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## From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields

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# FROM PICK AND SHOVEL TO MOUNTAINTOP REMOVAL: ENVIRONMENTAL INJUSTICE IN THE APPALACHIAN COALFIELDS

BY  
PATRICK C. MCGINLEY\*

*In this Essay, Professor McGinley examines a century of conflicts between the coal mining industry and the people of the “billion dollar coalfield” communities of southern West Virginia whose labors provided fuel for the industrial revolution, two world wars, and the energy demands of the nation. The Essay identifies a troubling paradox: Highly efficient new mining technologies, including so-called “mountaintop removal” strip mining, have resulted in the loss of tens of thousands of well paying jobs while coal production has reached record levels and many coalfield communities remain mired in economic stagnation and poverty.*

*The Essay identifies provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) that require commercial, residential, and industrial development as a prerequisite to permitting the radical alteration of the environment occasioned by mountaintop removal mining. Professor McGinley makes the case that government regulators missed the opportunity to bring permanent economic benefits to coalfield communities by refusing to enforce this economic development mandate of SMCRA. Instead, the Essay contends, regulators often choose to align themselves with coal industry interests while turning a blind eye to the adverse environmental impacts and property damage visited by mountaintop removal and other modern mining methods on those who still live in the old company towns or “coal camps” of the region.*

*The Essay exposes the plan and motive of some coal companies to target for extinction some communities located near modern large-scale mining operations. The plan was simple—conduct high intensity mining operations in close proximity to remote communities. When the*

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\* © Patrick C. McGinley, 2004. Professor of Law, West Virginia University College of Law, 1975–2004. J.D., Duke University School of Law; A.B., Dickinson College. The author served as plaintiffs’ counsel in the *Bragg v. Robertson* and *Moore v. Hobet Mining, Inc.* cases discussed in the Essay, and regularly represents coalfield plaintiffs in litigation against state regulatory agencies and coal companies. The author expresses his appreciation to West Virginia University College of Law’s Arthur Hodges Fund for the assistance given to support the completion of this Essay.

*nuisance conditions created by the mining became difficult to bear, the belief was that those affected would choose to sell out to the coal companies and move away from communities that had been family homeplaces for decades. In at least one area, a major national coal company conditioned its purchase of such homes on the sellers' agreement to move away and never return to the area for the rest of their lives.*

*The Essay concludes by identifying a movement among some influential West Virginia interests "to let natural selection play out." In synch with the coal companies' desire to eliminate rural coalfield communities near mountaintop removal mines, this Darwinian view envisions nonviable communities becoming "ghost towns." The conclusion observes that the century-long struggle of coalfield communities for environmental, economic, and social justice is likely to continue and that those who would destroy these communities in the name of eliminating "rural sprawl" or maximizing profits may be surprised at their resilience. Steeled by a century of oppression, the Essay suggests that the people of coalfield communities are likely to fight back.*

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## I. INTRODUCTION

Travelers entering Williamson, the county seat of Mingo County, West Virginia, pass a faded roadsign that reads: "Welcome to the Billion Dollar Coalfields." The irony of the greeting is hard to escape. Driving into the town which lies in the heart of central Appalachia's coal-producing region, one sees boarded-up stores and vacant and dilapidated buildings. Discouraging economic data and high unemployment in Mingo and other coal counties of southern West Virginia confirm what the eye sees: The billions of dollars of coal reserves mined from the region have only marginally benefited local people. After a century of mining in the "billion dollar coalfields," local

communities lack funds to upgrade aging schools; tens of thousands live below the federal "poverty line"; and public services such as fire, police, sewage treatment, and libraries struggle to survive on "bare-bones" budgets.

While the economic stagnation of coalfield communities continues, highly efficient coal mines have revolutionized coal mining in Appalachia. Coal production largely from giant "mountaintop removal"<sup>1</sup> strip mines and highly mechanized underground "longwall"<sup>2</sup> mines approaches record levels. How does one account for the pervasive dismal economic condition in a region which could aptly be called the "Saudi Arabia of coal"?

The answer lies in an understanding of the various forces that have shaped the history of the region. For better or worse, those forces—the coal industry and those who directly profit from mining, state and local politicians, and the United Mine Workers of America (UMWA)—led the coalfields to its present condition. Those same players continue to exert enormous influence, which promises to extend the economic *status quo*. The paucity of attention given by historians and legal scholars to the legal regime that provided the framework for economic development in the "billion dollar coalfields" provided the impetus for this Essay. The hope is that the following will initiate a scholarly discussion of environmental, economic, and social justice in a region that for a century has given much more to the nation than its citizens have received in return.

This Essay begins in Section II with a presentation of the historical context in which today's continuing environmental injustice in the coalfields developed. Next, the Essay turns in Section III to a brief discussion of the emergence of the Surface Mining Control and Reclamation Act (SMCRA),<sup>3</sup> describing its theoretical promise to protect the coalfield communities, and setting the stage for the breaking of that promise in application. Section IV presents a description of the lawlessness in southern West Virginia with regard to the application of SMCRA to mountaintop removal. Section V, truly the heart of the Essay, describes the coal companies' calculated efforts to remove not only mountain tops, but whole communities. Finally, the Essay concludes that regulatory failures and corporate plans to maximize profits by eliminating coalfield communities have combined to continue the historic deprivation of environmental, economic, and social justice long experienced by coalfield citizens.

## II. COAL MINING AND APPALACHIAN COMMUNITIES: A HISTORY AS DARK AS THE MINES THEMSELVES

Historian Ronald Eller describes the solitude of the mountains of southern Appalachia in the last decade of the nineteenth century:

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<sup>1</sup> In "mountaintop removal" strip mining, coal companies blast the tops off mountains to reveal the coal seams beneath them. Mining wastes are then deposited in nearby valleys, burying headwater streams. See *infra* notes 182–86 and accompanying text.

<sup>2</sup> See *infra* notes 179–80 for a discussion of this mining technique.

<sup>3</sup> Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201–1202, 1211, 1231–1240a, 1242–1243, 1251–1279, 1281, 1291–1309b, 1311–1316, 1321–1328 (2000).

Great forests of oak, ash, and poplar, covered the hillsides with a rich blanket of deep hues, and clear, sparkling streams rushed along the valley floors. No railroad had yet penetrated the hollows. The mountain people lived in small settlements scattered here and there in the valleys and coves. Life on the whole was simple, quiet, and devoted chiefly to agricultural pursuits.<sup>4</sup>

Thirty years later a “new industrial order” had arisen in Appalachia.<sup>5</sup> People of the region left their farms, moving to communities with names like Blair, Sharples, Five Block, and Monclo—people there call them “company towns” or “coal camps.”<sup>6</sup> Countless similar small coal camps were built during the early decades of the twentieth century by coal operators to house families of men who worked in nearby underground mines.<sup>7</sup>

Professor Eller describes in graphic detail the transformation of Appalachian communities that had occurred by 1920:

[E]vidence of change was to be found on every hand. Coal-mining village after coal-mining village dotted the hollows along every creek and stream. The weathered houses of those who worked in the mines lined the creeks and steep slopes, and the black holes themselves gaped from the hillsides like great open wounds. Mine tipples, headhouses, and other buildings straddled the slopes of

<sup>4</sup> RONALD D. ELLER, *MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION OF THE APPALACHIAN SOUTH, 1880–1930*, at 161 (1982).

<sup>5</sup> *Id.*

<sup>6</sup> Blair, Sharples, Five Block, and Monclo are located in close proximity to each other along West Virginia Route 17 in Logan County. For a century, these and other former Appalachian coal camps have experienced the periodic boom and bust impacts of the coal-based economy. In the last decade, these communities and other coal towns have been pushed to the brink of extinction as their residents have struggled to survive in the midst of large-scale mountaintop removal coal strip mining. Even as mountaintop removal mining has increased coal production and enabled coal companies to compete with coal mined in the Great Plains, the residents of these communities have suffered a broad range of adverse social, economic, and environmental impacts while sharing few of the benefits. *See* Sections IV–V, *infra*.

<sup>7</sup> The “outside world” has been largely ignorant of the history of the coal mining communities of the region. Perhaps the broadest exposure to the meaning of life in a coal camp came from *Sixteen Tons*, a popular song of the 1950s. Tennessee Ernie Ford, *Sixteen Tons, on 16 TONS* (Capitol Records 1956). The lyrics of the song were written by Merle Travis and popularized by singer “Tennessee Ernie” Ford. *SIXTEEN TONS—THE STORY BEHIND THE LEGEND* (2001), available at <http://www.ernieford.com/Sixteen%20Tons.htm>. The song became the fastest selling single in Capitol Records Company’s history. *Id.* It tells of the difficult lives of coal miners who lived in company towns. The lyrics include:

I was born one mornin' and the sun didn't shine  
I picked up my shovel and I walked to the mine  
I loaded sixteen tons of number nine coal  
And the straw boss said, “Well bless my soul!  
You loaded sixteen tons and what do you get?  
Another day older and deeper in debt.”  
St. Peter, don't you call me cause I can't go  
I owe my soul to the company store.

*Id.* For more on the history of this classic song, visit <http://www.ernieford.com/Sixteen%20Tons.htm>.

the mountains. Railroads sent their tracks in all directions, and long lines of coal cars sat on the sidings and disappeared around the curves of the hills.<sup>8</sup>

Professor Eller also describes how coal mining altered the Appalachian landscape:

The once majestic earth was scarred and ugly, and the streams ran brown with garbage and acid runoff from the mines. A black dust covered everything. Huge mounds of coal and "gob" piles of discarded mine waste lay about. The peaceful quiet of three decades before had been replaced by a cacophony of voices and industrial sounds.<sup>9</sup>

"Civilization" writes Eller, "had come into the mountains and had caught up the mountain people in the wellspring of progress."<sup>10</sup>

The coal camp symbolized this new Appalachian industrial order.<sup>11</sup> Life and work in the coal camps in the early decades of the twentieth century were violent, oppressive, and exploitive.<sup>12</sup> The company town lay at the heart of an authoritative system.<sup>13</sup> Historian David Alan Corbin observed:

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<sup>8</sup> ELLER, *supra* note 4, at 161–62.

<sup>9</sup> *Id.* at 162.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Professor Eller dedicates an entire chapter of his book to an examination of life in coal company towns. *Id.* at 161–98. He describes the context in which coal camp residents lived and worked:

[C]ompany town[s] became for thousands of mountaineers the dominant institution of community life—a vital social center around which the miners' world revolved. Not only was the coal camp the site of one's work, the source of one's income, and the location of one's residence, but for many it also provided an introduction to organized community life and the setting in which new attitudes, values, and social institutions evolved. Completely owned and tightly dominated by the coal companies, the mining towns also reflected the underlying transition in land ownership and social power which had swept the region with the coming of the industrial age.

*Id.* at 162. U.S. Senate Reports and Bureau of the Census information indicate that at the zenith of the early twentieth century coal boom, almost four-fifths of southern West Virginia mine workers and more than two-thirds of mining families in southwestern Virginia and eastern Kentucky lived in nearly 500 company towns. *Id.* at 162–63. In contrast, less than 100 independent incorporated towns existed in the same region. *Id.* at 163.

<sup>12</sup> THE WEST VIRGINIA MINE WARS: AN ANTHOLOGY 1 (David Alan Corbin ed., 1990) [hereinafter W. VA. MINE WARS]. Health conditions were often deplorable. Professor Eller describes what families faced:

With the movement into crowded and unsanitary coal camps, mountaineers increasingly fell victim to epidemics of smallpox, typhoid fever and intestinal diseases. Cases of tuberculosis and venereal disease, which were rare in preindustrial days, rose sharply in the congested mining towns, and many children suffered from pellagra and other dietary deficiencies.

ELLER, *supra* note 4, at 233.

<sup>13</sup> W. VA. MINE WARS, *supra* note 12, at 1. See generally DAVID ALAN CORBIN, LIFE, WORK, AND REBELLION IN THE COALFIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880–1922, at 61–86 (1981) (describing the racial unity in West Virginia coal camps that resulted from the common

Ownership of the land and resources gave coal companies enormous social control over the miners. "You didn't even own your own soul in those damnable places," recalled one elderly miner. "The company owned everything, the houses, the schools, churches, the stores—everything."

The coal company town was a complete system. In addition to owning and controlling all of the institutions in the town, coal company rule in southern West Virginia included the company doctor who delivered the babies, the mines in which children went to work, and the cemeteries where they were eventually buried.

....  
It was a complete and ruthless rule.<sup>14</sup>

Among the insults stemming from King Coal's tyranny were the environmental conditions in the coal camps. As the coal companies owned the towns, they were responsible for the existence—or lack thereof—of public utilities such as sewer systems.<sup>15</sup> However, only two percent of coal towns possessed such a system; the vast majority of the towns simply dumped their waste into nearby creeks.<sup>16</sup> The combination of this discharge of raw sewage with acid mine runoff completely eliminated all animal life in many streams.<sup>17</sup> The impact of water pollution on human health was also evident. Hot summers caused the polluted waters to emit an unbearable stench, and diseases such as typhoid ran rampant among the children of the coal camps.<sup>18</sup> The coal companies' response to the situation then is much the same as it is now: They "argu[ed] that coal could not be mined economically if they concerned themselves with ecology."<sup>19</sup>

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discontent felt by all miners); ELLER, *supra* note 4, at 161–98 (describing coal camp life in great detail); CRANDALL A. SHIFFLETT, *COAL TOWNS: LIFE, WORK, AND CULTURE IN COMPANY TOWNS OF SOUTHERN APPALACHIA, 1880–1960* (1991) (asserting that coal camp life was better than the life residents had known before they came to the region); Ronald L. Lewis, *Beyond Isolation and Homogeneity: Diversity and the History of Appalachia*, in *BACKTALK FROM APPALACHIA: CONFRONTING STEREOTYPES* 21, 34 (Dwight B. Billings et al. eds., 1999) ("[T]here were great differences among company towns, ranging from crude coal camps erected on 'gob piles' to model towns with all the modern conveniences and a benevolent owner-operator. All of them, however, were privately owned entities, not sovereign political jurisdictions.").

<sup>14</sup> W. VA. MINE WARS, *supra* note 12, at 1. In the coal camps, "company rule included the company police in the form of mine guards, who would toss the miners in jail when they got disruptive, or administer the company beating when they attempted to unionize." *Id.*

<sup>15</sup> WINTHROP D. LANE, *THE DENIAL OF CIVIL LIBERTIES IN THE COAL FIELDS* 2 (1924).

<sup>16</sup> ELLER, *supra* note 4, at 184.

<sup>17</sup> *Id.* at 186.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing Jerry Bruce Thomas, *Coal Country: The Rise of the Southern Smokeless Coal Industry and Its Effect on Area Development, 1872–1910* (1971) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill)).



## A. Union Battlefields in Appalachia

### 1. The Mine Wars: 1900–1932

Unionization was central in coal camp residents' struggle against the oppression of the company masters. "[W]hen miners did go on strike for their union," Corbin writes, "they did so not for simple wage increases, but for their dignity and freedom."<sup>20</sup> From the last decade of the nineteenth century until the beginning of the New Deal Administration of President Franklin Delano Roosevelt, miners battled nonunion coal operators who controlled the southern West Virginia coalfields with an iron fist. Actual warfare between coal company forces and miners broke out there during the decade from 1912 to 1921.<sup>21</sup>

These West Virginia "mine wars" involved skirmishes between private armies. On one side were the hired guns of the coal operators and on the other stood thousands of armed miners rebelling against coal company rule of the nonunion coal camps.<sup>22</sup> On several occasions martial law was declared and the state militia was summoned by West Virginia Governors whose sympathies lay with coal companies rather than the miners. Miners were arrested and tried by military tribunals.<sup>23</sup>

Once, in September 1921, President Warren G. Harding sent federal troops to intervene in the conflict.<sup>24</sup> When federal troops arrived, the miners' "army" dispersed, but an unarmed political struggle continued as miners sought to win the right to unionize.<sup>25</sup> Ten years later, Russell Briney, reporting for the *Courier-Journal* in Louisville, Kentucky, observed that the coal industry's domination and oppression of Kentucky miners and their communities had not abated:

In 1931, for all practical purposes, the only law for the miners . . . was the mining companies' law as interpreted by deputies sheriff selected and paid directly by the companies . . . . The system was simply law enforcement stripped of any pretense of impartiality, and it is difficult to imagine a more

<sup>20</sup> *Id.*

<sup>21</sup> See generally W. VA. MINE WARS, *supra* note 12.

