indeed, it is where lands are found to be suitable for surface coal mining that the most serious land use conflicts will arise. The opening of lands to surface coal mining is more difficult to mesh with land use planning than is a restriction on surface coal mining methods. Moreover, since the provision seeks to insure coordination with other land use determinations, Congress most likely intended the broader interpretation of the provision to govern.

A second question prompted by this provision is whether it was intended to require substantive as well as procedural integration of unsuitability determinations. The pertinent language reads: “determinations . . . shall be integrated . . . with . . . land use planning and regulation processes.” If “planning” is construed as an adjective modifying “processes,” then the requirement would seem to be merely procedural. But if “planning” is construed as a noun then the provision implicates substantive as well as procedural integration. Further complexity exists in the requirement that designation *determinations* rather than designation *processes* be integrated with land use planning and regulation processes. Integration of a determination with a plan or process requires a substantive examination of the merits of the issue presented. If the drafters had intended to require merely procedural integration they should have required integration of determination *processes* with planning and regulation processes. Thus, the only satisfactory resolution of this problem appears to be to treat the provision as requiring substantive and procedural integration.

A further question of interpretation is presented by the provision which requires that designation determinations be integrated “as closely as possible” with land use planning and regulation pro-

31. *Id.* § 522(a)(5), 30 U.S.C.A. § 1272(a)(5).

cesses at the state, federal, and local level. The phrase "as closely as possible" suggests an inflexible standard;³² but another provision in the same section of the Act seems to give the regulatory authority discretion to refuse to designate lands unsuitable for surface coal mining even where such a determination is incompatible with local or state land use plans.³³ If a designation determination must be integrated "as closely as possible" with applicable land use planning for the area, then a designation determination could rarely be made that was incompatible with such planning. Thus, the discretion of the regulatory authority would appear to be severely undermined if not altogether destroyed.

If designation determinations must be substantively integrated with federal, state, and local land use plans, the impacts may be profound. Consider, for example, the impact of agency designation of certain federal lands as unsuitable for surface coal mining³⁴ on a state regulatory authority's decision regarding adjacent non-federal lands. The SMCRA arguably imposes an affirmative obligation on the state regulatory authority to insure that their decision respects a federal designation, even to the extent that it forces an undesired decision. An illustration will perhaps better demonstrate the potential dilemma.

Suppose tract X, federal land, lies directly west of tract Y, non-federal land. Both X and Y contain known strippable coal reserves. The federal land management agency determines that surface coal mining on tract X would result in significant damage to important aesthetic values and on this basis designates it as unsuitable for surface coal mining. May a state regulatory authority permit surface coal mining on tract Y even where it would adversely affect the federal designation of tract X?³⁵ Arguably the state cannot, since the state's decision is not substantively integrated with the federal designation.

2. *The Petitioning Process*—³⁶"Any person having an interest which is or may be adversely affected" has the right to petition the

32. In Section 102 of the National Environmental Policy Act the phrase "to the fullest extent possible" is used to describe the duty of federal agencies. In discussing the meaning of this phrase, which seems analogous to the phrase "as closely as possible," Judge Wright stated: "[I]t sets a high standard for agencies, a standard which must be rigorously enforced by the reviewing courts. . . . Thus the Section 102 duties are not inherently flexible." *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114-15 (1971).

33. SMCRA § 522(a)(4)(A), 30 U.S.C.A. § 1272(a)(4)(A) (Supp. Nov. 1977). See text accompanying note 58 *infra*.

34. See note 28 *supra*.

35. A similar conflict might be expected to arise between two state regulatory authorities along state borders.

regulatory authority to have lands other than federal lands³⁷ designated as unsuitable for all or certain types of surface coal mining. Likewise, persons may petition to have such designations terminated.³⁸ The petitioner must submit evidence to support his claim and other persons, whether legally interested or not, may submit additional evidence either supporting or opposing the petition. Within ten months from filing and proper notice, a public hearing must be held at or near the area proposed for designation. A written decision on the petition supported with reasons must be issued within sixty days from the date of the hearing and furnished to all parties to the hearing.³⁹

3. *Surface Coal Mining Impact Statements*—Before designating any land as unsuitable for surface coal mining the regulatory authority must prepare a detailed statement that addresses: “(i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.”⁴⁰ Considering past experience with the environmental impact statements required by Section 102(2)(C) of the National Environmental Policy Act of 1969⁴¹ (NEPA) and the immense amount of litigation that provision has

36. The petitioning process described here should not be confused with that which was proposed for national forest lands. See text accompanying notes 16-17 *supra*. There petitions went directly to the Interior and Agriculture Departments; here the petitions go to the regulatory authority.

37. SMCRA § 522(c), 30 U.S.C.A. § 1272(c) (Supp. Nov. 1977). Though the SMCRA would not seem to include federal lands among those which are subject to petitioning, the Secretary of Interior might promulgate regulations to allow such designations. See the discussion on federal lands at text accompanying note 65 *infra*.

