



## COALEX STATE INQUIRY REPORT - 189

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### **TOPIC:** SUBSIDENCE AND PUBLIC LAND USE; TAKINGS

**INQUIRY:** Virginia deleted 160 acres from a coal company's underground mining permit at the time it was renewed. A new prison facility is to be constructed over the deleted acreage and the state believed that any subsidence from a mine under the site would affect the prison structure and the high-technology electronics the state will be using. The Division of Mined Land Reclamation subsequently approved a revision to the permit reinstating the 160 acres, but added several conditions to the permit. The coal company is suing on the grounds that new conditions constitute a taking of the 160 acres. Please locate any relevant case law.

**SEARCH RESULTS:** Research was conducted using LEXIS, existing COALEX Inquiry Reports and materials from an Interior symposium on valid existing rights held in April, 1990.

Articles from the Interior "Symposium on Valid Existing Rights", reported in the Journal of Mineral Law & Policy and the Annotations listed below provide good overviews of "takings" law. The most relevant cases from these sources are also listed below. One state case, DEPARTMENT OF NATURAL RESOURCES v INDIANA COAL COUNCIL, was identified that is particularly relevant to the inquiry presented here. Copies of materials discussed below are attached.

NOTE: This Report continues some of the research included as part of COALEX STATE INQUIRY REPORT - 106, "Constitutionality of the 300 foot waiver requirements" (1989). Report 106 and COALEX State Inquiry Report - 139, "Valid existing rights" (1990) are also attached.

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### **OVERVIEW OF RELEVANT LAW**

**Mansfield, "Regulatory Takings, Expectations and Valid Existing Rights", 5 J. Mineral Law & Policy 3, p. 431 (1990).**

In particular, see sections "II. Takings Jurisprudence Reviewed" and "III. 'Takings Test' Would not Generally Protect Industry".



**McGinley, "Of Pigs and Parlors: Regulatory Takings in the Coal Fields", 5 J. Mineral Law & Policy 3, p. 473 (1990).**

In particular, see sections "III. Taking by Eminent Domain and by Deprivation of Due Process" and "IV. Untangling the Web: The Court's KEYSTONE Decision Clarifies Takings Law and PENNSYLVANIA COAL".

**ANNOTATION, "Validity and Construction of Statutes Regulating Strip Mining", 86 A.L.R. 3d 27(1990).**

See section 2c "Practice pointers" for the discussion of police powers:

"A regulation under the police power of the state is generally considered justified if three criteria are met: (1) the interest of the public generally, as distinguished from those of a particular class, must require the regulatory interference; (2) the means chosen must be reasonable necessary for the accomplishment of the purpose; and (3) the means must not be unduly oppressive upon the individual."

**ANNOTATION, "Supreme Court's views as to what constitutes 'taking' within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation", 57 L Ed. 2d 1254.**

The Supreme Court, generally relying on the particular circumstances of each case, "has identified certain broad factors which are relevant in determining whether there has been a 'taking' for Fifth Amendment purposes: (1) the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations, and (2) the character of the governmental action in question, the court pointing out that a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

"[T]he application of particular land use regulations had been held under various circumstances not to amount to a 'taking' of property, the court expressing a very tolerant view of such regulations."

## **FEDERAL CASE LAW**

**PENNSYLVANIA COAL CO. v MAHON, 260 U.S. 393 (1922).**

The court held that the Pennsylvania statute regulating subsidence was invalid; it effected a "taking" without just compensation because the statute made it commercially impracticable to mine the coal and had nearly the same effect as the complete destruction of the mineral rights the claimant had purchased from the owners of the surface land.



"SYLLABUS:

1. One consideration in deciding whether limitations on private property, to be implied in favor of the police power, are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question; and this is to be determined from the facts of the particular case.
2. The general rule, at least, is that if regulation goes too far it will be recognized as a taking for which compensation must be paid."

**PENN CENTRAL TRANSPORTATION CO. v NEW YORK CITY**, 438 U.S. 104 (1978),  
reh den, Penn Cent. Transp. Co. v New York, 439 U.S. 883 (1978).

In considering the application of landmark preservation law, the court found that developing rules to determine what constitutes a "taking" was difficult; therefore, determinations will depend on the circumstances of each case. The factors to be taken into consideration in making a determination include:

1. The economic impact of the regulation on the claimant and particularly, the extent to which the regulation interfered with investment-backed expectations.
2. The character of the governmental action in question.

**From the ANNOTATION, 57 L Ed. 2d 1254, Sec. 7 Land Use Regulations:**

"(1) the law did not interfere with the present use of the building, but allowed the owner to continue using it as had been done in the past, permitting the owner to profit from the building and obtain a reasonable return on its investment; (2) the law did not necessarily prohibit occupancy of any of the air space above the landmark building, since under the procedures of the law, it was possible that some construction in the air space might be allowed; and (3) the law did not deny all use of the owner's pre-existing air rights above the landmark building".