<sup>22</sup> *Id.*

<sup>23</sup> Arthur Warner, *Fighting Unionism with Martial Law*, THE NATION, Oct. 12, 1921, at 395, 396. Arthur Warner, writing for *The Nation*, recounted how local newspapers referred to this strife as an "industrial controversy." *Id.* at 395. Warner noted that "the home folks resent the words 'civil war' as describing the situation, but they seem to forget that the phrase is that of their own Governor, who in proclaiming martial law in Mingo County on May 19 [1921], said that 'a state of war, insurrection, and riot and bloodshed is and has been for some time in existence' . . ." *Id.*

<sup>24</sup> *The War in West Virginia*, INDEPENDENT, Sept. 17, 1921, reprinted in W. VA. MINE WARS, *supra* note 12, at 106.

<sup>25</sup> James M. Cain, writing for *The Atlantic Monthly*, reported that at the end of the final Mine War in the fall of 1921, "The union faces the most persistent fight against it that it has ever known . . . . The union is literally on the defensive for its very existence." James M. Cain, *The Battle Ground of Coal*, ATLANTIC MONTHLY, Oct. 1922, reprinted in W. VA. MINE WARS, *supra* note 12, at 151, 157.

effective device for promoting violence and engendering resentful hatred among a people bred in the free air of the Kentucky hills.<sup>26</sup>

This decades-long imbalance of power was soon to be readjusted.

By 1930 the Appalachian coal industry “was sliding toward bankruptcy as the national economy caved in on top of an already depressed [coal] market.”<sup>27</sup> Cutthroat competition and “a vicious price-cutting spiral led ever downward until at last, in 1932, at some pits . . . coal was offered for sale at the incredibly low price of ten cents per ton.”<sup>28</sup> Bank and coal operator bankruptcies swept through the coal fields.<sup>29</sup> Companies, straining to keep their heads above water, first cut miners’ already-low daily wages and then put their pay on a piecework basis.<sup>30</sup> Miners were allowed to stay underground for as long as they wished, resulting in ten- to twelve-hour workdays.<sup>31</sup> Given this economic chaos, it was not surprising that attempts to unionize the coal camps were beaten back. Membership in the UMWA in 1930 had slipped to “a few hundred diehard members in West Virginia, even fewer in Kentucky and Alabama.”<sup>32</sup>

The affects of the Depression, as bad as they were for most American workers, were even more devastating to Appalachian coal miners and their families:

People who have never lived in mining communities cannot comprehend the feeling of captivity and helplessness that lay so heavy in the coal camps through these years. In times of prosperity the miner had been little better than a serf in his masters’ mine, and the Depression was far advanced before union

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<sup>26</sup> HARRY M. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS: A BIOGRAPHY OF A DEPRESSED AREA 195–96* (1962) (quoting Russell Briney of the *Courier-Journal* (Louisville, Kentucky)).

<sup>27</sup> JOHN ALEXANDER WILLIAMS, *APPALACHIA: A HISTORY* 272 (2002).

<sup>28</sup> CAUDILL, *supra* note 26, at 169. Harry Caudill is quoted extensively in this Essay. His best selling *Night Comes to the Cumberlands: A Biography of a Depressed Area* exposed for the first time to a national audience the impoverished conditions of coalfield communities in his native eastern Kentucky. Caudill’s work and Michael Harrington’s *The Other America* are said to have provided the intellectual ammunition used in making the case for the Kennedy and Johnson Administrations’ “War on Poverty,” which has channeled billions of dollars to Appalachia in an effort to alleviate the impoverished conditions there and promote sustainable development. While Caudill is lauded by many, some historians properly criticize him for a condescending attitude toward Appalachia’s mountain culture and his factually unsupported theory of genetic deficiency of the region’s inhabitants as a source of their plight. See, e.g., WILLIAMS, *supra* note 27, at 333–34 (criticizing Caudill for “tending to define [Appalachia] and its people negatively,” though with the “best of intentions”); RONALD ELLER, *HARRY CAUDILL AND THE BURDEN OF MOUNTAIN LIBERALISM* (1983), available at <http://www.uky.edu/RGS/AppalCenter/eller1.htm> (criticizing aspects of Caudill’s work, and speculating that the condescension stemmed from Caudill’s status as a middle class mountain resident, and an inherent tension between such residents and “the rest of the mountain population”).

<sup>29</sup> *Id.* at 171–74.

<sup>30</sup> *Id.* at 170.

<sup>31</sup> *Id.* at 170–71.

<sup>32</sup> WILLIAMS, *supra* note 27, at 272.

membership and the apparent sympathy of a great national administration brought relief to a situation which by then had become highly explosive.<sup>33</sup>

## 2. *The New Deal and the Rise of the UMWA: 1932-1941*

When President Franklin Roosevelt was inaugurated in March 1933 to serve his first term, the battle-fatigued UMWA was invigorated. John L. Lewis, the UMWA's legendary leader, "owed his opportunity during the 1930s to friendly federal legislation sponsored by Roosevelt and his liberal allies."<sup>34</sup> Union organizers told miners: "The President wants you to join the union."<sup>35</sup>

Within a few months after the union-friendly Roosevelt Administration assumed office, the UMWA held a massive union meeting in Charleston, West Virginia's capital. More than 2,500 delegates showed up in what the *UMW Journal* characterized as "the very citadel of the non-union bituminous coal industry."<sup>36</sup> It was reported that within the short span of two months, the union had established 728 local union offices in four southern states "with members in virtually every non-union coal camp in this territory."<sup>37</sup> Enactment of the National Labor Relations Act<sup>38</sup> in 1935 facilitated unionization of Appalachian coal mines.<sup>39</sup>

The coming of the New Deal did not immediately end coalfield violence nor the terrible poverty of the coal camps. Labor unrest and strikes continued to pit miners against nonunion coal operators during the 1930s. The combined impacts of the Great Depression and accelerated union organizing insured that coalfield communities would continue as a battleground of labor and industry.

Unionization during the Depression came to the coal camps in diverse ways. Some coal operators gave in quickly, while others "resolved to fight the menace so long as they had a shot to fire."<sup>40</sup> Appalachian historian and lawyer Harry Caudill captured the attitude of those coal operators who swam against the rising UMWA tide in the 1930s:

[T]hey proceeded step by step along the road to intimidation and coercion. Miners suspected of joining the union, harboring its agents or spreading its propaganda were summarily ordered out of company houses and off company property. The detailed leases covering the camp residences, as interpreted by

<sup>33</sup> CAUDILL, *supra* note 26, at 174-75.

<sup>34</sup> WILLIAMS, *supra* note 27, at 279.

<sup>35</sup> *Id.*

<sup>36</sup> *Historic Convention Held*, *UMW JOURNAL*, Aug. 1, 1922, *reprinted in* W. VA. MINE WARS, *supra* note 12, at 163.

<sup>37</sup> *Id.* The *UMW Journal* reported: "Among those present at the convention were veterans of the 1921 pitched battle in Logan, Mingo and 'Bloody McDowell' counties in this state. Many who took part in the 'armed march' . . . notified Mine Workers' officers that the hitherto solid non-union strongholds were practically 100 per cent union." *Id.*

<sup>38</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000).

<sup>39</sup> *See id.* § 157 (guaranteeing employees "the right . . . to form, join, or assist labor organizations").

<sup>40</sup> CAUDILL, *supra* note 26, at 195.

the docile courts, authorized such summary evictions. Many unfortunate coal diggers found their possessions and families thrust out of doors when they were practically without funds and with no place to go. If another miner took such a dangerous family into his own house for even the shortest period he risked the same fate.<sup>41</sup>

Company-town owners contradicted these reports. One operator testified before a federal commission charged with investigating coalfield labor strife that owners of company coal camps were “considerably more tolerant and considerably slower . . . than the dictates of justice or as humanity requires. . . . In all cases, regard has been paid to the health and comfort of those persons whom it was found necessary to evict. . . . Evictions have universally been carried out in a humane manner.”<sup>42</sup>

Other evidence calls into question operators’ definition of “justice” and “humane.” David Corbin reports that notice rarely preceded evictions.<sup>43</sup> Rather, companies routinely dispatched “mine guards” to a miner’s home to dump him, his family, and furniture onto the company-owned street.<sup>44</sup> Professor Corbin recounts an eviction during an early effort to unionize the coal camps along Cabin and Paint Creeks in Kanawha County, West Virginia:

[M]ine guards arrived in the early morning and threw breakfasts out with the furniture. During the process the mine guards destroyed over \$40,000 worth of furniture. In the town of Banner, the mine guards came to the house of Tony

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<sup>41</sup> *Id.* When a miner moved into a coal camp house he was required to sign a housing contract, with which the company intended to create a “master and servant” rather than a “landlord and tenant” relationship. RICHARD D. LUNT, *LAW & ORDER VS THE MINERS: WV 1906–1933*, at 100 (1992). The coal company could evict a miner at any time. *See* CORBIN, *supra* note 13, at 9 (describing the coal companies’ practice of evicting miners who made the mistake of allowing union organizers to stay with them); LANE, *supra* note 15, at 5–9 (same). There is only one reported West Virginia case in which a miner challenged his family’s eviction from a coal camp house after he was discharged from his job for participating in a labor strike. *Angel v. Black Band Consol. Coal Co.*, 122 S.E. 274 (W. Va. 1924). The case provides an example of coal company policy toward occupants of company town dwellings. The company took the position that the miner was merely an “at will” employee and could be evicted without notice. *Id.* at 278. The court held that “whether [the miner] was a trespasser, a tenant at will or a tenant at sufferance” was “unimportant.” *Id.* at 277. Whatever rights the miner had to the dwelling were terminated when he was notified to vacate on October 1, 1922, and when company guards evicted him, “placing his household goods out in the open about fifty feet distant from the dwelling house,” they were within their legal rights. *Id.* at 275, 277. “The tenancy being terminated, the company had the right to re-enter the premises and take possession, without legal process, provided it did so peaceably and without violence or breach of the peace.” *Id.* at 278. The case is extraordinary in one sense: The miner plaintiff had the chutzpah to find his way down the hollow to the state capital to seek legal counsel and then institute a suit in a hostile forum against the predominant power in the state. One can only imagine how difficult that struggle must have been. Practically speaking, the towns were run by the company—there was no local magistrate to go to challenge an eviction. Moreover, the county circuit courts in the billion dollar coalfields generally were presided over by judges hand-picked by the local power structure—coal companies, banks, and railroads.

<sup>42</sup> CORBIN, *supra* note 13, at 9 (quoting BITUMINOUS OPERATORS’ SPECIAL COMMITTEE, *THE COMPANY TOWN: REPORT SUBMITTED TO THE U.S. COAL COMMISSION 36–37* (1923)).

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Id.*

Seviller, whose wife was pregnant. The head of the squadron shouted, "Get out!" Mrs. Seviller, in bed and in labor when ordered out, responded, "My God! Can't you see I am sick; just let me stay here until my baby is born." The guard leader replied, "I don't give a damn, get out or I'll shoot you out." Mrs. Seviller gave birth to her baby two hours later, in a tent furnished by the UMWA.<sup>45</sup>

Coal Company reaction to union organizing was not limited to "legal" tactics like eviction.<sup>46</sup> According to Harry Caudill, "Suspected organizers and miners who were believed to have joined the union were secretly slain and their bodies cast out, gangster-fashion, on creek banks or in alleys."<sup>47</sup> Caudill adds, with more than a small measure of irony, that "[t]he company-controlled sheriffs and state patrolmen were baffled by these mysterious happenings and found no clues as to the identity of their perpetrators."<sup>48</sup> However, as unionization rapidly proceeded in the 1930s, miners felt empowered.<sup>49</sup> "[T]he swarms of deputies-sheriff, state highway patrolmen, private detectives and industrial policemen felt control of the situation slipping through their fingers."<sup>50</sup>

### 3. *The Second World War: 1940-1945*

By 1940, UMWA mines accounted for ninety percent of domestic coal production.<sup>51</sup> The federal government nationalized and ran coal mines during World War II; government negotiations with legendary UMWA President John L. Lewis resulted in generous miners' wages.<sup>52</sup> Caudill described the new coal boom sparked by the war:

On the whole the industry awakened with startling speed and performed wartime production miracles. In a market in which heavy machinery of all

<sup>45</sup> *Id.*

<sup>46</sup> This is not to suggest that miners and union organizers eschewed law breaking and violence. The historical record of the Appalachian coal fields is replete with evidence that violence was often used by both labor and management in the first forty years of the twentieth century.

<sup>47</sup> CAUDILL, *supra* note 26, at 195.

<sup>48</sup> *Id.*

<sup>49</sup> Professor John Williams views unionization and union organizers as crucial to lifting the yoke of oppression that hung heavily over coal camps. He notes:

The union organizers, venturing into the coal camps often at great personal risk, did not create discontent. They tapped it, gave it voice, and shaped it into goals that related in concrete ways to the miners' working and living conditions. With the union, men felt less alone. Company recognition of the union was an important psychological breach in the isolated and autocratic character of the mining towns.

WILLIAMS, *supra* note 27, at 262-63.

<sup>50</sup> CAUDILL, *supra* note 26, at 197.

<sup>51</sup> Richard A. Couto, *The Memory of Miners and the Conscience of Capital*, in *FIGHTING BACK IN APPALACHIA: TRADITIONS OF RESISTANCE AND CHANGE* 165, 167 (Stephen L. Fisher ed., 1993). Total UMWA membership grew from a few thousand in 1931 to almost 300,000 ten years later. WILLIAMS, *supra* note 27, at 280.

<sup>52</sup> Couto, *supra* note 51, at 167.

kinds was extremely difficult to obtain, in which competition for labor was sometimes almost insane, the coal corporations managed to assemble labor crews and find the essential equipment required . . . . And the creek and hollow mountaineers, and the multitude of one-time miners employed on W.P.A. projects, turned eagerly to their old calling. . . . Empty camps filled again and the ghastly, painted houses swarmed with new brigades of ragged irrepressible children.<sup>53</sup>

Wartime energy demands boosted coal production to new heights. The coal camps had been rejuvenated by 1945, and union miners and their families were enjoying unparalleled freedom and prosperity. These good times would be short-lived.

#### 4. Postwar Economic Decline in the Appalachian Coalfields: 1946–1960

Following the world war, the owners resumed control of the mines.<sup>54</sup> At the end of hostilities there was a glut of coal on the market created by the high consumption needed to satisfy wartime needs and the reduced demands of the peacetime economy.<sup>55</sup> Moreover, coal was beginning to lose its traditional markets. The fuel of choice for railroads and home furnaces turned from coal to oil and natural gas.<sup>56</sup>

A new era of labor-management hostility arose as the coalfield economy declined. The UMWA and the Bituminous Coal Operators' Association (BCOA) finally agreed on contract terms that would revolutionize coalfield labor relations after a long and hostile strike in 1950 and 1951.<sup>57</sup> In this rapprochement, operators agreed to increased wages and benefits while the union did not object to mechanization of the mines.<sup>58</sup> John L. Lewis led the union team negotiating a deal whereby they traded mine mechanization for "high wages and a health and welfare fund that promised comfortable retirements and good medical care for both retirees and active miners."<sup>59</sup>

Lewis and national UMWA leaders expected job losses due to mechanization to increase slowly but steadily.<sup>60</sup> These optimistic expectations were overcome by the reality of a quick and significant increase in coal production and a concomitant rapid and enormous loss of

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<sup>53</sup> CAUDILL, *supra* note 26, at 220–21.