38. The standing granted by this provision is not as broad as that in the Clean Air Act, 42 U.S.C. § 18 (1970), which allows any citizen to bring an action, but it is essentially the same as the provision found in the Federal Water Pollution Control Act, 33 U.S.C. § 1365 (Supp. V 1975). This latter provision has been characterized as a legislative enactment of the standing test put forth in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See *Natural Resources Defense Council v. Train*, 510 F.2d 692, 700-01 nn.47-48 (D.C. Cir. 1974). In *Sierra Club*, the Court followed the two part test which it had announced in *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970). This approach requires the party alleging standing to show an “injury in fact” and to show injury to an interest “arguably within the zone of interests” sought to be protected by the statute. *Sierra Club* refined this test by recognizing esthetic and environmental injuries, even where the injury was incurred by a large number of persons, so long as the persons claiming standing could show a personal injury. Thus, petitioners under the designation provisions of the SMCRA need only allege some personal impairment of their recreational or environmental interests to have standing to bring the petition. Once a valid petition is filed, however, any person whether “interested” or not may intervene in the proceeding. SMCRA § 522(c), 30 U.S.C.A. § 1272(c) (Supp. Nov. 1977). See also *United States v. SCRAP*, 412 U.S. 669 (1973).

39. A hearing need not be held if all petitioners so stipulate. SMCRA § 522(c), 30 U.S.C.A. § 1272(c) (Supp. Nov. 1977).

40. *Id.* § 522(d), 30 U.S.C.A. § 1272(d).

41. 42 U.S.C. § 4332(2)(C) (1970).

spawned⁴² over the adequacy of these costly and often voluminous studies, the regulatory authority is likely to look upon this requirement with some trepidation.⁴³ Moreover, the NEPA statement must only address environmental impacts while the SMCRA statement requires the consideration of economic and coal related issues as well. Still, the impact statement requirement can, if carefully controlled, be a useful tool for the decision maker.

Aside from the mechanical problems the impact statement requirement will engender, the SMCRA presently mandates the preparation of these statements in one situation where they are wholly superfluous; that is, where designation is mandatory because the reclamation of land is not feasible. In such cases, an impact statement would serve no useful purpose and could possibly undermine the mandatory nature of the provision. If studies conducted solely to determine the reclamation potential of the land reveal that the reclamation is infeasible then no more studies should be made. Requiring the regulatory authority to prepare a statement that also addresses economic and coal related impacts is not merely wasteful of taxpayer's money; it raises the specter of extraneous factors weighing heavily in a decision that should only take into account reclamation potential.

B. *Mandatory Designations*

The designation of lands as unsuitable for surface coal mining is mandatory only where reclamation in accordance with the provisions of the SMCRA is not economically and technologically feasible.⁴⁴ Because the SMCRA standards for reclaiming surface coal mined lands are vastly different depending on the kind of land involved, the definitions section of the Act does not define the term "reclamation."⁴⁵ It is, however, essential that the regulatory authority in charge of administering the designation provisions have a thorough understanding of what the Act requires for reclamation on any given site.

42. See cases noted at 42 U.S.C.A. § 4332 (1976) (notes 251-81).

43. One industry representative criticized this provision on the ground that it would allow "irresponsible gadflies to tie up thousands of acres of land" by arbitrarily initiating proceedings under section 522. See 1977 *Senate Hearings*, *supra* note 24, at 170 (statement of Steven L. Friedman, Counsel, Pennsylvania Coal Mining Association). This criticism does not seem justified, however, since all petitions must contain "allegations of facts with supporting evidence which would tend to establish the allegations." SMCRA § 522(c), 30 U.S.C.A. § 1272(c) (Supp. Nov. 1977).

44. SMCRA § 522(a)(2), 30 U.S.C.A. § 1272(a)(2) (Supp. Nov. 1977).

45. The reclamation standards established by the SMCRA are, for the most part, set out at section 515, 30 U.S.C.A. § 1265.

The reclamation standards set by the SMCRA fall into two basic categories: (1) land restoration; and (2) restoration of hydrological integrity. The former involves: (a) returning impacted land to a condition capable of supporting its uses prior to mining or to "higher and better" uses that are reasonably likely;⁴⁶ (b) backfilling, compacting, grading, and in most cases, restoring the approximate original contour⁴⁷ of the land; and (c) replacing topsoils and other soil layers sufficient to ensure the successful reintroduction of native plant and animal species. Restoration of hydrological integrity involves: (a) protecting natural watercourses from erosion and acid mine drainage;⁴⁸ (b) restoring aquifers and other underground water systems; and (c) cleaning out and removing settling ponds or siltation structures built to treat mine water.⁴⁹

A substantial part of the burden of insuring that the designation of lands not meeting these standards falls on the general public. The language of the Act suggests that lands subject to administrative designation may only be designated by petition.⁵⁰ The proper role of the regulatory authority throughout the petitioning process, however, may not have been adequately considered by the drafters of the statute. Certainly the regulatory authority acts as a judge, but may it also act as an advocate? The law states that *any person* may

46. SMCRA § 515(b)(2), 30 U.S.C.A. § 1265(b)(2) (Supp. Nov. 1977). The reference to higher and better uses is somewhat troublesome considering the variety of interpretations that might be accorded the phrase. A few state courts have concluded that this phrase was meant to refer to higher and better financial uses. *See, e.g., State Nat'l Bank v. Planning & Zoning Comm'n of Trumbull*, 156 Conn. 99, 239 A.2d 528 (1968); *South Side Elevated R. R. v. Frieberg*, 221 Ill. 508, 77 N.E. 920 (1906). These cases, however, arose in significantly different contexts. Thus, if the mining site could be returned to a condition capable of supporting a power plant and there was a reasonable likelihood of a power plant being built on the site, reclamation could be deemed in compliance with the Act. However, given that the section of the law under which this phrase appears is entitled, "*Environmental Protection Performance Standards*," a reasoned argument could be made that the provision was meant to refer to higher and better environmental uses. Any other reading would substantially undercut the strict reclamation standards required by the Act.