**AGINS v CITY OF TIBURON**, 447 U.S. 255 (1980).

"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests...or denies an owner economically viable use of his land.... The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of stat power in the public interest. Although no precise rule determines when property has been taken...the question necessarily requires a weighing of private and public interests."

**KEYSTONE BITUMINOUS COAL ASSN. v DEBENEDICTIS**, 480 U.S. 470 (1987).

In this challenge to Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act [Act], the court ruled that PENNSYLVANIA COAL, above, did not control:



"Unlike the statute considered in PENNSYLVANIA COAL, the Act is intended to serve genuine, substantial, and legitimate public interests in health, the environment, and the fiscal integrity of the area by minimizing damage to surface areas.... Thus, the Commonwealth has merely exercised its police power to prevent activities that are tantamount to public nuisance."

"The record in this case does not support a finding similar to the one in Pennsylvania Coal that the Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations."

Also see *NOLLAN v CALIF. COASTAL COMM.*, 483 U.S. 825 (1987).

**WHITNEY BENEFITS, INC. v UNITED STATES**, 926 F 2d 1169 (Fed Cir 1991), cert. den. *UNITED STATES v WHITNEY BENEFITS, INC.* 502 U.S. 952 (1991). *WHITNEY BENEFITS, INC. v UNITED STATES*, 18 Ct. Cl. 394 (Ct Cl 1989, corrected 1990). *WHITNEY BENEFITS, INC. v UNITED STATES*, 752 F 2d 1554 (Fed Cir 1985).

The Court of Appeals for the Federal Circuit affirmed the Claims Court finding that "on enactment SMCRA's prohibition of surface mining of alluvial valley floors (AVF's) constituted a taking of the Whitney coal property." The ruling included payment of \$60 million plus interest to Whitney Benefits.

## STATE CASE LAW

**DEPT. OF NATURAL RESOURCES (DNR) v INDIANA COAL COUNCIL, INC.**, 542 NE 2d 1000 (Ind 1989), cert. den. *INDIANA COAL COUNCIL, INC. v INDIANA DEPT. OF NATURAL RESOURCES*, 493 U.S. 1078 (1990).

The Wabash Valley Archaeological Society petitioned DNR to have the Beehunter site designated as an area unsuitable for surface coal mining because of its archeological significance. The director of DNR made an initial determination that Beehunter was an area unsuitable for surface coal mining. As part of the final order, the director included a mitigation plan which provided a means by which the designation of "area unsuitable" could be removed. The court held that the final order which provided a mitigation plan "did not amount to an unconstitutional taking of property."

## ATTACHMENTS

- A. Mansfield, "Regulatory Takings, Expectations and Valid Existing Rights", 5 J. Mineral Law & Policy 3, p. 431 (1990).
- B. McGinley, "Of Pigs and Parlors: Regulatory Takings in the Coal Fields", 5 J. Mineral Law & Policy 3, p. 473 (1990).
- C. ANNOTATION, "Validity and Construction of Statutes Regulating Strip Mining", 86 A.L.R. 3d 27 (1990).