<sup>54</sup> Couto, *supra* note 51, at 167.

<sup>55</sup> CAUDILL, *supra* note 26, at 247.

<sup>56</sup> *Id.*; Couto, *supra* note 51, at 168.

<sup>57</sup> WILLIAMS, *supra* note 27, at 318. BCOA was a trade association whose membership included almost all of the major coal operators with operations east of the Mississippi River. See Couto, *supra* note 51, at 168 (describing the formation of BCOA).

<sup>58</sup> WILLIAMS, *supra* note 27, at 318; Couto, *supra* note 51, at 168–69.

<sup>59</sup> WILLIAMS, *supra* note 27, at 318. Richard Couto notes that "Observers at the time described the accord as consistent with the industrial finance theory of bargaining. It established and imposed a uniformly high wage scale that both required capital investment in mechanization and protected that investment. Mechanization encouraged higher wage rates and higher wage rates encouraged still more mechanization." Couto, *supra* note 51, at 169.

<sup>60</sup> WILLIAMS, *supra* note 27, at 318.

miners' jobs.<sup>61</sup> Coal production per man-day increased from 5.57 tons in 1945 to 10.05 tons in 1957.<sup>62</sup> In 1948, 117,104 miners were at work in West Virginia.<sup>63</sup> In 1957, only 58,732 miners had jobs, and by 1961 employment of miners had shrunk to only 42,557 in West Virginia and less than 200,000 nationwide.<sup>64</sup>

### *B. The Coal Camps After World War II*

The discussion above addresses labor management relations and the Appalachian coalfield economy in the decade and a half after the end of World War II. But what of the company camps of Central Appalachia? Given the history of exploitation, it is not surprising that the corporate owners of the camps, either coal companies or successor land holding companies, cynically continued to reap profit from those who remained.

As the 1960s began, a combination of coal industry consolidation, a poor coal market, population exodus from coalfield communities, and the attendant collapse of mining employment "made for a severe and chronic economic predicament" for West Virginia's coalfield communities.<sup>65</sup> West Virginia's unemployment rate was the nation's highest, more than triple that of the rest of the nation.<sup>66</sup> As the coal-based economy continued to collapse, tens of thousands left the coalfields in search of work in the industrial plants of the Northeast and the nonunion textile and manufacturing plants of the Sunbelt.<sup>67</sup>

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<sup>61</sup> *Id.*; Couto, *supra* note 51, at 168–69; *see* CAUDILL, *supra* note 26, at 258–64 (describing the mechanization of coal mining). *See generally* KEITH DIX, WHAT'S A COAL MINER TO DO? THE MECHANIZATION OF COAL MINING (1988).

<sup>62</sup> OTIS K. RICE & STEPHEN W. BROWN, WEST VIRGINIA: A HISTORY 280 (2d ed. 1993).

<sup>63</sup> *Id.* In 1910, the industry employed 700,000 coal miners to satisfy the nation's need for coal. CAUDILL, *supra* note 26, at 263. As coal employment collapsed, emigration from southern West Virginia coalfield communities eclipsed the loss of farm population:

Thousands of young men, who normally would have entered the mines, and experienced miners whose jobs vanished, were left without employment. Many of them left for Pittsburgh, Cleveland, Akron, Chicago, Detroit, and other cities. Between 1950 and 1960 the population of West Virginia declined from 2,005,552 to 1,860,421, a loss in excess of seven percent at a time when nearly every other state gained population. More than seventy percent of the loss occurred in the ten leading coal mining counties . . .

RICE & BROWN, *supra* note 62, at 280.

<sup>64</sup> RICE & BROWN, *supra* note 62, at 280; CAUDILL, *supra* note 26, at 263; *see also* JERRY BRUCE THOMAS, AN APPALACHIAN NEW DEAL: WEST VIRGINIA IN THE GREAT DEPRESSION 238 (1998) (noting that mining employment in West Virginia dropped "[f]rom an all time high of 126,669 employees in 1948 . . . to 42,557 by 1961").

<sup>65</sup> THOMAS, *supra* note 64, at 239. Farm population in West Virginia stood at 445,000 at the end of World War II, but by the 1950s it had decreased by 246,000. *Id.* at 238.

<sup>66</sup> *Id.* at 239.

<sup>67</sup> *See* RICE & BROWN, *supra* note 62, at 280 ("Thousands of young men, who normally would have entered the mines . . . left for Pittsburgh, Cleveland, Akron, Chicago, Detroit, and other cities."); WILLIAMS, *supra* note 27, at 394 (describing migration to the Sunbelt).

### 1. *The Coal Bust of the 1960s: New Relationships Between Coal Camp Residents and the Companies*

Unwilling to be stuck with camp houses, commissaries, and other facilities that the newly contracted industry did not need, some camp owners altered the relationship between themselves and the miners living in the company houses.<sup>68</sup> This relationship continued in many instances for decades; even today there are former coal camps where the successors in interest to the first coal company masters collect rents from descendants of early miner occupants.<sup>69</sup>

The rent in most cases was and is consistent with the quality of the premises involved. For example, a 1987 *Charleston Gazette* (the *Gazette*) article related that coal camp houses were being rented then for \$15 per month.<sup>70</sup> While the rental amount seems incredibly low, one must consider that the amount reflects what is said to be the first rule of real estate valuation: location, location, location. Associated Press reporter Jules Loh described the location of the old coal camp in Eureka Hollow:

The springs from Eureka Hollow flow into Elkhorn Creek. The village on its trash-strewn banks at the mouth of the hollow is Eckman. You won't find it on a road map. Eckman consists of a grocery store, filling station and a one-room post office. Wooden planks thrown over a ditch at the uphill edge of town mark the start of the road up Eureka Hollow.

Woebegone wooden houses, many of them falling down, dot the hillsides along the road. Tree limbs, like crutches, prop up porches. Abandoned houses crumble alongside inhabited mobile homes. Coal dust trodden into black gum replaces grass. Red dog, a rust-colored mine waste turned into coarse gravel, paves driveways. Automobile carcasses rot beneath clotheslines burdened with patched jeans and faded shirts.

Roosters peck around lopsided sheds, providing a staccato music. Homemade pinwheels stuck in bare yards offer snatches of joy.<sup>71</sup>

After closure of the mines connected to a company town, the landlord-tenant relationship was most frequently a "month to month" agreement.<sup>72</sup>

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<sup>68</sup> CAUDILL, *supra* note 26, at 263.

<sup>69</sup> See Jules Loh, *The Longstanding Paradox of Eureka Hollow*, CHARLESTON GAZETTE, Jan. 4, 1987, at A4 (noting that in 1987, Eureka Hollow, W. Va. resident Roger Luster rented his home from the successor of the coal company that owns the former coal camp house in which he lives).

<sup>70</sup> *Id.* The article quoted the son of a miner whose family had lived in Eureka Hollow, West Virginia for decades, renting from successor coal companies: "This house of ours is an old coal camp house,' Roger Luster said. 'I pay \$15 a month rent to Pokey Fuel.' That would be the Pocahontas Fuel Co. It has been taken over by Consolidation Coal Co. of Bluefield, about 40 miles away. . . . Roger pays his \$15 rent . . . [i]n cash." *Id.*

<sup>71</sup> *Id.* Loh's description should not be understood as a generalization of the appearance and conditions of former coal camps. Some coal or land holding company lessors conducted periodic maintenance and remodeled and improved the old company houses.

<sup>72</sup> In property law, month to month tenancies give tenants no protection from the whim of the landlord who may at any time raise the rent or abruptly terminate the tenancy at will without cause and evict the occupants of the rented premises. See BLACK'S LAW DICTIONARY



These month to month tenancies in many instances were honored by the coal camp owners for decades. However, as explained below, in the last ten years encroachment of large-scale mountaintop removal and longwall mining operations has often resulted in abrupt termination of these long relationships. With little notice, families whose history in an old coal camp extends back for many decades have been unceremoniously forced to move to make way for mining operations.<sup>73</sup> In some instances, a whole community has been evicted.<sup>74</sup> Within weeks of notice, homes were torched and bulldozed, leaving only empty lots where community and family roots had been planted and nurtured for the better part of a century.<sup>75</sup>

Renting coal camp houses was not the only way owners of coal camps sought profit. In the 1950s many coal companies chose to sell the camp houses to their occupants.<sup>76</sup> Harry Caudill describes the sales “technique” used to persuade coal camp occupants to buy the houses in which they lived:

The first step in their program to “free” the camps lay in the making of blandly optimistic statements to their employees and to the general public. They gave the impression that the company anticipated twenty or thirty years of uninterrupted mining with their employees drawing high wages. No mention was made of mechanization or of reduced payrolls. While no specific promises were made, the miner and his wife were led to believe the inhabitants of the camps could expect continued employment at union-scale wages.<sup>77</sup>

The next step in the operators’ disposition of coal camp houses was the announcement that they were getting out of the real estate business so their

1465–67 (6th ed. 1990) (defining the different types of tenancy and tenants).

<sup>73</sup> See, e.g., Ken Ward Jr., *Scope of Massey Expansion Unclear*, CHARLESTON GAZETTE, Apr. 15, 1993, at 6A [hereinafter *Scope of Massey Expansion Unclear*] (noting an instance where at least four, and as many as eleven, families in a coal camp in Raleigh County, W. Va. were being evicted to make way for a new mining complex). See also *infra* Sections V.B–V.C and accompanying text (discussing current practices of coal companies toward coalfield renters whose homes present an obstacle to modern mountaintop removal and longwall mining operations).

<sup>74</sup> See Rudy Abramson, *New Coal Isn’t Old Coal*, 20 APF REPORTER 1 (2001) (noting that in Dehue, a former mining camp in Logan County, W. Va., 200 families that had rented their camp homes for decades from a land holding company were evicted to make way for a new underground longwall mine), available at <http://www.aliciapatterson.org/APF2001/Abramson/Abramson.html>.

<sup>75</sup> See, e.g., PENNY LOEB, BLAIR (describing the loss of the community of Blair, W. Va.), at <http://www.wvcoalfield.com/newpage2.htm> (last visited Feb. 22, 2004).

<sup>76</sup> CAUDILL, *supra* note 26, at 263. Caudill notes:

Since constructing them more than thirty years before the company had recovered its investments in its houses many times. A house’s floors were worn thin by decades of boots and the bare feet of multitudes of children. Its walls were scarred from the inevitable batterings that gangs of children inflict. Nevertheless such houses carried all the sentimental attachments of home to men and women who had known no other for more than a quarter of a century.

*Id.* at 263–64.

<sup>77</sup> *Id.* at 263.

executives could concentrate on mining.<sup>78</sup> Writing with razor-sharp sarcasm, Caudill describes the “con”:

Besides, said the benevolent bosses, they wanted the miners and their families to enjoy the feeling of independence and self-assurance that comes from home ownership. It was undemocratic, the Big Bosses now declared, for the company to dominate the affairs of the community. A new generation of stockholders and officials wanted the people to live proudly in their own homes and to govern their communities in conformity with the Great American Dream.<sup>79</sup>

The company owners opened up offices for the purpose of facilitating the sale of camp houses.<sup>80</sup> Prices were not exorbitant and occupants were given purchasing priority.<sup>81</sup> Buyers could pay through monthly deductions from their wages.<sup>82</sup>

The timing of these sales programs was excellent—for the company owners. Most sales occurred as the winds of mechanization began to blow through the industry.<sup>83</sup> The timing was not so good for a miner who might find “himself jobless before his home was cleared of debt, though most purchasers pridefully held a deed ‘free and clear of encumbrances’ before the discharge notices were slipped into their pay envelopes.”<sup>84</sup>

Although nearby underground mines closed and production from the remaining deep mining operations continued to decline, if the new home owners could find work in other mines they tried to maintain and improve what they had purchased.<sup>85</sup> Moreover, a critical distinction existed between

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* As Caudill describes it, coal camp residents reacted positively to this message:

The families who lived in the rows of company-owned houses on company-owned streets, who bought their groceries at company-owned stores and endured sickness in company-owned hospitals, felt their imaginations stirred. At war’s end a majority of the miners were close to sixty years of age, but a new generation of younger men had come up among them. Old and young, they concluded that prudence dictated the purchase of a house.

*Id.*

<sup>80</sup> *Id.* at 264.

<sup>81</sup> *Id.* One half of a duplex sold for about \$1,600 and a four-room cottage with front and back porches sold for a similar amount. *Id.* A small lot came with each dwelling. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 265.

<sup>84</sup> *Id.* In essence, Caudill asserts that corporate owners of coal camps conned their employees into buying these houses, knowing that it would not be long before company managers would close nearby mines throwing the new homeowners onto the unemployment roles with little promise of finding jobs at comparable wages nearby. *Id.* at 263–67. A miner who had saved for years and invested this hard earned nest egg would see the value of his investment drastically reduced as there are few buyers interested in purchasing a home in communities where there are few or no jobs to be found. *Id.* If Caudill’s assertion is true, and the historical record supports such a scenario, the cynicism of the corporate managers and their complete disrespect for the human beings whose entire lives had been dedicated to their company and community is stunning indeed.

<sup>85</sup> *Cf. id.* at 263–68 (describing the impact of mechanization of the mines on the miners who had purchased their homes from the coal companies).

coal camp rental properties, whose residents had no incentive to spend their often meager income on property that they were merely renting and houses purchased by camp residents from company owners.<sup>86</sup> Families in the latter category generally invested in the maintenance, repair, rehabilitation, and remodeling of their homes to the extent that their income would enable them to do so.<sup>87</sup> Attorney Gerald Stern described how families worked to improve the camp houses they bought from the company and the investment they made to transform a camp house to a home of their own:

The miners took great pride in turning them into real homes, helping each other, or even paying someone to do the work once they saved enough money. An indoor bathroom, maybe new electrical wiring, electrical baseboard heating, new floors, a new roof, new siding to keep out the cold, maybe a new porch or even a new room. Roland [Staten] and his wife Gladys spent seven years remodeling House No. 20—adding a cesspool, paneling, insulation, siding, a new roof and furnace, and even a garage. This was no coal-camp house anymore.<sup>88</sup>

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<sup>86</sup> See *id.* at 264–65 (contrasting the continued dilapidation of camp homes not sold with the renovations made to those that were sold).

<sup>87</sup> See *id.* at 265 (describing the miners' investment of their life savings in the renovation of their homes).

<sup>88</sup> GERALD M. STERN, *THE BUFFALO CREEK DISASTER: HOW THE SURVIVORS OF ONE OF THE WORST DISASTERS IN COAL-MINING HISTORY BROUGHT SUIT AGAINST THE COAL COMPANY—AND WON* 41–42 (Vintage Books 1977) (1976). Unfortunately, the Staten home and others Stern describes were destroyed in a 1972 flood caused by the collapse of a coal waste impoundment negligently maintained by a subsidiary of then coal industry giant, Pittston Company. See generally *id.* *Charleston Gazette* investigative reporter Paul J. Nyden wrote of the devastation caused by the flood in his unpublished 1974 Columbia University doctoral dissertation entitled *Miners for Democracy: Struggle in the Coalfields*:

As a huge gash opened up in the 50-foot high dam, more than 120 million gallons of water broke loose and smashed into the mountain opposite the dam, back up into the hollow a few hundred feet toward the mines, and then went crashing down the narrow valley which is only between 200 and 500 feet wide.