47. SMCRA § 701(2), 30 U.S.C.A. § 1291(2) (Supp. Nov. 1977).

48. Acid mine drainage, a common phenomena in mining, is caused by the exposure of mine waste, such as pyrite, to surface, ground, or rain water with which it reacts to form sulphuric acid. The acid mixes with the water and thus makes its way into rivers, streams and lakes where it kills fish and causes other damage.

49. *See generally* GRIM & HILL, ENVIRONMENTAL PROTECTION IN SURFACE MINING OF COAL (Environmental Protection Technology Series, EPA-670/2-74-093, 1974); NATIONAL ACADEMY OF SCIENCES ENGINEERING STUDY COMMITTEE ON THE POTENTIAL FOR REHABILITATING LANDS SURFACE MINED FOR COAL IN THE WESTERN UNITED STATES, REHABILITATION OF WESTERN COAL LANDS (a Report to the Energy Policy Project of the Ford Foundation, 1974).

50. The Act seems to limit the regulatory authority's designation powers to actions on petitions since the pertinent sections for designating lands begin with the words, "Upon petition pursuant to subsection (c) of this section." SMCRA § 522(a)(2), (3), 30 U.S.C.A. § 1272 (a)(2), (3) (Supp. Nov. 1977).

file a petition or intervene in a proceeding. The SMCRA defines "person" as "any individual, partnership, association, society, joint stock company, firm, company, corporation or other business organization."⁵¹ Was this language intended to exclude the regulatory authority? From a practical point of view, the question deserves a negative response, for it is the regulatory authority, more than any other individual or group, that possesses the interdisciplinary expertise⁵² and has the resources to accumulate the necessary evidence upon which to make an informed determination. Moreover, the cost of culling needed evidence is most rationally borne by the regulatory authority since all studies concerning the reclamation capacity of lands will be valuable to the regulatory authority in future situations regardless of the outcome of the petition. Aside from these observations, it might be argued that the Act implicitly imposes on the regulatory authority an affirmative obligation to make independent determinations as to the unsuitability of land for surface coal mining.⁵³ Thus, allowing the regulatory authority to petition will help the regulatory authority meet this obligation. This interpretation also obviates the apparent conflict with the definition of "person" noted above.

Given resource limitations and sound management policies, it would be impractical for the regulatory authority to become actively involved in every designation petition filed. It is therefore suggested that the following procedures be implemented:⁵⁴

- (1) Insure the right of any person, including the regulatory authority, to instigate the petition process.⁵⁵

- (2) Once a petition is filed, the regulatory authority should notify the petitioner and other interested parties of the location of known evidence that might have an impact on the designation of the subject site.

- (3) Place the initial burden of establishing a *prima facie* case

51. *Id.* § 701(20), 30 U.S.C.A. § 1291(20).

52. The regulatory authority seemingly is required to possess interdisciplinary expertise. *Id.* §§ 503(a)(3), 522(a)(4)(B), 30 U.S.C.A. §§ 1253(a)(3), 1272(a)(4)(B).

53. The Act requires each state "to establish a planning process enabling objective decisions . . . as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations." *Id.* § 522(a)(1), 30 U.S.C.A. § 1272(a)(1). *See also id.* § 503(a)(5), 30 U.S.C.A. § 1253(a)(5). This suggests an affirmative obligation on the state to make independent decisions concerning the availability of lands for surface coal mining.

54. Such procedures might be incorporated into each state and federal program under the authority of Sections 503(a)(5) and 522(a) of the SMCRA, 30 U.S.C.A. §§ 1253(a)(5), 1272(a) (Supp. Nov. 1977).

55. If the regulatory authority is ultimately allowed to participate in the petitioning process the regulations ought to require that its investigative functions be kept wholly separate from its hearings functions.

on the petitioner.⁵⁶ Once the burden has been met, permit the regulatory authority to produce additional evidence prior to the hearing where, in its discretion, such evidence is necessary to make an informed decision, and where the regulatory authority determines that the petitioner does not have adequate expertise or resources to prove its claims.