- D. ANNOTATION, "Supreme Court's views as to what constitutes 'taking' within meaning of Fifth Amendment's command that private property not be taken for public use without just compensation", 57 L Ed. 2d 1254.
- E. PENNSYLVANIA COAL CO. v MAHON, 260 U.S. 393 (1922).
- F. PENN CENTRAL TRANSPORTATION CO. v NEW YORK CITY, 438 U.S. 104 (1978), reh den, PENN CENT. TRANSP. CO. v NEW YORK, 439 U.S. 883 (1978).
- G. AGINS v CITY OF TIBURON, 447 U.S. 255 (1980).
- H. KEYSTONE BITUMINOUS COAL ASSN. v DEBENEDICTIS, 480 U.S. 470 (1987).
- I. NOLLAN v CALIF. COASTAL COMMN., 483 U.S. 825 (1987).
- J. WHITNEY BENEFITS, INC. v UNITED STATES, 926 F 2d 1169 (Fed Cir 1991), cert. den. UNITED STATES v WHITNEY BENEFITS, INC. 502 U.S. 952 (1991).
- K. WHITNEY BENEFITS, INC. v UNITED STATES, 18 Ct. Cl. 394 (Ct Cl 1989, corrected 1990).
- L. WHITNEY BENEFITS, INC. v UNITED STATES, 752 F 2d 1554 (Fed Cir 1985).
- M. DEPT. OF NATURAL RESOURCES (DNR) v INDIANA COAL COUNCIL, INC., 542 NE 2d 1000 (Ind 1989), cert. den. INDIANA COAL COUNCIL, INC. v INDIANA DEPT. OF NATURAL RESOURCES, 493 U.S. 1078 (1990).
- N. COALEX STATE INQUIRY REPORT - 106, "Constitutionality of the 300 foot waiver requirements" (1989). [Enclosed without attachments.]
  - A. WILLOWBROOK MINING CO. v COMMONWEALTH OF PENNSYLVANIA, 499 A.2d 2 (1985)
  - B. HODEL v VIRGINIA SURFACE MINING & RECLAMATION ASSOCIATION, 452 U.S. 264 (1981)
  - C. HODEL v INDIANA, et al., 452 U.S. 314 (1981)
  - D. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F.2d 694 (1988)
  - E. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION v HAMILTON BANK OF JOHNSON CITY, 473 U.S. 172 (1985)
  - F. BURLINGTON NORTHERN RAILROAD CO. v U.S., 752 F.2d 627 (1985)
  - G. AINSLEY v U.S., 8 Cl. Ct. 394 (1985)
  - H. GINN v CONSOLIDATION COAL CO., 437 N.E.2d 793 (1982)
  - I. SMITH v NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, 712 S.W.2d 951 (1986)
- O. COALEX STATE INQUIRY REPORT - 139, "Valid existing rights" (1990). [Enclosed without attachments.]
  - A. COALEX STATE INQUIRY REPORT - 13.
  - B. US v POLINO, 131 F Supp 772 (ND W Va 1955).
  - C. 44 FR 14902 (MARCH 13, 1979). Permanent Program Final Rule. [Excerpts only attached.]
  - D. 44 FR 67942 (NOVEMBER 27, 1979). Notice of suspension of certain rules in 30 CFR Chapter VII. [Excerpts only attached.]
  - E. 45 FR 8241 (FEBRUARY 6, 1980). Proposed rulemaking. [Excerpts only attached.]
  - F. 45 FR 51547 (AUGUST 4, 1980). Notice of suspension and statement of policy regarding effect on State programs. [Excerpts only attached.]
  - G. 47 FR 25278 (JUNE 10, 1982). Proposed rules. [Excerpts only attached.]



- H. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. [Excerpts only attached.]
- I. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 22 ERC 1557, Mem op (D DC March 22, 1985).
- J. 51 FR 41952 (NOVEMBER 20, 1986). Final rule; suspension.
- K. 52 FR 2421 (JANUARY 22, 1987). Notice of intent to prepare an environmental impact statement (EIS) and a preliminary regulatory impact analysis (RIA).
- L. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules.
- M. 54 FR 989 (JANUARY 11, 1989). Notice.
- N. 54 FR 4837 (JANUARY 31, 1989). Notice of public hearings.
- O. 54 FR 9847 (MARCH 8, 1989). Notice of reopening of public comment period.
- P. 54 FR 30557 (JULY 21, 1989). Withdrawal of proposed rule.
- Q. DASET MINING CORP. v COMMONWEALTH OF PENN., DEPT OF ENVIRONMENTAL RESOURCES (DER), 1981 EHB 109 (1981).
- R. WILLOWBROOK MINING CO. v COMMONWEALTH OF PENN., DEPT OF ENVIRONMENTAL RESOURCES, 92 Pa Commw 163, 499 A 2d 2 (Pa Commw Ct 1985).
- S. COGAR et al. v FAERBER AND SPRING RIDGE COAL CO., 371 SE 2d 321 (W Va 1988).
- T. COGAR et al. v SOMMERVILLE; SPRING RIDGE COAL CO., INC.; AND PARDEE & CURTIN LUMBER CO., 379 SE 2d 764 (W Va March, 1989).
- U. EVANGELINOS v DIV. OF RECLAMATION, Case No. 88-B-12, 1989 Ohio App LEXIS 3618 (Ohio Ct App September, 1989).
- V. RUSSELL v ISLAND CREEK COAL CO. AND FAERBER, No. 19104, 1989 W Va LEXIS 986 (W Va December, 1989); rehearing refused February, 1990.
- W. Illinois: 54 FR 118 (January 4, 1989).
- X. Kansas: 53 FR 39467 (October 7, 1988).
- Y. Ohio: 53 FR 51543 (December 22, 1988).
- Z. Oklahoma: 54 FR 37454 (September 11, 1989).
- AA. Pennsylvania: 54 FR 29704 (July 14, 1989).
- BB. Tennessee: 49 FR 38874 (October 1, 1984).
- CC. Texas: 45 FR 78635 (November 26, 1980).
- DD. TABLE OF REGULATIONS