A wave of black water between 20 and 30 feet high, filled with thousands of tons of sludge and coal waste, poured down over the 16 coal mining towns, moving at about 30 miles per hour. As the flood waters tore little homes and churches from their foundations and wrenched steel rails from wooden railroad ties, it gained tremendously in destructive force. About 45 minutes later, the flood reached the bottom of the hollow, 700 feet below the elevation of the dam which had collapsed.

By 11:00 a.m., the worst flood in West Virginia's history had spent its energy, but not before it had destroyed five towns almost completely and damaged 11 more extensively. One hundred twenty-five people lay dead beneath all the debris and about 4,000 were left homeless. Over 1,100 people were injured or treated for illnesses. Five hundred seven homes were demolished and 936 more were damaged, 273 seriously. Thirty house trailers had been destroyed; 30 business establishments and 600 automobiles had been washed away. People living down the hollow got about ten minutes warning of the approaching flood, but many families living right below the dam had none.

Paul J. Nyden, *Miners for Democracy: Struggle in the Coalfields* (1974) (unpublished Ph.D. dissertation, Columbia University), available at <http://www.wvgazette.com/static/series/buffalocreek/NYDEN.html>. Pittston Coal executives and

In those communities where mining jobs could still be found, miners receiving respectable middle-class wages often built modest new homes so that they could continue to live near relatives in what had been their homeplace for many decades.

Of course, when a camp house was purchased and the family breadwinner lost his mining job and could not find another that paid a living wage, purchasing food and fuel for heating and cooking took precedence over home maintenance and repair. During the 1960s bust, and again in the last decade and a half of the twentieth century, many residents of the former coal camps found it increasingly difficult to maintain their homes as more and more mines closed and mining jobs evaporated.

Thus, to the vicious cycle of coal industry boom and bust—long the dominant impediment to sustained coalfield economic development—was added the albatross of home ownership. Miners who purchased a coal camp house and abruptly found themselves on the unemployment dole without promise of finding work faced the horns of a dilemma. To provide for their families, they would be forced to migrate to another region of the country leaving behind their relatives, lifelong friends, and ancestral homeplace. And, if they decided to leave, it would be difficult to sell their home.<sup>89</sup> If they could find a seller at all, they were likely to sell at a significant loss. If they stayed, there were no jobs and only the largess of government relief programs was available to sustain them.

Faced with such a choice, many unemployed miners chose to seek work in other states, abandoning their homes and the life savings they often represented.<sup>90</sup> Some who left could not establish themselves in other places and returned to their homeplace.<sup>91</sup> Others chose to hang on, hoping against

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lawyers claimed the impoundment collapse was an "Act of God." *Id.* Government investigators found otherwise. Jack McCarthy, *Voices of Buffalo Creek: Families Cannot Forget the Day When Their Worlds Were Turned Upside Down*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Feb. 23, 1997, at 1A ("A federal Bureau of Mines report following the flood said, 'The dams were not designed or engineered on the basis of a thorough knowledge of the engineering properties of coal processing refuse.'"), available at 1997 WL 7087560. For an interesting and informative discussion of the Buffalo Creek disaster including the above excerpt from Dr. Nyden's dissertation, visit <http://www.wvgazette.com/static/series/buffalocreek/index.html>.

<sup>89</sup> Not surprisingly, in areas of high unemployment where the local environment has been degraded by an industry in decline, little or no real estate market exists. It is axiomatic that rock-bottom property values are found after emigration from places like deteriorating inner-city cores and central Appalachian coalfield communities.

<sup>90</sup> Historians and sociologists have extensively studied the migration of coalfield residents triggered by the decline of coal mine employment in the twentieth century. See, e.g., WILLIAMS, *supra* note 27, at 312–26. See generally CHAD BERRY, SOUTHERN MIGRANTS, NORTHERN EXILES (2000) (describing migration from Appalachia during economically challenging times); CARTER GOODRICH ET AL., MIGRATION AND PLANES OF LIVING 1920–1934 (1935) (describing migration trends in the United States during the depression); HARRY K. SCHWARTZKELLER ET AL., MOUNTAIN FAMILIES IN TRANSITION: A CASE STUDY OF APPALACHIAN MIGRATION (1971) (describing the "exodus" of residents from Beech Creek, Ky.).

<sup>91</sup> In 1987, Roger Luster related to an Associated Press reporter his experience of leaving home to seek a job, failure, and his life after returning. Loh, *supra* note 69. Roger and his wife Doris had grown up in Eureka Hollow. *Id.* He was 37 years old when interviewed; Doris was 23. *Id.* They had three children, all under the age of six. *Id.* When he left Eureka Hollow to find a

hope that another coal boom would begin and “the mines” would start hiring again. In the interim, unemployed miners would do whatever it took to survive.<sup>92</sup> Roger Luster, of Eureka Hollow explained the quandary he and thousands of other coal camp families faced as coal mining jobs evaporated:

“It’s rough, buddy. . . . This is home. This is where we were both born and raised. We like it here. Until I can find work, we stay. If the program I’m on runs out, well, then I guess we’ll have to think about moving on. Where to? Where can a man with a family go with no place to set out for and no money to get there? Hard as it is, we want to stay here. This hollow is home.”<sup>93</sup>

Unfortunately, new underground and strip mining technology and other political and economic factors dashed dreams of a new boom and “the mines,” as 1960s coal camp residents knew them, ceased to exist. Professor John Alexander Williams places the hopes of coalfield residents and four decades of reality into perspective:

One measure of the social change induced by these trends was the number of miners in West Virginia: more than 150,000 in 1945, but just over 17,000 in 1999, by which time there were fewer miners in the state than there were nurses or telephone solicitors. WalMart now has more employees in West Virginia than any coal company, although coal industry apologists still insist that “five thousand people working at WalMarts in this state don’t equal 400 coal jobs.”<sup>94</sup>

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job, almost one hundred families lived there; less than two dozen remained when he returned a few years later. *Id.* Roger’s mother still lived in the hollow, cared for by a married daughter. *Id.* The reporter explained Roger’s story:

The gaunt and empty houses on the hillsides are reminders of others who felt they also had no choice but to flee. . . . [Roger] dropped out of school at 16 to find work and wound up making molds in a [sic] Union City, Ind., iron foundry. He had a regular paycheck but also a failed marriage and returned to the hollow broke. He got a job driving a truck and he and Doris Luster married. Profitless mines started closing down around here rapidly in 1982, with the usual domino effect on other businesses. Roger Luster got laid off and hasn’t cashed a paycheck in four years.

*Id.*

<sup>92</sup> Proud, hard working men like Roger Luster of Eureka Hollow, West Virginia were forced to rely on government benefits and programs to see them through. *Id.*

<sup>93</sup> *Id.* (quoting Roger Luster).

<sup>94</sup> WILLIAMS, *supra* note 27 at 345–46 (quoting David Akers, of Matewan, W. Va., quoted in Diana Nelson Jones, *Looking for Life after Coal: Region is Digging for Alternatives to Bring the Abundance Promised by LBJ*, PITTSBURGH POST-GAZETTE, Nov. 28, 2000, at A1). In 1956, 68,318 miners were reported to be working in West Virginia; only four years later, in 1960, mine jobs had declined by almost 20,000 to 48,696. WEST VIRGINIA OFFICE OF MINERS’ HEALTH SAFETY & TRAINING, PRODUCTION OF COAL AND COKE IN WEST VIRGINIA 1863–2002 [hereinafter PRODUCTION OF COAL AND COKE IN WEST VIRGINIA], at <http://www.wvminesafety.org/historicprod.htm> (last visited Jan. 28, 2004). State agency figures show that the number of miners in West Virginia had declined from the 17,000 figure cited by Williams for 1999 to less than 14,500 in 2003. WEST VIRGINIA OFFICE OF MINERS’ HEALTH, SAFETY & TRAINING, 2003 COAL PRODUCTION BY COUNTY [hereinafter 2003 COAL PRODUCTION BY COUNTY], at <http://www.wvminesafety.org/cnty2003.htm> (last updated Feb. 6, 2004).

Michael Harrington's widely acclaimed book, *The Other America*,<sup>95</sup> captured the plight of the urban and rural poor at the beginning of the 1960s. The book was a phenomenon, revealing for the first time to a broad national audience that the nation's post-World War II economic prosperity had not reached many Americans. Harrington observed, "The millions who are poor in the United States tend to become increasingly invisible. Here is a great mass of people, yet it takes an effort of the intellect and will even to see them."<sup>96</sup>

The dire circumstances of many who lived in the coal camps of central Appalachia was not invisible to those who took the time to look. But, as Harrington explained, "looking" took some effort:

Poverty is often off the beaten track. It always has been. The ordinary tourist never left the main highway, and today he rides interstate turnpikes. He does not go into the valleys of Pennsylvania where the towns look like movie sets of Wales in the thirties. He does not see the company houses in rows, the rutted roads (the poor always have bad roads whether they live in the city, in towns, or on farms), and everything is black and dirty. And even if he were to pass through such place by accident, the tourist would not meet the unemployed men in the bar or the women coming home from a runaway sweatshop.<sup>97</sup>

Two years before *The Other America* was published, one important observer did take the time to visit West Virginia's coal camps. Then-Senator John F. Kennedy was shocked by what he saw and learned there during the state's 1960 presidential primary.<sup>98</sup> That primary campaign was crucial to Senator Kennedy's quest for the Democratic Party's nomination and his later election to the presidency.<sup>99</sup> As one West Virginia newspaper observed:

It was important to Kennedy . . . He won the primary, showing that a Catholic could win in a predominantly Protestant state, a key victory in his drive to the nomination and the presidency.

It was important as well because of what he saw, and what the reporters and TV cameramen with him saw, at the home of Burley Luster. Luster was a disabled coal miner with a sickly wife and eight hungry children living in a four-

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<sup>95</sup> MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962).

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> WILLIAMS, *supra* note 27, at 339. Historian John Alexander Williams observes that "Kennedy later identified the West Virginia primary as the most important single milestone on his road to the White House, and the same might be said of its importance in the emergence of Appalachia's crisis as a national issue." *Id.* "Kennedy . . . was touched," wrote Williams, "by what he saw in the state's farming and mining districts, while the television cameras that followed him . . . through the state broadcast haunting images of regional poverty amid national affluence . . ." *Id.*

<sup>99</sup> See RICE & BROWN, *supra* note 62, at 281 ("Political analysts . . . agree[d] that Kennedy's victory in West Virginia was the turning point on his road to the White House. . . . Kennedy needed a victory in West Virginia to demonstrate that a Catholic could win in a strongly Protestant and unionized state . . ."). Kennedy won the 1960 West Virginia primary by a wide margin, garnering sixty percent of the total vote. DEMOCRATIC PRIMARIES, *at* [http://www.jfkin61.com/presidency/democratic\\_primaries.html](http://www.jfkin61.com/presidency/democratic_primaries.html) (last visited Feb. 22, 2004).

room shanty. Kennedy talked with them for 45 minutes and then, shaken, stood on the Luster's sagging front steps and promised, if elected, to press Congress for federal help in Appalachia.

Kennedy's message from Eureka Hollow alerted America to the paradox of wretched poverty in an area teeming with rich resources.<sup>100</sup>

Professor John Alexander Williams relates that "Kennedy and his entourage . . . traveled through West Virginia by bus and car in the early spring, when nature had not yet hidden the abuse of the land by mining . . . . The politicians and reporters following the campaign were less impressed by the state's scenic beauty than by its environmental scars and miserable roads."<sup>101</sup> Despite the relief efforts at the federal level, life was as bleak as ever in the coalfields of Appalachia as the 1960s drew to a close.

## 2. The 1970s Coal Boom

As the decade of the 1970s began, John Denver's song *Take Me Home, Country Roads* portrayed West Virginia as "almost heaven."<sup>102</sup> Denver's song put West Virginia residents in an upbeat mood, coming along "at just about the right time" as "it reflected a growing feeling of satisfaction shared by many, if not most, citizens, a feeling that one of the worst chapters in West Virginia's history was closing at last."<sup>103</sup>

The coalfield economy perked up again at the beginning of the 1970s as the United States attempted to come to grips with an "energy crisis" triggered by price fixing of petroleum supplies by a Middle-Eastern cartel.<sup>104</sup> The cost per barrel of petroleum soared during the 1970s as the Organization of Petroleum Exporting Countries (OPEC) ratcheted up prices in response

<sup>100</sup> Loh, *supra* note 69. Kennedy's promise made from the porch of Burley Luster's Eureka Hollow home came to fruition in the Kennedy and Johnson Administrations' creation of food stamps, the Appalachian Regional Commission, and other federal programs that funneled billions of dollars to the region over the last four decades. See generally WILLIAMS, *supra* note 27, at 340-45 (describing the efforts of the Kennedy and Johnson Administrations to push legislation aiding Appalachia through Congress).

<sup>101</sup> WILLIAMS, *supra* note 27, at 339-40.

<sup>102</sup> John Denver, *Take Me Home, Country Roads*, on POEMS, PRAYERS, AND PROMISES (RCA Records 1971).

<sup>103</sup> JOHN ALEXANDER WILLIAMS, *WEST VIRGINIA: A HISTORY 187-88* (2d ed. 2001). Professor Williams suggests that "[t]his feeling had a substantial basis in fact, for in the beginning of the 1970s there was an abundance of tangible evidence that things were not as bad as they had been. Measurements that had once inspired gloomy prognoses now provided statistical glimmers of hope." *Id.* at 188. Even West Virginia's coalfield counties were seeing a bit of light at the end of the tunnel as the coal market stood at the threshold of a new boom era. *Id.*

<sup>104</sup> See generally DAVID YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 607-09 (1991) (discussing the energy crises and oil embargo). The cartel, the Organization of Petroleum Exporting Countries (OPEC), acted in the midst of the so-called "Yom Kippur War," in which Egypt launched a surprise attack on Israeli forces occupying the Gaza Strip and the Sinai Peninsula. *Id.* at 600-03. The price of gasoline at American gas stations rose 40% within months. *Id.* at 616; cf. Abramson, *supra* note 74 ("The [oil] crises fomented an extraordinary burst of national resolve, and with expert assurances that America had enough coal to last into the middle of the next millennium, energy independence became a national battle cry. . . . OPEC had stepped on the tail of a dragon and the roar was music in the coal fields.").

to the Yom Kippur War and the closing of the Iranian oil fields after the Shah of Iran was overthrown in a 1978 Islamist coup.<sup>105</sup> The U.S. economy reeled in the 1970s from the impact of the abrupt skyrocketing of energy prices.<sup>106</sup> The nation's gross domestic product fell by 6% and unemployment doubled to 9%.<sup>107</sup>

In the former company towns of southern West Virginia and other Appalachian states, significant numbers of job postings for coal mines appeared for the first time in decades as electric energy producers shifted from petroleum to a more reliable and less costly product.<sup>108</sup> In West Virginia alone, more than 17,000 new miners were placed on payrolls during the period between 1973 and 1978.<sup>109</sup>

Freelance journalist Rudy Abramson capsulized life in the Appalachian coalfields during the short-lived boom:

During those fabulous days in the mid-seventies, thousands of men who had left the mountains came home from distant cities to dig coal. In West Virginia, Virginia, Kentucky, and Tennessee, small truck mines that had been abandoned for years were reopened. Nearly anybody who had or could borrow money to buy a dump truck and a road grader could become a strip mine operator. Bootleggers mined without permits and got good money for gray mixtures of coal, slate, and rock. Spot market prices soared to nearly \$100 a ton and suddenly-rich independent operators lived in opulence, bought luxury cars for their wives, and concluded business deals on the golf course.<sup>110</sup>

Two and a half decades after the boom, Abramson interviewed people who had lived in or near the Boone County, West Virginia, town of Whitesville. They described life there during the boom:

Saturday nights in Whitesville were reminiscent of the good old days after World War II when it was hard to get through the crowds on the sidewalks. Miners' families from communities up and down the Big Coal River—Seth, Comfort, Sylvester, and Sundial—and up from Marfork, High Coal, and Seng Creek Hollows came to shop, take in a movie, and catch up on the news. You could forget finding a parking place in the middle of town.<sup>111</sup>

The good times did not last.