(4) If, after the required hearing, there still exists a reasonable doubt as to the reclamation potential of the subject lands, require a comprehensive reclamation study on the site.⁵⁷

C. *Discretionary Designations*

The petitioning process may be used to designate lands as unsuitable for reasons other than the infeasibility of reclamation. A designation under these other categories, however, is discretionary. The SMCRA provides:

Lands may be designated as unsuitable for surface coal mining if such operations will:

(A) be incompatible with existing State or local land use plans or programs; or

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific and esthetic values and natural systems; or

(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.⁵⁸

The SMCRA offers no guidance as to how the regulatory authority should exercise its discretion. The Secretary of Interior should, therefore, promulgate regulations to curb arbitrary decisions. These regulations should focus on appropriate methods for establishing an objective decision making apparatus capable of handling the kinds of planning decisions envisioned in the discretionary designation section of the SMCRA, and should make the establishment of such

56. The SMCRA requires that the petitioner have the initial burden of proof. See SMCRA § 522(c), 30 U.S.C.A. § 1272(c) (Supp. Nov. 1977).

57. The type of study envisioned by Section 522(d) of the SMCRA is necessary here. As was discussed in text accompanying notes 40-43 *supra*, such a study may be unduly broad for its suggested purpose.

58. SMCRA § 522(a)(3), 30 U.S.C.A. § 1272(a)(3) (Supp. Nov. 1977).

an apparatus a condition precedent to approval of any state or federal program.⁵⁹

While it is tempting to suggest that regulations should provide definitions for such phrases as "*significant damage*," "*important historic, cultural, scientific and esthetic values*," and "*substantial losses of long range productivity*," values such as these defy accurate definition.⁶⁰ Each case must be considered on its own merits. Regulations might give some direction, however, by providing specific examples. For instance, the regulations might posit that surface mining operations which impair the water quality in a watershed and thereby threaten the use of lower lands for agriculture and livestock for a period of twenty years from the inception of mining operations cause "a substantial loss . . . of long range productivity."

Of even greater import, perhaps, is the need for regulations that offer guidance as to the procedures that the regulatory authority ought to utilize in the designation process. Because the administrator's discretion is expressly preserved by the statute, the regulations should not impose on a state a scheme which dictates when its authority should be exercised. But the regulations should insist that each state program contain a fair and rational process for making discretionary designations. Further, the regulations ought to set out an exemplary scheme which would be used on all federal lands and which any state could opt to use on its own lands.

The following procedures are proposed for use by the regulatory authority whenever a petition is filed to have lands designated under the discretionary provisions of the SMCRA.

(1) To the extent practical, utilize the same basic procedures for discretionary designations as are established for mandatory designations.

(2) Make a preliminary determination as to whether any of the lands addressed in the petition fall within any of the four discretionary categories as defined by the Act and the applicable regulations.

(3) If the lands are found not to meet any of the four categories, issue a decision tentatively denying the petition on this basis,

59. The SMCRA requires the establishment of "a planning process enabling objective decisions based upon competently and scientifically sound data and information as to which, if any, land areas of a state are unsuitable for all or certain types of surface coal mining." *Id.* § 522(a)(1), 30 U.S.C.A. § 1272(a)(1).

60. During the hearings several persons testified as to the ambiguity of these provisions but they were left unchanged in the final bill. See 1977 *Senate Hearings, supra* note 24, at 753, 762, 815, 830.

and then hold a hearing as required by the SMCRA solely on this issue. After the hearing, render a final decision on whether the lands described in the petition fall within the delineated categories. Affirmation of the preliminary decision constitutes a final agency action and further review must be sought through the courts.

(4) If the lands are found to meet any of the discretionary categories, prepare a surface coal mining impact statement⁶¹ as authorized by Section 522(d) of the Act, placing particular emphasis on the characterization(s) in the petition which allegedly makes the land unsuitable for surface coal mining.

(5) Hold a hearing on the merits of designating the subject lands, allowing at least 30 days for review of the completed surface coal mining impact statement prior to the hearing.⁶² Use this statement together with the petitions of all parties as the basis for the hearing and the record. This hearing should be held on the record and thus subject to the procedural safeguards of Section 5 of the Administrative Procedures Act.⁶³

(6) Render a written decision with reasons on the merits of the whole record.

The process suggested here would help ensure the accountability for discretionary decisions and would permit courts a more solid framework for review.

Two points in the proposed process appear particularly vulnerable to litigation. These are the initial characterization of lands as within or without the delineated categories and the substantive soundness of the final agency decision. Problems in these areas can be limited and hopefully avoided by a detailed explanation of the reasons the lands were determined not to fall within the categories alleged in the petition using the express language of the statute and examples provided in the proposed regulations, by ensuring the collection and competent analysis of all pertinent information,⁶⁴ and by insisting that all proceedings be open to the public. Although an orderly and open process will not always prevent the filing of lawsuits, it should help provide reasoned decisions.

D. Federal Lands

The designation provisions of the SMCRA place federal lands

61. See text accompanying notes 40-43 *supra*.

62. The SMCRA sets a ten month deadline for hearings from the date of petition and since the preparation of an impact statement may take a considerable amount of time it may be difficult to provide interested parties with sufficient time to review the statement prior to the hearing.

63. 5 U.S.C. § 554 (1976).