### *3. The Coal Camps: 1980 to Present*

The boom of the 1970s was short. As oil prices increased in the 1980s, and midwestern utility companies turned to cheaper western coal in the

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<sup>105</sup> YERGIN, *supra* note 104, at 607–09, 685.

<sup>106</sup> *Id.* at 635.

<sup>107</sup> *Id.*

<sup>108</sup> PRODUCTION OF COAL AND COKE IN WEST VIRGINIA, *supra* note 94.

<sup>109</sup> *Id.*

<sup>110</sup> Abramson, *supra* note 74.

<sup>111</sup> *Id.*



1990s,<sup>112</sup> the economy of the Appalachian coalfields cycled again into a bust phase.<sup>113</sup> Another factor responsible for this shift was the continuing loss of mining jobs in Appalachian underground mines resulting from even further mechanization.<sup>114</sup> In 1980, coal jobs had dropped by 7,000 from the boom high of almost 63,000 in 1978; five years later only 35,813 miners were working in West Virginia.<sup>115</sup> Ten years later, in 1990, coal mine employment had dipped further to less than 29,000.<sup>116</sup> Today, less than 15,000 miners work in the state.<sup>117</sup>

The recession of the early 1980s further weakened West Virginia's economy. By 1984, West Virginia had the nation's highest unemployment rate and "economic indicators pointed to continuing difficulties, with recovery trailing far behind that of the other states."<sup>118</sup>

Another important factor in the economic plight of West Virginia from the 1980s to the present has been the coal industry's continuing political domination of state government. In 1985, the West Virginia Legislature enacted the "super tax credit," a law supposedly intended to expand economic development in the state.<sup>119</sup> In 1986, the legislature extended the super tax credits, provided that existing state companies increased hiring and modernized their operations.<sup>120</sup> Given the grip of King Coal on state politicians, it is not surprising that coal companies received nearly ninety percent of the total amount of these credits.<sup>121</sup>

This coal lobbyist-generated windfall for industry harmed the state economy rather than promoting economic development. One observer has suggested that:

[I]n their long-range effect, they may have actually compounded the very problem they were supposed to alleviate. The study of the super tax credits in 1990 revealed that the number of jobs in coal mining had fallen by 1,300 in spite of an increase of 13.3 percent in coal production. The adverse effects of the super tax credits on state revenues and on the general economy led in 1990 to

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<sup>112</sup> The Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C.), "reduced the marketability of high-sulfur coal." WILLIAMS, *supra* note 27, at 345. That statute gave utility companies a choice of ways to reduce their emissions of sulfur dioxide: They could either install expensive technology to "scrub" their emissions, or solely burn low-sulfur coal. *Alliance for Clean Coal v. Bayh*, 72 F.3d 556, 558 (7th Cir. 1995). Low-sulfur coal is abundant in both the West and in southern Appalachia. See ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 603 (3d ed. 2000) ("Coal mines in the West and in eastern Kentucky and southern West Virginia where low-sulfur coal is found are thriving due to the shift in demand toward low-sulfur coal."). The difference between coal from the two regions is cost—"western strip mines where giant seams can be strip mined for as little as \$3.50 per ton." Abramson, *supra* note 74.

<sup>113</sup> WILLIAMS, *supra* note 27, at 345; RICE & BROWN, *supra* note 62, at 238.

<sup>114</sup> WILLIAMS, *supra* note 27, at 345.

<sup>115</sup> COAL AND COKE PRODUCTION IN WEST VIRGINIA, *supra* note 94.

<sup>116</sup> *Id.*

<sup>117</sup> 2003 COAL PRODUCTION BY COUNTY, *supra* note 94.

<sup>118</sup> RICE & BROWN, *supra* note 62, at 238.

<sup>119</sup> See *id.* at 288 (discussing the 1985 Business Investment and Jobs Expansion Act).

<sup>120</sup> *Id.* at 289.

<sup>121</sup> *Id.*

legislation to prevent coal companies from using the super tax credits to avoid payments of severance taxes. . . . [T]ax officials estimated that about 20% of the coal mined in the state was produced free of any business taxes.<sup>122</sup>

During his last term in office (1985–1989), Governor Arch A. Moore Jr. led efforts to enrich coal companies at the expense of coalfield citizens. Under the guise of stimulating new coal development, the state's Workers' Compensation Fund (WCF) slashed premiums paid by coal companies by thirty percent and awarded generous refunds to companies.<sup>123</sup> By the beginning of the 1990s, the WCF faced a deficit of \$1.2 billion.<sup>124</sup> Sadly, the super tax credits, the reduction in worker's compensation premiums, and other components of the Moore Administration's economic development program furthered the Governor's corrupt self-enrichment scheme:

In return for tax favors, Moore and others in his administration received hundreds of thousands of dollars from unscrupulous and compliant coal operators and other businessmen for illegal "underground" political activities and for their personal profit. These nefarious dealings [involved] government officials, businessmen, their intermediaries, lobbyists, and others seeking favor . . . .<sup>125</sup>

While West Virginia ended the 1970s in better economic shape than it had been in for decades, state government corruption in the 1980s eliminated the economic gains. Journalist Rudy Abramson interviewed Randy Sprouse who had lived Whitesville, West Virginia during the 1970s boom.<sup>126</sup> Sprouse remembered the prosperity of the moment: "You had two or three clothing stores, shoe stores, furniture stores, a whole bunch of restaurants, taverns, a movie theater, and a bowling alley. . . . Anything you wanted, you could get right there in Whitesville. You didn't have to leave Whitesville for anything."<sup>127</sup> Whitesville today is depressingly different:

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<sup>122</sup> RICE & BROWN, *supra* note 62, at 289.

<sup>123</sup> *Id.* at 288–90; Paul J. Nyden, *The Making of a Deficit: Moore's Actions Put Fund on Brink of Insolvency*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Dec. 21, 1997, at 5A, available at 1997 WL 17424715.

<sup>124</sup> RICE & BROWN, *supra* note 62, at 290.

<sup>125</sup> *Id.* at 290–91. Governor Moore was eventually "convicted of various felonies . . . and sentenced to five years ten months in prison." *Id.* at 291. The felonies for which Governor Moore was convicted included a federal charge of accepting \$500,000 from a coal company operator. Lawyer Disciplinary Bd. v. Moore, 591 S.E.2d 338, 342 (W. Va. 2003). As reported by the federal prosecutor at the hearing at which Moore pleaded guilty, "Mr. Moore . . . while governor, did assist [the coal company operator] in obtaining [a refund of more than \$2,000,000 from the state black lung fund] by intervening on [the operator's] behalf with the state Department of Natural Resources to prevent environmental action from being taken against [the coal operator's] companies . . . . The refund was in fact granted, . . . and . . . Mr. Moore[] received personally [\$523,721.47]" *Id.* (quoting federal prosecutor's factual basis for the charges). Governor Moore told the federal judge presiding over his guilty plea that he believed the facts as presented by the prosecutor were substantially correct. *Id.* at 343.

<sup>126</sup> Abramson, *supra* note 74.

<sup>127</sup> *Id.*

Most of [what Randy Sprouse described] has been gone for years. The sidewalks of Whitesville are usually empty. Vacant stores dot the town's main drag and windows are covered with dust from coal trucks that rumble through night and day. Traffic lights work intermittently. Parking meters were removed long ago.<sup>128</sup>

The economic plight of coalfield communities, perpetuated in the 1980s by corrupt and ineffective state government, continued throughout the next decade as new mining technologies replaced more labor-intensive methods. While Appalachian coal production approached record levels in 2003, the number of coal miners declined to its lowest level since the nineteenth century.<sup>129</sup> The coalfield economy continues to stagnate with high levels of unemployment in those areas which lead in coal production.<sup>130</sup>

Unable to rely on state government for economic and environmental protection, the communities looked to Washington for assistance. The federal assistance that John F. Kennedy had promised from the front porch of Burley Luster's Eureka Hollow home in 1960 materialized in a plethora of federal programs such as food stamps and Medicaid, which continue to this day to sustain many who remain in the old camps of central Appalachia.<sup>131</sup> One new federal program, the Surface Mining Control and Reclamation Act of 1977, held out the promise of protecting coalfield communities and their citizens from the environmental, economic, and social harm that unregulated coal mining had caused. The following discussion examines how that promise was effectuated.

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<sup>128</sup> *Id.*

<sup>129</sup> In 1892, 13,894 miners were employed in West Virginia mines. PRODUCTION OF COAL AND COKE IN WEST VIRGINIA, *supra* note 94. Today, 14,498 people mine coal in West Virginia. 2003 COAL PRODUCTION BY COUNTY, *supra* note 94.

<sup>130</sup> For example, the unemployment rate in Mingo County, West Virginia—one of the state's leading coal producing counties—was 10.3% in 2003. WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS, MINGO COUNTY, CALENDAR YEAR 2003: MONTHLY REPORT OF THE CIVILIAN LABOR FORCE, EMPLOYMENT, AND UNEMPLOYMENT, *at* <http://www.state.wv.us/bep/lmi/TABLE2/T203Ming.HTM> (last updated Jan. 23, 2004). In contrast, the 2003 unemployment rate for all of West Virginia was 6.1%. WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS, STATEWIDE, CALENDAR YEAR 2003: MONTHLY REPORT OF THE CIVILIAN LABOR FORCE, EMPLOYMENT, AND UNEMPLOYMENT, *at* <http://www.state.wv.us/bep/lmi/TABLE2/T203stat.HTM> (last updated Jan. 23, 2004).

<sup>131</sup> For a discussion of the genesis of such programs and their impacts on Appalachia, see WILLIAMS, *supra* note 27, at 339–52, 366–79; WILLIAMS, WEST VIRGINIA: A HISTORY, *supra* note 103, at 189, 192–95. Harry Caudill, in *The Watches of the Night*, expressed the concern that federal relief from the Kennedy-Johnson “War on Poverty” had come to Appalachia in the form of welfare entitlements that threatened to “turn Appalachia into a giant welfare reservation.” WILLIAMS, *supra* note 27, at 369 (citing HARRY CAUDILL, THE WATCHES OF THE NIGHT (1976)). Professor Williams's examination of the historic record of federal funding for Appalachia revealed that West Virginia “led all other Appalachian states in per-capita transfer payments.” *Id.* Williams concluded that Caudill's point may have been well taken. *Id.*

## III. REGULATION OF THE ADVERSE IMPACTS OF COAL MINING

When historian John Williams completed *West Virginia: A History*, he made predictions about the future of West Virginia and its coalfield communities:

In terms of short-run market considerations, strip mining is the swiftest and cheapest way to expand coal production . . . Stripping is the most costly method of producing coal, however, if social and environmental factors are calculated. . . The future of tourism and recreation depends to a significant extent on what is done about surface mining and other environmental issues . . . Yet the political impact of recreation industries is diffuse, and the aesthetic and human values that environmental degradation subverts are difficult to measure. By contrast, the coal industry retains much of its old-time political power in West Virginia and can readily deploy it to defend immediate and specific economic concerns.<sup>132</sup>

It appears that Professor Williams was especially prescient when he predicted that “environmental controversies promise to generate the most lively and probably the most crucial debates that West Virginia faces in the last quarter of the twentieth century.”<sup>133</sup>

Professor Williams’s prediction that environmental controversies would come to the fore as the twentieth century came to a close was not based on gut instinct or crystal-ball gazing. Rather, as a historian, Williams based his predictions on an appreciation of the policies, politics, and players that had shaped West Virginia’s past and his recognition of the old and new forces that were then in motion vying for control of the extraction of Appalachia’s vast coal wealth.<sup>134</sup>

As students of history are aware, most of the enterprises of the Industrial Age created significant adverse externalities.<sup>135</sup> For example, effluent from steel and chemical manufacturing poisoned thousands of miles of the nation’s streams and air pollution from the same plants clouded urban skies. For the better part of a century, the nation’s polluting industries were given a free pass by Americans who agreed with industry’s plea—“where there’s smoke there’s jobs.”

It was not until the mid-1960s that people in the United States began to appreciate the extent to which industrialization had externalized costs to their own communities. Citizens’ demand for pollution cleanup and regulation of the adverse effects of industrial activities spurred Congress to enact the National Environmental Policy Act of 1969<sup>136</sup> and reached its apogee in 1977 with passage of the federal Surface Mining Control and

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<sup>132</sup> WILLIAMS, WEST VIRGINIA: A HISTORY, *supra* note 103 at 201–02.

<sup>133</sup> *Id.* at 202.

<sup>134</sup> Although Williams’s predictions addressed West Virginia’s future, they are arguably equally relevant to other coalfield states as well.

<sup>135</sup> See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing externalities).

<sup>136</sup> 42 U.S.C. §§ 4321–4370e (2000).

Reclamation Act. No other federal environmental regulatory statute contains as many opportunities for citizen involvement nor grants to citizens such a broad array of statutory rights that may be used to influence the law's administration and enforcement than does SMCRA.

To understand the current struggle of the people of the coalfields for economic and environmental justice, one must understand how SMCRA came to be law and the way in which its strict mandate has been administered and enforced. The following discussion begins with an examination of SMCRA's origins in the oppressed and poverty stricken Appalachian coal camps in the 1960s. SMCRA's history is then traced from enactment through criticism of state and federal enforcement to the current extraordinary controversy over enforcement of SMCRA's so-called "mountaintop removal" regulatory regime.

### *A. Historical Overview of the Pre-SMCRA Period*

Prior to the enactment of SMCRA in 1977, unregulated surface and underground coal mining created enormous environmental harm throughout the Appalachian coalfields.<sup>137</sup> These externalities created disincentives for local economic development as well as other adverse social and economic consequences. Generally, local people experiencing these costs of mining also enjoyed the benefits of jobs created by mining. The adverse environmental impacts of mining received scant notice in the Appalachian coal camp struggle for survival during the first half of the twentieth century. Like the pervasive pollution that accompanied steel mills and chemical plants, coal mining's adverse impacts were seen as part and parcel of the industrialization.

The most visible adverse impacts of coal strip mining were the scars gashed in Appalachian mountainsides. Surface mining strips away forest vegetation, causing erosion and attendant stream sedimentation and siltation, accompanied by negative impacts on aquatic life and drinking water supplies.<sup>138</sup> In some coalfield regions, iron-laden sulphuric acid mine drainage pollution from underground mining produces red-orange stained stream beds and renders watercourses ecologically sterile.<sup>139</sup> Underground

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<sup>137</sup> See CHAD MONTRIE, *TO SAVE THE LAND AND PEOPLE: A HISTORY OF OPPOSITION TO SURFACE COAL MINING IN APPALACHIA 2* (2003) ("Surface coal mining has dramatically impacted communities in the Appalachian coal fields. As the industry expanded in the years after World War II, it exacerbated the poverty and chronic unemployment in the region, compounding the impoverishment that was a legacy of other extractive economic activities, including deep mining."). Montrie's book provides the first comprehensive documented chronicle of the history of the coalfield citizens' movement in opposition to the excesses of unregulated coal mining in Appalachia, the enactment by Congress of SMCRA, and the subsequent effect of the legislation on Appalachian communities and lands. See *generally id.*

<sup>138</sup> MONTRIE, *supra* note 137, at 3.