64. As with mandatory designations, the regulatory authority ought to be assured the opportunity to participate in the filing of petitions and the collection of this data.

in a category all their own.⁶⁵ The Secretary of Interior is given the exclusive authority to make designation determinations for federal lands, after consulting with the affected state.⁶⁶ The Act affirmatively commits the Secretary to review all federal lands to ascertain whether any areas fall within the mandatory or discretionary categories that apply to non-federal lands. If any federal lands fall within those categories the Secretary must withdraw such area or condition any mineral leasing or mineral entries in a manner so as to limit surface coal mining operations on such area.⁶⁷ The Secretary may permit surface coal mining prior to completing the review of all federal lands. Although the Act itself is unclear, it would seem reasonable to interpret this provision to mean that the review of lands where advance permission is granted must already have been accomplished. In any event, since the Secretary has discretion in this matter, a regulation should be promulgated to clearly reflect the suggested meaning.

The review provisions for federal lands seem clear, but, to the extent that they are incongruous with the approach established for non-federal lands, they are likely to generate problems. Most obvious perhaps, is the fact that the petitioning process ostensibly applies only to nonfederal lands, yet areas that persons will want to have designated are not likely to respect federal, non-federal boundaries.⁶⁸ No logical reason exists for restricting petitions to non-federal lands. The Secretary of Interior might easily resolve this dilemma by promulgating regulations which extend petitioning rights to federal lands. Although apparently not required by the Act, the implementation of such a procedure would complement the Secretary's review mandate and seems consistent with the intent of the Act.⁶⁹

The most troublesome feature of the provisions for designating federal lands is that they fail to address designations of lands subject to existing federal coal leases where surface mining operations had not commenced prior to the passage of the Act.⁷⁰ The SMCRA seems to confine the Secretary's authority to prospective federal

65. SMCRA § 522(b), 30 U.S.C.A. § 1272(b) (Supp. Nov. 1977).

66. *Id.* § 503(a)(5), 30 U.S.C.A. § 1253(a)(5).

67. *Id.* § 522(b), 30 U.S.C.A. § 1272(b).

68. The requirement that designation determinations be integrated with state and local land use plans might alleviate this problem to some extent. *See id.* § 522(a)(5), 30 U.S.C.A. § 1272(a)(5); text accompanying note 31 *supra*.

69. *See id.* § 201(c), 30 U.S.C.A. § 1211(c)(2) which requires the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act."

70. Surface mining operations begun prior to the passage of the SMCRA are exempt from the designation provisions. *See id.* § 522(a)(6), 30 U.S.C.A. § 1272(a)(6).

leases since the Act allows him only to withdraw land⁷¹ and condition mineral leases—not to withdraw present leases. Why the Act requires a review of all federal lands is therefore not clear. Furthermore, persons with federal leases seem to enjoy greater protection than owners of private mineral estates whose lands are plainly subject to designation.⁷² Conceivably, these questions could be answered by a finding that the Secretary of Interior does, in fact, have the authority to designate lands over existing coal leases as unsuitable for surface coal mining. Even if the Secretary's authority in this matter is upheld, however, two significant roadblocks to designating leased lands will remain. The first is the claim of the lessee that his lease granted him a right to extract coal subject only to the terms and conditions of the lease and the applicable regulations in effect when the lease was issued, and that the federal government is estopped from imposing any conditions on the lease that would effectively preclude its development.⁷³

Traditionally it was thought that the government could not be estopped, the theory being that "the King could do no wrong."⁷⁴ Gradually, however, that anachronistic view has worn away, and the modern trend has moved toward allowing the government to be estopped, particularly in those instances where it is exercising a proprietary function.⁷⁵ The question likely to arise in the present situation concerns representations made by the federal government in its leases⁷⁶ and the extent to which these were relied upon by the lessees. The lessee, will try to show that his lease is proprietary in

71. Withdrawals of federal land are made pursuant to Section 204 of the Federal Land Policy and Management Act of 1976, which defines a withdrawal as "withholding an area of Federal land from settlement, sale, location, or entry under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the areas." 43 U.S.C. § 1702(j) (1976).

72. The push to designate federal lands presently under lease will likely receive its greatest support from the environmental community, but, in one sense at least, it is worthy of the support of the coal industry as well. The coal companies know that under the SMCRA they will have to meet stringent environmental standards, see SMCRA § 515, 30 U.S.C. § 1265 (Supp. 1977), including a showing that the land can be reclaimed in accordance with the requirements of the Act. See *id.* § 508, 30 U.S.C.A. § 1258. If a determination is ultimately made that the land cannot be reclaimed, the coal company is far better off knowing this prior to the time it has expended considerable sums of money developing a mining plan that would, in the end, have to be rejected by the regulatory authority.

73. While all federal coal leases provide for readjustment of their terms every twenty years, the lessee will claim that the government cannot impose such new conditions as would make the mining of the coal physically or economically impossible. See 30 U.S.C. § 207 (1976).

74. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.01 (1958).

75. *Id.* § 17.09.

76. See United States Department of Interior, Bureau of Land Management (BLM) Form 3130-1 (October, 1967), which is the standard form coal lease used by the BLM.

nature, that the lease gave him a right to surface mine for coal, and that prior to the passage of the SMCRA he had expended a considerable sum of money in reliance on this right. By contrast, the government will contend that the lease conferred no absolute right to surface mine for coal and that the lease was conditioned upon the right of the Secretary, acting in the public interest, to impose reasonable changes in its terms,⁷⁷ including the designation of at least a portion of the lands under lease as unsuitable for surface coal mining.

Once over the estoppel hurdle there still remains the question of whether or not designating leased lands constitutes an unlawful taking. That question will now be addressed in the broader context of the entire designation section.

III. THE TAKINGS PROBLEM

The fifth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment, forbids the taking of private property for public use without just compensation.⁷⁸ Though a strict reading of the amendment suggests that it applies only where there has been a physical invasion of property, the courts have long recognized that government regulations which cause substantial interference with the use and enjoyment of one's property may, in some instances, constitute a "taking." It is in this sense that the designation provisions of the SMCRA are likely to be challenged.

Suppose, for example, that prior to the enactment of the SMCRA X Company purchased a fee simple estate, a mineral estate, or a coal lease on land known to be valuable for strippable coal. Subsequently, the land was designated as unsuitable for all forms of surface coal mining, thus drastically reducing its value. Was the designation an unconstitutional taking of private property for a public use without just compensation?

The history of the fifth amendment suggests that actions taken by a state aimed at protecting the public health, safety and welfare, commonly referred to as an exercise of state police powers, do not fall within the ambit of the fifth amendment takings clause.⁷⁹ Since

77. See, e.g., *Branch Banking & Trust Co. v. United States*, 98 F. Supp. 757 (Ct. Cl. 1951), *cert. denied*, 342 U.S. 893 (1951) ("In general, an officer authorized to make a contract for the United States has the implied authority thereafter to modify its terms particularly where it is clearly in the interest of the public to do so").

78. U.S. CONST. amends. V, XIV.

79. See Stever, *Land Use Controls, Takings and the Police Power—A Discussion of the Myth*, 15 N.H.B.J. 149, 153 (1974). In discussing the history of the takings clause, Stever notes: "The pattern of English regulatory law demonstrates quite convincingly that the [takings] clause was not intended to be a limit on the police power." See also Mugler v.

the designation provisions are easily defended as police power-type provisions,⁸⁰ the historical perspective on the fifth amendment suggests that designations made pursuant to the SMCRA do not implicate any compensation requirement. Many courts, however, have ignored this historical evidence and have relied on other factors, most notably, the amount of diminution in property value resulting from the regulation,⁸¹ in deciding whether or not a taking has occurred. Thus, what once may have been a rather straight forward legal problem has evolved into a complex and confusing controversy over which much scholarly debate has ensued.⁸²

Fortunately, several important developments in takings law, which are particularly relevant to the designation provisions in the SMCRA, can be gleaned from the case law without becoming totally immersed in this polemical. Central to the discussion is the fact that where there is a near total diminution in the value of private property as a result of a government regulation, the courts are strongly inclined to find that a taking in violation of the fifth amendment has occurred. The classic articulation of the diminution in value theory appeared in *Pennsylvania Coal Co. v. Mahon*.⁸³ That case concerned a law passed by the State of Pennsylvania which forbade (except in certain situations irrelevant to the case) the mining of coal which caused the subsidence of any human dwellings. The surface owner brought an action under this law to enjoin the owner of the mineral estate, Pennsylvania Coal Co., from mining the coal under the surface owner's home. Writing for a majority of the Court, Justice Holmes held that the Pennsylvania law went "too far" in the regulation of private property since it caused the value of the property to be substantially diminished: "When [the diminution of value] reaches a certain magnitude, in most if not in all

Kansas, 123 U.S. 623 (1887), where the Court stated: "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 668-69.

80. The constitutional basis for the SMCRA was the commerce power. But where, as in this case, the commerce power is used to promote the public welfare, see SMCRA §§ 101(c), 102(h), 30 U.S.C.A. §§ 1201(c), 1202(h) (Supp. Nov. 1977), it is commonly referred to as the "national police power." See, e.g., LOCKHART, KAMISAR & CHOPER, *CONSTITUTIONAL LAW: CASES, COMMENTS AND QUESTIONS* 254 (4th ed. 1975); Cashmen, *The National Police Power under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 381 (1919); Fuller, *Is There a Federal Police Power?*, 4 COLUM. L. REV. 563 (1904).

81. See Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50-60 (1965).

82. See, e.g., Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1198 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *supra* note 81; Stever, *supra* note 79.

83. 260 U.S. 393 (1922).

cases, there must be an exercise of eminent domain and compensation to sustain the act."⁸⁴

A strict application of the diminution in value theory could profoundly undermine the efficacy of the designation provisions in the SMCRA, for certainly most designations will substantially diminish the value of the land involved. The theory appears to have undergone several refinements, however, which should tend to lessen its significance and which may ultimately provide an adequate framework for defending most designations made under the SMCRA. For example, if a designation and consequent diminution in value can be shown to impact only a portion of an aggrieved party's land, then the prevailing view seems to be that no taking has occurred. Typical of this view are the wetlands cases where a finding that the owner has the right to fill only a portion of his land has been generally sufficient to sustain a regulation prohibiting the filling of wetlands.⁸⁵