<sup>139</sup> Montrie describes these impacts:

Surface coal mining affected the environment of the Appalachian coalfields, too. Stripping denuded millions of acres of steep slopes and rolling hills in the coalfields, and this loss of vegetation caused soil erosion as well as increased surface runoff. Erosion

and strip mining contaminated or depleted underground aquifers that provide domestic and farm water supplies to many coalfield families.<sup>140</sup> Loud noise and dust from blasting and earth-moving activities disturb nearby communities and wildlife.<sup>141</sup> During mining, dust and debris often fill the air as soil and underlying rock strata are blasted apart, earth is moved, and coal extracted.<sup>142</sup> Landslides caused by indiscriminate dumping of mine spoil downslope on steep Appalachian mountainsides buried cars, homes, and sometimes killed people.<sup>143</sup>

State legislatures made some early ineffective attempts to ameliorate the harm caused by unregulated stripping. The first state to regulate surface mining was West Virginia, which enacted legislation in 1939.<sup>144</sup> A handful of states followed West Virginia's lead, but the resulting state legislation has been characterized as "mild" and merely an attempt by politicians and the mining industry to make it appear to concerned communities that steps were being taken to safeguard the environment and limit the effects of mining.<sup>145</sup>

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led to the siltation of streams, and this devastated aquatic life. Increased surface runoff caused heavier flooding and floods where there had been none before. The bare hills also deprived numerous animal and plant species of habitat. Acid mine drainage, produced when sulfur-containing compounds . . . are exposed to air and water, polluted streams and groundwater. . . . [T]he drainage and acid-laden soil made revegetation and post-mining crop production nearly impossible.

*Id.* at 3. See generally Patrick C. McGinley & Thomas J. Sweet, *Acid Coal Mine Drainage: Past Pollution and Current Regulation*, 17 DUQ. L. REV. 67 (1978) (discussing the environmental impacts of acid-mine drainage).

<sup>140</sup> Cf. COMMITTEE ON GROUND WATER RECHARGE IN SURFACE-MINED AREAS, NAT'L RESEARCH COUNCIL, SURFACE COAL MINING EFFECTS ON GROUNDWATER RECHARGE 4 (1990) (describing destruction of aquifers in Kentucky caused by surface mining); U.S. ARMY CORPS OF ENGINEERS ET AL., DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA III.E-6 (2003) ("[Coal mine drainage] can adversely affect human populations by impuring surface and ground water used for drinking water. . . .") available at

<http://www.epa.gov/region03/mntntop/pdf/III.%20Affected%20Environment%20and%20Consequences%20of%20MTM%20VF.pdf>.

<sup>141</sup> See MONTRIE, *supra* note 137, at 3 ("[B]lasting at surface mines cracked the foundations of people's homes, sunk their wells (which in some cases were already muddied or fouled by acid runoff), and sent 'flyrock' hurtling dangerously into the air.").

<sup>142</sup> *Id.*; see also H.R. REP. NO. 95-218, at 58-59 (1977) (detailing the devastating impacts of surface mining which inspired Congress to pass SMCRA), reprinted in 1977 U.S.C.C.A.N. 539, 596-97.

<sup>143</sup> MONTRIE, *supra* note 137, at 3.

<sup>144</sup> 1939 W. Va. Acts, ch. 84 (repealed 1965).

<sup>145</sup> See John D. Edgcomb, Comment, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299, 305-08 (1983) (describing state efforts in West Virginia, Kentucky, Pennsylvania, and Ohio). Edgcomb relates the story of the Virginia General Assembly's enactment in 1972 of a statute "essentially drafted by the Virginia coal industry" which created a regulatory agency, the Division of Mined Land Reclamation (DMLR). *Id.* at 307. The DMLR was located within Virginia's existing Department of Conservation and Economic Development. *Id.* The new agency was charged with the authority to implement and enforce regulations promulgated by the Department. *Id.* However, the DMLR received no general revenue fund appropriations and was forced to survive on meager permit fees which were insufficient for the agency to carry out its mission. *Id.*

From the beginning of these efforts to regulate strip mining, the coal industry cooperated with local and state politicians to oppose meaningful state regulation. Economic competition between coalfield states for jobs and tax revenues fueled this opposition.<sup>146</sup> Instead of placing limits on the worst of strip mining abuses, legislators chose to protect their own domestic industry. Obviously, they reasoned, a state choosing to pass laws to reduce the adverse consequences of coal mining would impose increased costs on its own coal industry. Those costs would not be incurred by coal operators in other states that chose to give *carte blanche* to their own coal operators. State politicians recognized that the price of coal produced in a state forbearing regulation would be cheaper and thus more competitive in the market than coal produced in a state that imposed environmental regulatory costs on its operators.<sup>147</sup>

By the end of the 1960s, public concern over the adverse impacts of coal mining had grown to a crescendo of opposition. It was generally recognized that the states could not and would not impose meaningful regulation on coal companies operating within their own borders. Coalfield citizens and other critics of strip mining realized that only a statute passed by Congress could end the states' "race to the bottom." A federal law imposing uniform national regulatory standards would nullify the strongest argument raised against regulation—in-state coal operators' competitive position *vis-à-vis* operators in other states. Operators in every state would be required to play by the same federal rules. The race to the bottom pressures would be eliminated by instituting a uniformly applicable federal regulatory program.

Years of national media attention and unrelenting pressure from coalfield residents made it impossible for Congress to ignore coal stripping. Proponents of federal regulation accumulated massive documentation of the enormous costs coal mining had externalized onto coalfield communities. Furthermore, Congress faced a national outcry against irresponsible coal mining when the totally avoidable collapse of a huge coal waste impoundment at Buffalo Creek, West Virginia killed more than one hundred people, injured thousands more, and wiped out whole communities.<sup>148</sup>

Twice Congress passed legislation, and twice the coal industry and its state political allies succeeded in persuading President Gerald Ford to

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<sup>146</sup> See 30 U.S.C. § 1201(g) (2000) ("The Congress finds and declares that . . . surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders."). This competition is often described as a "race to the bottom." See, e.g., William Funk, *The Court, the Clean Water Act, and the Constitution: SWANCC and Beyond*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,741, 10,762 (July 2001) (discussing Congress's fear of a "race to the bottom" as a motivating factor in the passage of SMCRA). However, there is academic debate as to whether a "race to the bottom" actually exists. See generally Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210 (1992).

<sup>147</sup> Edgcomb, *supra* note 145, at 308.

<sup>148</sup> See generally STERN, *supra* note 88 (detailing the Buffalo Creek flood and its aftermath).

exercise his veto power.<sup>149</sup> But with the transition to the Carter Administration came cooperation from the executive branch, and Congress once again passed legislation regulating surface mining.<sup>150</sup> On August 3, 1977, President Jimmy Carter signed the Surface Mining Control and Reclamation Act of 1977. Finally, federal regulation was being imposed on the coal industry in an effort to minimize the adverse impacts of underground and strip mining.<sup>151</sup>

### *B. SMCRA's Cooperative Federalism Approach to Regulation*

Paralleling other federal environmental regulatory laws, Congress designed SMCRA as a “cooperative federalism” statute.<sup>152</sup> Congress found that “the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.”<sup>153</sup> However, as explained below, the conflict spawned by SMCRA far exceeded that experienced in the implementation and administration of other cooperative federalism statutes.

SMCRA's cooperative federalism scheme instituted an extensive and permanent federal regulatory presence to deal with problems previously within the sole domain of the states. Congress created a new Office of Surface Mining (OSM) to oversee implementation, administration, and enforcement of SMCRA.<sup>154</sup> Congress intended that states have the option to assume “exclusive jurisdiction” to administer and enforce SMCRA, subject to compliance with minimum statutory standards and compliance with OSM's implementing regulations.<sup>155</sup> Moreover, state assumption of

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<sup>149</sup> ENV'T & NATURAL RESOURCES POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, STATE SURFACE MINING LAWS: A SURVEY, A COMPARISON WITH THE PROPOSED FEDERAL LEGISLATION, AND BACKGROUND INFORMATION, S. DOC. NO. 95-25, at iii, 3-9 (1977).

<sup>150</sup> See *id.* at iii (“[M]uch of the previous atmosphere of intense conflict [between Congress and the executive branch] has vanished with President Carter's assurance that he supports a strong surface mine bill.”).

<sup>151</sup> Congressman Morris K. Udall (D-Ariz.) described the moment: “[The] Act was passed after years of struggle by people in the coal fields—people who have lived with the mutilated mountainsides, spoiled streams, landslides and destruction of their homes. The voices of those people were heard on that August day.” Morris K. Udall, *Foreword* to MARK SQUILLACE, THE STRIP MINING HANDBOOK: A COALFIELD CITIZENS' GUIDE TO FIGHT BACK AGAINST THE RAVAGES OF STRIP MINING AND UNDERGROUND MINING 1, 1 (1990).

<sup>152</sup> See 30 U.S.C. § 1201(k) (2000) (describing the statutory framework as a “cooperative effort”).

<sup>153</sup> *Id.* SMCRA also differs significantly from other federal environmental regulatory statutes in that it is directed at a single industry: coal mining. Congress did identify and distinguish, to a minor degree, differences within the coal industry itself. Congress found the presence of significant regional differences in topographical, geological, and hydrological conditions required that federal regulation be tailored to some degree to those diverse conditions. *Id.* § 1201(f). SMCRA also recognized the differences between underground and strip mining. See, e.g., *id.* § 1266 (mandating that the Secretary of Interior, charged with implementation of the statute, “consider the distinct difference between surface coal mining and underground coal mining” when regulating the surface effects of underground mining).

<sup>154</sup> *Id.* § 1211.

<sup>155</sup> *Id.* § 1253. OSM's approval of a regulatory program allowing a state to assume primary jurisdiction over SMCRA's administration and enforcement is made contingent upon OSM



“exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” was made specifically subject to OSM’s oversight and enforcement power.<sup>156</sup> If an OSM-approved state fails to implement, enforce, or maintain its program in accordance with SMCRA, OSM must enforce part or all of such program or assume exclusive federal jurisdiction over all mining operations within the state.<sup>157</sup>

SMCRA required an “interim” program of joint state and federal enforcement in the period before state primacy programs were approved, followed by a “permanent” regulatory program based on OSM-promulgated regulations.<sup>158</sup> The interim regulatory program was required to be based upon and to incorporate most of SMCRA’s important permitting requirements.<sup>159</sup> Nine months after SMCRA’s August 3, 1977 effective date, all surface mining operations regulated by a state were to be in compliance with interim program requirements.<sup>160</sup> Within six months of enactment of SMCRA, OSM was required to implement a federal inspection and enforcement program in the field that would remain until replaced by an approved state primacy program or a federal regulatory program was established.<sup>161</sup> Within one year of SMCRA’s effective date, OSM was required to promulgate regulations defining the details of the “permanent regulatory program.”<sup>162</sup>

Problems immediately arose pertaining to OSM’s administration of SMCRA’s phased implementation. OSM’s effort to promulgate permanent program rules produced one of the most extensive rulemaking proceedings in the history of administrative law. Two drafts were submitted for public comment; 57 public meetings and 25 days of public hearings were held; 589 public comments were received by OSM; 22 different task forces, composed of over 100 technical experts from more than 20 agencies, evaluated and revised the draft rules into their final form.<sup>163</sup>

SMCRA’s tight implementation time schedule and Congress’s failure to fund OSM for the first seven months of its existence exacerbated tensions between the interested parties and provoked litigation seeking to force OSM to extend statutorily prescribed time schedules.<sup>164</sup> Congress had required OSM to develop interim and permanent regulatory programs from scratch, but failed to take into account the extensive technical, scientific, legislative, and regulatory work involved. The unreasonable timeline imposed on OSM also ignored the probability of continued coal industry and state political

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making certain affirmative findings. The requirements are set forth in 30 U.S.C. § 1253(a) (2000).

<sup>156</sup> *Id.* § 1253(a).

<sup>157</sup> *Id.* §§ 1254(a)(3), 1271(b); 30 C.F.R. part 733 (2004).

<sup>158</sup> 30 U.S.C. § 1252(b)–(e) (2000).

<sup>159</sup> *Id.* § 1252(b).

<sup>160</sup> *Id.* § 1252(c).

<sup>161</sup> *Id.* § 1252(e).

<sup>162</sup> *Id.* § 1251(b).

<sup>163</sup> Edgcomb, *supra* note 145, at 318 n.5.

<sup>164</sup> Comment, *The 1977 Surface Mining Act Revisited: National Regulatory Program Surmounts Judicial and Legislative Challenges*, 9 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,199, 10,200 (Nov. 1979).

resistance to the strict federal regulation, oversight, and enforcement demanded by the Act.<sup>165</sup>

*C. Coal Industry and State Opposition to Implementation, Administration, and Enforcement of SMCRA*

Not surprisingly, resistance to federal legislation by the coal industry and many state political and regulatory interests carried over to OSM's efforts during the implementation phase of the Act. Continuing conflict occurred between those from whom the SMCRA demanded cooperation: the states and the federal government.<sup>166</sup> The strident opposition of coal industry and state forces present during Congressional consideration of proposed legislation continued as OSM attempted 1) to carry on SMCRA mandated concurrent enforcement and 2) to create a totally new, complex, and comprehensive regulatory program. State, industry, and environmental groups challenged in court numerous provisions of OSM's regulations and the scope of OSM's regulatory authority.<sup>167</sup> Challenges to interim regulations included allegations that OSM arbitrarily failed to include a broad exemption and variance procedure, and that, *inter alia*, strict water pollution control and stringent detection and enforcement regulations exceeded the scope of power delegated to OSM by Congress.<sup>168</sup> The United States District Court for the District of Columbia upheld OSM's rulemaking efforts, rejecting almost all of these challenges.<sup>169</sup>

Industry and states also attacked the constitutionality of SMCRA in five lawsuits, alleging numerous constitutional defects including challenges based on the Commerce Clause, the Due Process Clause, the Contract Clause, the Equal Protection Clause, the Tenth Amendment, and the Takings Clause.<sup>170</sup> Nonetheless, the Supreme Court upheld SMCRA as constitutional.<sup>171</sup>

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<sup>165</sup> See Edgcomb, *supra* note 145, at 311–26 (presenting a comprehensive review of the challenges presented by the timeline).

<sup>166</sup> A fluctuating coal market and SMCRA-imposed regulatory costs threatened bankruptcy for many marginal, under-capitalized operators. These so-called “small operators” were at the forefront of coal industry attacks on OSM and permanent program rules.

<sup>167</sup> Twenty-four court actions challenging OSM's interim regulations were consolidated in the United States District Court for the District of Columbia. See *In re Surface Mining Regulation Litig.*, 452 F. Supp. 327 (D.D.C. 1978) (motion for preliminary injunction); *In re Surface Mining Regulation Litig.*, 456 F. Supp. 1301 (D.D.C. 1978) (motion for summary judgment). Nine separate lawsuits were filed challenging OSM's permanent program regulations and these were also consolidated for review in the United States District Court for the District of Columbia. See *In re Permanent Surface Mining Regulation Litig.*, 9 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,720, 20,721 (D.D.C. 1979).

<sup>168</sup> *In re Surface Mining Regulation Litig.*, 452 F. Supp. at 538; *In re Surface Mining Regulation Litig.*, 456 F. Supp. at 1313–15, 1323–24.

<sup>169</sup> *In re Surface Mining Regulation Litig.*, 456 F. Supp. at 1326 (ordering judgment entered for government, with some narrow exceptions).

<sup>170</sup> See generally *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (evaluating the constitutionality of SMCRA's performance standards); *Indiana v. Hodel*, 452 U.S. 314 (1981) (evaluating the constitutionality of SMCRA's prime farmland provisions).

<sup>171</sup> See *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. at 268 (upholding SMCRA's

In the quarter century since enactment of SMCRA, the environmental degradation and attendant adverse social and economic impacts on coalfield communities continue, albeit not at the catastrophic levels that existed in the pre-SMCRA years when coal mining was essentially unregulated. One of the best examples of such continuing regulatory failure can be seen in the failures of state and federal enforcement of SMCRA's requirements pertaining to huge mountaintop removal strip mines that have proliferated in the southern West Virginia coalfields. It is there, near the benighted former coal camps, that a specific SMCRA promise of environmental protection and local economic development was broken by coal operators and compliant federal and state regulators.