Another important development appeared in *Goldblatt v. Town of Hempstead*.⁸⁶ In this case, the enactment of an ordinance prohibiting excavations below the water table effectively closed the defendant's sand and gravel mining operation. The Supreme Court held that the fact that the property was deprived of its most beneficial use did not render the ordinance unconstitutional, since the ordinance was a valid exercise of the town's police powers.⁸⁷ The import of *Goldblatt* lies in its inference that property subject to government regulation which retains some beneficial use cannot be considered to have been unconstitutionally taken. Seen in this light, the *Goldblatt* decision might dispose of several situations under which SMCRA designations could be challenged. For example, if a person owned both the surface and mineral estate of land, a designation of unsuitability for surface coal mining would not be considered a taking if the surface was valuable for other purposes. Similarly, if the coal could be extracted by other, albeit more expensive methods, such as underground or *in situ* methods, then a designation that

84. *Id.* at 413.

85. This view seems to have prevailed despite its ostensible inconsistency with the holding in *Pennsylvania Coal*. See, e.g., *Brecciaroli v. Connecticut Comm'r of Environmental Protection*, 168 Conn. 349, 362 A.2d 948 (1975); *Sibson v. State*, 115 N.H. 137, 336 A.2d 239 (1975); *Sands Point Harbor, Inc. v. Sullivan*, 136 N.J. Super. 436, 346 A.2d 612 (1975). In *State v. Johnson*, 265 A.2d 711 (Me. 1970), however, the Maine Wetlands Act was held unconstitutional where it was found that certain land had no value absent the right to fill it.

86. 369 U.S. 590 (1962).

87. *Id.* at 592, 596. The Court declined to decide whether a deprivation of all beneficial use of the land would render the regulation unconstitutional, since that issue was not before it. *Id.* at 594.

the land was unsuitable for surface coal mining would likely not be deemed a taking.

A final important development in takings law strikes at the heart of the diminution in value theory and may in fact signal its eventual demise. In *Consolidated Rock Products v. City of Los Angeles*,⁸⁸ the California Supreme Court held that even where there is a total diminution in property value as a result of a government regulation, if that regulation is reasonably necessary to prevent injury to others then no compensation is required. In that case, a zoning ordinance restricted plaintiff's property to agricultural or residential use. The trial court found that the property was of great value for rock, sand, and gravel extraction yet worthless for other purposes. It further found that the excavation and production operations proposed by the plaintiff were probably compatible with adjacent land uses, although it acknowledged that "reasonable minds might differ" on that conclusion. Nonetheless, the California Supreme Court upheld the ordinance. Quoting in part from a prior California decision,⁸⁹ the court stated:

The primary purpose of comprehensive zoning is to protect others, and the general public from uses of property which will, if permitted, prove injurious to them. . . . "So far as such use of one's property may be had *without injury to others*, it is a lawful use which cannot be absolutely prohibited". . . . [T]he legislative body in our case has determined that the prohibited use cannot be had without injury to others.⁹⁰

The Supreme Court dismissed an appeal of this case which technically is a decision on the merits; but, since the holding in this case severely undercuts the *Pennsylvania Coal* decision it must be viewed with some circumspection. Still, it is in line with some older Supreme Court opinions⁹¹ and thus offers an attractive argument for the courts and prospective litigants.⁹² Should the *Consolidated Rocks* decision prevail, it will provide an ideal defense to SMCRA designations, since surface coal mining operations will invariably have extraterritorial impacts causing some injury to others.

88. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

89. *In re Kelso*, 147 Cal. 609, 82 P. 241 (1905).

90. 370 P.2d at 348 (emphasis in original)

91. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887). See note 79 *supra*.

92. The approach taken by the California Court in *Consolidated Rocks* is essentially the same as that advocated by Professor Sax. See Sax, *supra* note 82, at 163. Sax argues that restrictions on uses of land should not be deemed compensable takings if such uses cause what he calls "spillover effects." Interestingly, Sax uses surface mining on a steep slope as the paradigm of a spillover type use.

Despite the erosion which the diminution in value theory has experienced, it is certainly not dead,⁹³ and the careful litigant would be well-advised to avoid attacking the theory directly if at all possible. A much safer approach would be to show how the designation fits within one or more of the cases described above. Indeed, the one case which has recently considered the takings problem in conjunction with designation provisions similar to those in the SMCRA⁹⁴ suggests that diminution in value principles may yet be controlling.

*Bureau of Mines of Maryland v. Georges Creek Coal and Land Co.*⁹⁵ involved the validity of a Maryland statute which prohibited surface coal mining on all state owned land. The plaintiffs who owned the mineral estate in such land brought an action against the state of Maryland, the surface owner, alleging that the statute effected an unconstitutional taking of their property without just compensation. After an extensive analysis of the law of takings, the court remanded the case for a finding as to the magnitude of the loss suffered by the plaintiffs, thus evincing the Maryland court's continued recognition of diminution in value principles.⁹⁶ Curiously, the Maryland court did not even mention the *Consolidated Rocks* decision and failed to consider whether the mining would cause "injury to others." Though its continued reliance on diminution in value is not atypical, the case does suggest the need for additional guidance from the Supreme Court.

93. See, e.g., *Armstrong v. United States*, 364 U.S. 40 (1960) where the Court stated: "The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." *Id.* at 48. Indeed, diminution in value principles appear to have retained some measure of popularity among state courts. See, e.g., *Eldridge v. Palo Alto*, 57 Cal.App. 3d 613, 129 Cal. Rptr. 575 (1976); *Bureau of Mines v. Georges Creek Coal & Land Co.*, 272 Md. 143, 321 A.2d 748 (1974); *Czech v. Blaine*, 253 N.W.2d 272 (Minn. 1977).

94. Several state courts have addressed the very question of the validity of prohibiting surface coal mining on private lands. Most, however, have been in the context of local zoning ordinances, and the disposition of the constitutional problem has been cursory at best. See, e.g., *Madis v. Higginson*, 164 Colo. 320, 434 P.2d 705 (1967); *Village of Spillertown v. Prewitt*, 21 Ill. 2d 228, 171 N.E.2d 582 (1961); *Midland Elec. Coal Corp. v. Knox County*, 1 Ill. 2d 200, 115 N.E.2d 275 (1953); *East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379, 143 N.E.2d 309 (1957); *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954).

95. 272 Md. 143, 321 A.2d 748 (1974).

96. The Maryland statute might be distinguished from the SMCRA since it imposed a blanket prohibition on surface coal mining on state land whereas the federal law is limited to specific categories of land where surface coal mining is deemed particularly destructive or incompatible with the use of other lands. This distinction, however, goes to the scope of the exercise of the power and not to the question of whether the regulation should be considered a taking. See Bosselman, *The Control of Surface Mining: An Exercise in Creative Federalism*, 9 NAT. RES. J. 137, 155 (1969).

IV. THE GRANDFATHER CLAUSE

Section 522(a)(6) of the SMCRA exempts from the designation provisions all surface coal mining operations in existence as of August 3, 1977, or where a permit has been issued pursuant to the Act, or where "substantial legal and financial commitments" in such operations were in existence prior to January 4, 1977. The purpose of this clause was to minimize the economic impacts that the designation provisions would have if applied retroactively.

The first two exceptions seem reasonable. Given the substantial capital expenditures involved in a surface coal mining operation, it would seem unjust to require an existing operator to shut down. Moreover, since the lead time for such an operation is substantial, the operator could not fairly be accused of rushing in bad faith to commence operations prior to the passage of the law. Allowing surface coal mining to proceed where a valid SMCRA permit has been issued is similarly reasonable. The procedures involved in obtaining a permit are extensive and thus interested parties should have ample time before a decision is made to submit a designation petition which would halt issuance of the permit.⁹⁷

The final exception, however, is, on its face at least, a bit more troublesome. The meaning of the phrase "substantial legal and financial commitments" lacks certainty. The House Report on the proposed bill explains the phrase as follows:

The phrase 'substantial legal and financial commitments' . . . is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in powerplants, railroads, coal handling and storage facilities and other capital-intensive activities. The committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute 'substantial legal and financial commitments.'⁹⁸

Thus, the exception may be narrower than the language indicates, encompassing only those situations where surface coal mining is necessary to meet contract obligations entered prior to January 4, 1977. Presumably the language covers capital-intensive activities by both the coal supplier and user. Though not explicit in the report, it may be inferred that Congress further intended that where a coal supplier under contract obligation is in a position to procure coal from a source other than from lands where surface coal mining is subject to designation, he must, if commercially reasonable, do so.

97. SMCRA § 510(b)(4), 30 U.S.C.A. § 1260(b)(4) (Supp. Nov. 1977).

98. H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 95 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1543, 1581.

It was clearly the intent of Congress in fashioning this clause to avoid undue hardships on individual buyers and sellers. Thus, if such hardships can be avoided without surface coal mining, it might be argued that the exclusion for substantial legal and financial commitments does not apply.

The exception for substantial legal and financial commitments received substantial attention from both sides in the legislative hearings. Many environmentalists felt that the provision should have been deleted entirely from the bill since it sanctions conduct by parties who, knowing that this loophole might be incorporated into the law, negotiated contracts for the purpose of circumventing the law. These concerns would appear to be borne out by the unsuccessful industry lobby to have the date advanced to the date the law was enacted,⁹⁹ presumably so that contracts could be negotiated prior to the President's signature.

V. CONCLUSION

The recognition that certain lands should be fully protected from surface coal mining is a welcome land use policy development and in this sense, the provisions in the SMCRA on designating lands as unsuitable for such mining are a giant step forward. For the most part they are comprehensive in scope and substance. Still, some refinements are needed. Regulations to clarify the ambiguities and to affirmatively implement the intent of the law must be promulgated. Rigorous enforcement by all regulatory personnel is, of course, essential. But ultimately, the success of the SMCRA designation provisions will depend on the ability of the interested public to marshal its forces towards the intelligent and constructive use of the law.

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99. See generally 1977 Senate Hearings, *supra* note 24, at 364, 815, 830, 905. See also *Reclamation Practices and Environmental Problems of Surface Mining: Hearings on H.2 Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 9, 168, 176-77 (1977).