#### IV. "ALMOST LEVEL, WEST VIRGINIA":<sup>172</sup> MOUNTAINTOP REMOVAL STRIP MINING

A decade and a half after enactment of SMCRA, some believed the statute was reducing abuses of coalfield lands and people caused by conventional strip and underground mining. Notwithstanding a measure of success, some coalfield communities continued to feel the effects of inadequately regulated mining that had plagued them decades earlier.<sup>173</sup> Many of these post-SMCRA impacts were produced by new surface and deep mining techniques that had gained favor with the nation's biggest coal producers.

A major transformation of the coal industry triggered this post-SMCRA departure from conventional mining methods.<sup>174</sup> Corporate mergers, consolidations, and bankruptcies accompanied intense competition between eastern and western coal mining operations.<sup>175</sup> A combination of all of these

performance standards); *Indiana v. Hodel*, 452 U.S. at 317–18 (upholding SMCRA's prime farmland provisions).

<sup>172</sup> This play on John Denver's opening lyric ("Almost heaven, West Virginia") to his hit song *Take Me Home, Country Roads*, has been attributed to former West Virginia Secretary of State Ken Hechler. *DIARY: Take Me Home, Country Roads*, DRILLBITS & TAILINGS, Nov. 23, 1999, available at [http://www.moles.org/ProjectUnderground/drillbits/4\\_19/diary.html](http://www.moles.org/ProjectUnderground/drillbits/4_19/diary.html).

<sup>173</sup> MONTRE, *supra* note 137, at 197. It is clear that SMCRA has eliminated many coal-operator abuses and has promoted significant improvement in environmental reclamation over the "shoot and shove" mining practices which were the rule in pre-SMCRA days. See Udall, *supra* note 151, at 1 ("Overall [SMCRA] has produced a vast improvement in mining methods and reclamation compliance in much of the coalfields. Nevertheless, in some regions—too often the very regions which compelled the passage of the law—abuses continue at an alarming rate."). Notwithstanding these accomplishments, coal industry resistance to regulation after SMCRA was enacted has continued to the present. SMCRA was intended to advance economic, social, and environmental justice in coalfield communities. The means to that end was SMCRA's strict regulatory regime that held coal operators accountable. However, as discussed herein, the cutting edge of SMCRA's permanent regulatory program has been dulled by a coalition of forces: coal industry lobbyists, coal-friendly state politicians inured to industry positions by campaign contributions or fear of political reprisals, and government regulators whose willingness to turn a blind eye to the law has been astonishing.

<sup>174</sup> MONTRE, *supra* note 137, at 197.

<sup>175</sup> Freelance journalist Rudy Abramson points out that, notwithstanding new mining methods, "the efficiency of Appalachia's most productive mines pales beside that of mines in the West." Abramson, *supra* note 74. Companies mining in Wyoming's Powder River Basin, he

events foreshadowed the growth of “mountaintop removal”—a strip mining technique that existed only on a small scale before SMCRA.<sup>176</sup> One commentator observed:

Because of [competition with] cheap western coal, mountaintop removal suddenly boomed in central Appalachia in the 1990s. Trucks and power shovels have grown to gargantuan sizes, and drag lines swing shovels holding up to 100 cubic yards of rock. Mountaintop mines that reduce ridges and peaks by hundreds of feet now sprawl across more than 2,000 acres. An estimated 400 square miles of southern West Virginia mountains and ridges have been leveled and 1,000 miles of streams buried beneath debris blasted, shoved, and dumped into narrow valleys.<sup>177</sup>

The move to the use of large-scale mountaintop removal operations would make mining in Appalachia more efficient, productive, and—most importantly for coal operators—much less labor-intensive.<sup>178</sup> Mechanization and concomitant massive job losses attendant stripping operators’ embrace of mountaintop removal were paralleled by the underground operators’ adoption of new deep mining technology.<sup>179</sup>

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reports, use 400-ton trucks; one bite of a western dragline can chew up 200 cubic yards. *Id.*

<sup>176</sup> SMCRA recognized mountaintop removal as a legitimate mining technique, albeit one that required stringent regulation. 30 U.S.C. § 1265(c) (2000). In 1970, only ten percent of West Virginia’s coal came from strip mining. Ken Ward Jr., *As High As God Did: Law to Rebuild Mountains Falls by Wayside*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), May 3, 1998, at 1A [hereinafter *As High As God Did*], available at 1998 WL 5948792. In 1998, approximately one third of the coal produced in West Virginia was strip mined. *Id.* Between 1981 and 1998, nearly 500 square miles of West Virginia was stripped. *Id.* During the 1980s, the state issued 44 permits allowing coal companies to conduct mountaintop removal mining on 9,800 acres. *Id.* From 1996 to 1998, the West Virginia Department of Environmental Protection, charged with implementing the state version of SMCRA, approved permits for 38 mountaintop removal mines, impacting an area of over 27,000 acres. *Id.*

<sup>177</sup> Abramson, *supra* note 74; see also Ken Ward Jr., *Industry, Critics Look for Mountaintop Removal Alternative: Is There Another Way?*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), June 6, 1999, at 1A [hereinafter *Is There Another Way?*] (“In the early 1980s, 85-ton trucks were the largest used in West Virginia mining. Back then, strip mines and valley fills were much smaller. Generally, fills contained less than 250,000 cubic yards of rock and dirt. [By the end of the 1990s,] mountaintop removal mines use 240-ton trucks. Valley fills sometimes measure 100 million cubic yards or more.”), available at 1999 WL 6730006.

<sup>178</sup> See Abramson, *supra* note 74 (“In 1979, it took 58,565 miners to produce 112.3 million tons [of coal in West Virginia]. Twenty years later, fewer than 15,000 miners produced nearly 170 millions tons.”).

<sup>179</sup> Longwall mining “uses a steel plow or a rotating drum with teeth, pulled back and forth along the face of a coal seam, taking in several hundred feet in one pass, and taking many bites into the seam.” BARLOW BURKE, JR. ET AL., *MINERAL LAW: CASES AND MATERIALS* 316 (1994). This highly mechanized underground mining method swept through the coalfields contemporaneously with the expansion of mountaintop removal. Longwall mining displaced small, conventional continuous mining machines and brought greater efficiency to underground mining in Appalachia. However, its low labor-intensity allowed operators to slash payrolls and thousands of underground miners lost jobs. See *id.* (“[O]ne [longwall machine] operator can do the work formerly performed by several persons. . . . [L]ongwalling means fewer . . . jobs for miners.”). Notwithstanding these economic advantages, eastern longwall mining continues to struggle to compete with western coal. For example, in 1998, Arch Coal Company’s huge “Black Thunder” strip mine in Wyoming produced 42 million tons; in contrast, the largest mine in

The coal industry's competition-driven movement to new mining methods in central Appalachia adversely impacted coalfield communities both above and below the earth's surface.<sup>180</sup> On both fronts, coal production and man-hour efficiency in Appalachian mines increased dramatically.<sup>181</sup> However, as mountain ridges were blasted apart and more miles of headwater streams were buried under huge valley fills, mine jobs continued to hemorrhage. Promises that mountaintop removal mining would spur job-creating commercial, industrial, and residential development went unfulfilled.

### *A. Description of Mountaintop Removal Mining Methods*

SMCRA regulations define mountaintop removal as "surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing substantially all of the overburden off the bench and creating a level plateau or gently rolling contour, with no highwalls remaining."<sup>182</sup> As

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Appalachia, Arch Coal's underground longwall "Mountaineer" mine produced "only" 7.4 million tons. Abramson, *supra* note 74. In spite of the high cost of transcontinental rail haulage of western coal, utilities in the east still find it cheaper to burn western coal. *Id.*

<sup>180</sup> Longwall mining removes huge chunks of a coal seam that lies horizontally hundreds of feet beneath the earth's surface. See BURKE, *supra* note 179, at 316. A huge longwall shear cuts coal from the seam; the coal drops on a conveyor belt and is transported by conveyor or belt to the surface. *Id.* The longwall shear and attendant equipment is protected by hydraulic roof jacks ("roof supports") that shield them as well as the miners operating the longwalling machine. *Id.* The longwall's hydraulic roof supports move forward as the shears bite into the coal seam. *Id.* As the supports move forward, the rock they had been supporting caves in behind the roof supports causing overlying rock strata to break and subside. *Id.* at 316-17. Overlying homes, out-buildings, streams, wells, and springs are often damaged, sometimes irreparably. Longwall mining under rural Appalachian homes and communities has caused widespread significant subsidence damage to homes and other surface structures. Similarly longwall subsidence has triggered pervasive loss or contamination of rural domestic well and spring water supplies. See *id.* ("After the subsidence, water supplies may be affected . . ."). Nowhere has the "double whammy" of longwall and mountaintop removal mining been felt more intensely than in Mingo and Boone Counties in southern West Virginia. There, communities have experienced blasting-caused vibrations and damage to homes, pervasive dust, and mining-induced flooding from mountaintop removal mines combined with damage to homes and loss of domestic spring and well water supplies caused by longwall mining.

<sup>181</sup> In 1996, West Virginia coal production jumped to 174 million tons, the most coal produced since 1947. Peter Galuszka, *Strip-Mining On Steroids: It Now Levels Mountains and Threatens Appalachia's Landscape*, BUS. WK, Nov. 17, 1997, at 70.

<sup>182</sup> 30 C.F.R. § 785.14 (2004). SMCRA itself provides:

Where an applicant meets the requirements of paragraphs (3) and (4) of this subsection a permit without regard to the requirement to restore to approximate original contour . . . may be granted for the surface mining of coal where the mining operation will *remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing all of the overburden and creating a level plateau or a gently rolling contour with no highwalls remaining, and capable of supporting postmining uses in accord with the requirements of this subsection.*

traditional contour and area mining rapidly declined during the 1980s and 1990s, growing numbers of mountaintop removal mines began clear-cutting the steep-sloped hardwood forests and chopping off mountaintops in eastern Kentucky and southern West Virginia.<sup>183</sup> The underlying coal seams there lie sandwiched in layers of rock and soil hundreds of feet thick. In mountaintop removal operations, each layer of the rock above a coal seam is blasted and removed, the coal is extracted, and then the next layer is removed until the removal of rock and coal layers is no longer cost-effective.

Operators put some of the removed rock back on the flattened mountaintop. Because rock blasted from its natural state “swells,” coal operators assert there is usually inadequate room available on the flattened mountaintop to place this “swell” or “excess spoil.”<sup>184</sup> The spoil is dumped in adjacent valleys, often creating huge “valley fills.”<sup>185</sup> A single valley fill may be 1,000 feet wide and extend several miles at the upper reaches of Appalachian headwater streams.<sup>186</sup>

Over the course of more than two decades, the West Virginia Department of Environmental Protection (DEP) and its predecessors authorized the coal companies to bury at least 786 miles of West Virginia streams under valley fills.<sup>187</sup> Thousands of acres of hardwood forests were leveled.<sup>188</sup> The United States Fish and Wildlife Service found that “the loss of these streams and their associated forests may have ecosystem-wide implications.”<sup>189</sup> Beginning in the late 1980s, the size and number of mountaintop removal mines and their associated valley fills increased, especially in southern West Virginia, which has enormous reserves of high-energy, low-sulfur coal coveted by electric utilities.<sup>190</sup>

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<sup>183</sup> MONTRIE, *supra* note 137, at 197. *Business Week* reported that “[r]emoving a mountaintop can cost up to \$100 million . . . . Only the largest companies . . . can afford such undertakings.” Galuszka, *supra* note 181, at 70.

<sup>184</sup> See *Bragg v. Robertson*, 72 F. Supp. 2d 642, 646 (S.D.W. Va. 1999) (describing mountaintop removal and the creation of valley fills), *rev'd sub nom.* *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001); see also *W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1281 (S.D.W. Va. 1989) (discussing the construction of valley fills), *aff'd*, CA-87-834-2, 1991 WL 75217 (4th Cir. May 13, 1991).

<sup>185</sup> *Bragg*, 72 F. Supp. 2d at 646; *W. Va. Coal Ass'n*, 728 F. Supp. at 1281.

<sup>186</sup> Brief for the Federal Appellants at 7, *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) (No. 99-2683), available at <http://www.osmre.gov/news/041700mtbrief.txt>; CITIZENS COAL COUNCIL, MOUNTAINTOP REMOVAL STRIP MINING: THE CURSE OF APPALACHIA, at <http://www.citizenscoalcouncil.org/facts/mtntop.htm> (Last visited Feb. 21, 2004).

<sup>187</sup> Brief of Plaintiff-Appellees at 2, *Bragg v. W. Va. Coal Ass'n* (No. 99-2443) [hereinafter Appellees Brief].

<sup>188</sup> *Id.*; see also U.S. ARMY CORPS OF ENGINEERS ET AL., *supra* note 140, at III.F-12 (noting that “a single [mountaintop removal] permit involved changing thousands of acres of hardwood forests into herbaceous cover”).

<sup>189</sup> Ken Ward Jr., *Valley Fills Cover Hundreds of Miles, Report Says*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Oct. 4, 1998, at 1A (quoting U.S. Fish and Wildlife Service Report to EPA Region III dated September 23, 1998), available at 1998 WL 5975717.

<sup>190</sup> One commentator suggested that the growth of mountaintop removal mining stemmed from public utilities’ “insatiable demand for low-sulfur coal, the best of which is found in eastern Kentucky and southern West Virginia.” Galuszka, *supra* note 181, at 70. See *supra* note 112 (discussing Clean Air Act’s impact on the market for low-sulfur coal).

*B. SMCRA's Strict Limits on Mountaintop Removal Mining*

Ordinarily, when a state grants a permit to conduct strip mining operations, a coal operator is required to restore mined land to its approximate original contour (AOC).<sup>191</sup> When Congress was debating SMCRA, central Appalachian coal operators and coal-state congressional representatives sought an exemption from the AOC requirement for mountaintop removal mining. Mountaintop removal mining, they argued, could produce flat land for development—a commodity in very short supply in the mountainous coalfields of West Virginia, Kentucky, Virginia, and Tennessee.<sup>192</sup> Congress accommodated these requests, but placed severe limitations on those situations where mountaintop removal would be allowed under a variance from the generally applicable AOC reclamation requirement.

In order to qualify for a variance from the AOC requirement, SMCRA requires that a mountaintop removal permit applicant propose a postmining land use that falls in one of five specific categories: industrial, commercial, agricultural, residential, or public facility (which includes recreational facilities).<sup>193</sup> In addition, the permit applicant must also prove that the

<sup>191</sup> SMCRA provides in relevant part:

General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to

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except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter) . . . .

30 U.S.C. § 1265(b)(3) (2000).

<sup>192</sup> In 1973, then-Senator Jennings Randolph (D-W. Va.) argued that allowing operators to flatten mountains would promote economic development: "In the state of West Virginia, we have a need for level land. . . . We know that oftentimes surface mining can allow for the locations of a school, an airport, or for housing—not one, but many homesites." *As High As God Did*, *supra* note 176 (quoting Sen. Jennings Randolph (D-W. Va.)). Then-West Virginia Governor Jay Rockefeller asserted in a 1977 congressional hearing that "[m]ountaintop removal should certainly be encouraged, if not specifically dictated, by proposed legislation." *Id.* (quoting Gov. Jay Rockefeller (D-W. Va.)). However, other elected officials from West Virginia fought to ban mountaintop removal mining. In 1974, then-Congressman Ken Hechler (D-W. Va.) said, "This is not only aesthetically bad, as anyone can tell who flies over the state of West Virginia or any places where the mountaintops are scalped off, but also it is devastating to those people who live below the mountain." *Id.* (quoting Congressman Ken Hechler (D-W. Va.)).

<sup>193</sup> Specifically, SMCRA provides:

In cases where an industrial, commercial, agricultural, residential or public facility (including recreational facilities) use is proposed [for] the postmining use of the affected land, the regulatory authority may grant a permit for a surface mining operation of the nature described in subsection (c)(2) of this section . . . .

30 U.S.C. § 1265(c)(3) (2000).

proposed postmining use constitutes an equal or better economic or public use of the affected land as compared to the premining land use.<sup>194</sup> An applicant seeking an AOC variance must also provide specific plans for its proposed postmining land use and accompanying assurances.<sup>195</sup> Finally, SMCRA requires that the applicant demonstrate that the proposed use would be consistent with adjacent land uses, existing state and local land-use plans and programs, and that all other requirements of SMCRA will be met.<sup>196</sup> In granting a mountaintop removal permit with an AOC variance, a state must impose certain specific public safety and environmental protection requirements on the permittee.<sup>197</sup>

### C. Media Exposé of Mountaintop Removal Impacts

In a 1997 interview, longtime West Virginia coal industry lobbyist Ben Greene told *Business Week*, “With mountaintop removal, you get 100% mineral recovery, you can’t mine again, and you get better land use than you ever had in its natural state.”<sup>198</sup> If by “better land” Greene meant “flatter” land then his statement was true. Mountaintop removal had created tens of thousands of acres of flat land. Greene’s claims echoed the arguments that persuaded Congress to allow the practice only if the resulting flattened mountaintop was to be used as part of a coal operator proposed development that would create jobs for coalfield communities and promote local economies.

Ben Greene was not alone in trumpeting the value of flat land. As they have from SMCRA’s inception, coal industry and government officials

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<sup>194</sup> *Id.* § 1265(c)(3)(A).

<sup>195</sup> *Id.* § 1265(c)(3)(B). Specifically, the applicant must assure the Secretary of Interior that postmining land use will be:

- (i) compatible with adjacent land uses;
- (ii) obtainable according to data regarding expected need and market;
- (iii) assured of investment in necessary public facilities;
- (iv) supported by commitments from public agencies where appropriate;
- (v) practicable with respect to private financial capability for completion of the proposed use;
- (vi) planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use; and
- (vii) designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site.

*Id.*

<sup>196</sup> *Id.* § 1265(c)(3)(C), (E). The permitting agency is required, under section 1265(c)(3)(D), to provide “the governing body of the unit of general-purpose government in which the land is located and any State or Federal agency which the regulatory agency, in its discretion, determines to have an interest in the proposed use, an opportunity of not more than sixty days to review and comment on the proposed use.” *Id.* § 1265(c)(3)(D).

<sup>197</sup> See *id.* § 1265(c)(4)–(6) (setting forth specific public safety and environmental protections).

<sup>198</sup> Galuszka, *supra* note 181, at 70.



continue to tout flattening mountain ridges as a panacea for economic development. There was, and is, one problem with the scenario—mountaintop removal has played a significant role in the precipitous decline in coal mine employment, and has flattened and deforested mountaintops that now lay barren, generating weeds rather than jobs. As explained below, a quarter century after enactment, SMCRA's promise to coalfield communities of shopping centers, industrial plants, and new affordable housing—all located on flattened mountaintops—has been broken.

In August 1997, Penny Loeb, a Senior Editor at *U.S. News & World Report*, broke the story of mountaintop removal's adverse impacts on coalfield residents.<sup>199</sup> Her article, "Shear Madness," exposed to a national audience the social and environmental injustice attendant the large-scale expansion of mountaintop removal in the coalfields.<sup>200</sup> Loeb wrote:

[C]oal companies and some state officials note that strip mining provides high-paying jobs—weekly pay averages \$922. And some contend that West Virginians are better off with their mountains flattened—several dozen buildings, including four schools and three jails, have been built on them so far.

. . . But the costs are indisputable, and the damage to the landscape is startling to those who have never seen a mountain destroyed. Topographic and landscaping changes leave some regions more vulnerable to floods. . . . And state employment records suggest the jobs argument is not very compelling. Mountaintop removal accounts for only 4,317 workers in the state—less than 1 percent of its job force. Overall, mining employment in the state has fallen from 130,000 in the 1940s and 1950s to just 22,000 last year.<sup>201</sup>

Loeb catalogued multiple impacts on coalfield communities caused by the proliferation of mountaintop removal mines:

Thirty floods have occurred in the past two years in areas where watersheds were bared and redesigned, and several people have lost their lives in such floods.

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<sup>199</sup> Penny Loeb, *Shear Madness*, U.S. NEWS & WORLD REP., Aug. 11, 1997, at 28.

<sup>200</sup> *Id.* Courts took note of Loeb's investigative reporting, observing that "the disruption to the immediate environment created by mountain-top mining is considerable and has provoked sharp differences of opinion between environmentalists and industry players." *Bragg v. Robertson*, 248 F.3d 275, 286 (4th Cir. 2001) (citing Loeb, *supra* note 199). The Fourth Circuit's opinion described its view of the plaintiffs' concerns underlying the suit before it:

As Loeb reported these differences of opinion, environmentalists decry the "startling" change in the topography, which leaves the land more subject to floods, results in the pollution of streams and rivers, and has an "incalculable" impact on wildlife. The environmentalists also criticize the mining process itself, which cracks foundations of nearby houses, causes fires, creates dust and noise, and disrupts private wells.

*Id.* Interestingly, the Fourth Circuit referred to the complaints of "environmentalists," failing to recognize that the individual plaintiffs in the case were people who lived in southern West Virginia and were personally impacted by nearby mountaintop removal mines.

<sup>201</sup> Loeb, *supra* note 199, at 31.

Whatever the role of mining in the state's overall economy, its impact on nearby communities is devastating. Dynamite blasts needed to splinter rock strata are so strong they crack the foundations and walls of houses: Homeowners filed 287 blasting complaints with the state in the past year. Trucks full of coal rumble past some people's front porches at the rate of 20 an hour, 24 hours a day. Mining dries up an average of 100 wells a year and contaminates water in others.<sup>202</sup>

Loeb's report was followed by a comprehensive, fact-packed series of newspaper articles in the *Charleston Gazette*, beginning in 1998, which examined mountaintop removal mining and its impacts on the economy and people of the coalfields.<sup>203</sup> The series, "Mining the Mountains," was written by Ken Ward Jr., an award-winning investigative reporter. Ward's reporting exposed the myth promoted by two decades of coal industry propaganda. The claims of industry lobbyists, politicians, and regulators that mountaintop removal would bring economic development and prosperity to coalfield communities were shown to be false.

### *1. State Mountaintop Removal Permitting Receives Scrutiny*

The first article in the series described a DEP hearing on the application for the largest strip mine ever proposed in West Virginia.<sup>204</sup> The hearing was held in the gymnasium of an aging Logan County elementary school; more than 125 people jammed the narrow bleachers.<sup>205</sup> Ward described the scene as follows:

Just over the ridge from the school, Arch Coal Inc. had stripped 2,500 acres of the Logan County hills around Blair Mountain. The company has applied for a permit to mine 3,200 more.

If state regulators approve the new permit, giant shovels and bulldozers will eventually lop off the mountaintops of an area as big as 4,500 football fields.

Residents of the tiny communities along W.Va. 17 complained Arch Coal's existing mine already makes their lives miserable. Why, they asked regulators at the hearing, should the company get a permit to mine more?

Melvin Cook of Blair was the first to walk across the gym floor to a microphone and speak up. He complained about the blasting.

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<sup>202</sup> *Id.*

<sup>203</sup> That series, "Mining The Mountains," is ongoing and can be accessed on the *Charleston Gazette's* website at <http://www.wvgazette.com/section/Series/Mining+the+Mountains>. Investigative reporter Ken Ward Jr. utilized computer-assisted research tools and good old-fashioned "leg-work" to marshal the facts. The series is full of information derived largely from the files of state and federal regulators and interviews with government officers, union members, coal industry officials, miners, and coal camp residents. Ward's careful research included field visits to mines and coalfield homes and months of examining hundreds of thick permit files and voluminous records located in the offices of OSM and DEP.

<sup>204</sup> Ken Ward Jr., *Strip-Mining Battle Resurfaces in State*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Mar. 22, 1998, at 1A [hereinafter *Strip-Mining Battle Resurfaces*], available at 1998 WL 5940942.

<sup>205</sup> *Id.*

....  
 "You can't bear it," Cook said. "It has torn my house all to pieces."<sup>206</sup>

Residents of nearby communities were not the only people who attended the public hearing. A solid block of the gym's bleachers was filled with miners and their families who said that "they wanted jobs at the new mine. But they agreed the company should make sure mining doesn't disturb area residents."<sup>207</sup>

The *Gazette* series told of giant machines that "towered over old-time shovels and bulldozers" used in earlier coal stripping.<sup>208</sup> Those monster machines "can literally move mountains," the newspaper related; only a few skilled equipment operators stood at the controls.<sup>209</sup> *Gazette* readers also learned that in twenty years nearly 500 square miles of the state had been strip mined; from 1994 to 1998, the average size of the new mines had doubled each year; and, in 1997, DEP had issued new permits totaling 31 square miles, an area larger than Charleston, West Virginia.<sup>210</sup>

## 2. State Mountaintop Removal Permitting Decisions Questioned by Environmental Protection Agency

The *Gazette* also closely examined specific mountaintop removal permitting decisions by state and federal agencies. The series noted that Arch Coal, Inc.'s subsidiaries had been seeking agency approval to permit larger and larger mines which would bury long segments of mountain headwater streams.<sup>211</sup> Arch Coal's Hobet 21 mountaintop removal operation had finished stripping almost 10,000 acres of Boone County mountains by the end of 1995.<sup>212</sup> In 1997, the company proposed a new 2,000 acre mountaintop removal mine in neighboring Lincoln County, which would produce more than 30 million tons of coal over a decade.<sup>213</sup> Arch Coal's subsidiary, Hobet Mining, Inc., planned to dispose of "excess spoil" by burying two miles of Connelly Branch, a mountain headwater stream.<sup>214</sup> The

<sup>206</sup> *Id.* Some of the other residents complained that blasting at the mine "toss[ed] rocks and dust into [their] communities . . . [and shook] their homes, crack[ed] foundations and damage[d] water wells." *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* For example, the series described the a twenty-story tall "dragline, a cranelike machine nicknamed 'Big John' [whose] bucket can hold 83 cubic yards of material, or about five Jeep Cherokees." Lawrence Pierce, *Fight over Strip Mining Renewed in State*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Mar. 22, 1998, at 5A, available at 1998 WL 5940922. That gigantic machine had been used in stripping 10,000 acres of mountainous land at Arch Coal's Hobet 21 subsidiary located in Boone County, West Virginia. *Strip-Mining Battle Resurfaces*, *supra* note 204.

<sup>209</sup> *Strip-Mining Battle Resurfaces*, *supra* note 204.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* The article explained what would occur in ways the uninitiated reader could understand: The stream would be buried "with enough spoil to fill 1.1 million railroad cars, a train that would stretch from Charleston[, W. Va.] to Myrtle Beach, S.C., and back a dozen

United States Environmental Protection Agency (EPA) was the only regulatory agency charged with monitoring surface mining that raised questions about the enlarged scope of mountaintop removal permits being issued in West Virginia. In September 1996, an EPA Region III official wrote to DEP, observing that "Connelly Branch is the longest stream in West Virginia that has ever been proposed to be covered by a valley fill to our knowledge" and its loss "could possibly affect aquatic life in the Mud River, particularly in combination with other existing and proposed valley fills in the watershed."<sup>215</sup> EPA told DEP that it would object to issuance of the permit unless Hobet Mining considered alternatives to burying the stream.<sup>216</sup> However, within a few months, EPA retreated from this stance.<sup>217</sup>

In June 1997, another valley fill permit caught EPA's attention.<sup>218</sup> A.T. Massey, Inc. had filed an application proposing to bury two miles of James Creek in Boone and Raleigh Counties.<sup>219</sup> EPA suggested Massey should consider altering its mining plans in order to reduce the amount of excess spoil dumped into the creek.<sup>220</sup> Within a few months, EPA once again retreated.<sup>221</sup> Officials of EPA's Region III Water Division indicated, however, that it was "still very concerned about the disturbing trend toward larger fills and increased stream impacts by coal companies, and wish[ed] to work closely with DEP to prevent these impacts where possible."<sup>222</sup>

As its series progressed, the *Gazette* reported a third instance of EPA questioning a mountaintop removal mine permit application.<sup>223</sup> Pittston Coal had applied for a permit for a gigantic new mine in Logan County in late 1996.<sup>224</sup> In January and February 1998, DEP's mining and water resources offices issued permits for the Pittston mine, but EPA officials objected and raised questions.<sup>225</sup> The *Gazette* reported that the company negotiated with

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times." *Id.*

<sup>215</sup> *Id.* (quoting then-EPA Region III Water Division Director Al Morris).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* EPA apparently was satisfied when Hobet agreed to make a few minor changes in the valley fill and agreed to perform periodic testing to see if the fill harmed the nearby Mud River. *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* The agency "concluded that there do not appear to be options for further reducing the fill length, other than significantly changing the amount and type of mining." *Id.* (quoting EPA).

<sup>222</sup> *Id.* (quoting EPA).

<sup>223</sup> Ken Ward Jr., *Getting Tough on Valley Fills: Federal Regulators May Rein in Strip Mines if State Doesn't*, CHARLESTON GAZETTE, Mar. 31, 1998, at C1 [hereinafter *Getting Tough on Valley Fills*], available at 1998 WL 5942449.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* EPA's Region III Water Division Director, Tom Maslany, wrote to the DEP, saying, "EPA is concerned about the proposed permanent elimination of at least two miles of productive streams, possible fill reduction alternatives not considered, and the adequacy of the agreed mitigation to compensate for elimination of these streams." *Id.* (quoting EPA Region III Water Division Director Tom Maslany).

EPA and quickly agreed to reduce the size of the mine from 1,350 acres to 930 acres.<sup>226</sup> EPA responded by dropping its objections.<sup>227</sup>

### *3. Coal Industry's Initial Response to Media Investigations of Mountaintop Removal*

At the beginning of the "Mining The Mountains" series, Ken Ward Jr. explained the initial response of coal industry officials and state and federal regulators: "Coal operators say all of this attention is unwarranted. Some have hauled out standard jobs-vs.-the-environment arguments. Others insisted the fight over stopping strip mining ended decades ago—and that they won."<sup>228</sup>

Arch Coal mine manager John McDaniel told Ward, "I want everybody to understand that we have been trying to work with the community[.] . . . It's not as one-sided as everybody tries to make it appear."<sup>229</sup> John Ailes of the DEP Office of Mining and Reclamation said, "We think we're doing a daggone good job, but we could always do better."<sup>230</sup> Dan Sweeney, an environmental engineer in EPA's Region III told Ward: "We are definitely evaluating the overall issue[.] . . . But at this point, we're just talking among ourselves[.] . . . It's a little early to say what EPA will do right now."<sup>231</sup>

#### *D. Lawlessness: Regulators Ignore SMCRA's "Approximate Original Contours" Mandate*

As discussed in Section IV.B, *supra*, SMCRA requires most strip mines to be reclaimed to their approximate original contours (AOC).<sup>232</sup> SMCRA,

<sup>226</sup> *Id.* The change reduced the spoil pushed into streams by two-thirds, from 94 million cubic yards to 33 million cubic yards. *Id.*

<sup>227</sup> *Id.* Subsequently, EPA's Region III Administrator wrote to then-West Virginia Governor Cecil Underwood, saying:

This short-term gain of extracting coal by large-scale surface mining in mountainous areas leaves a lasting legacy of valley fills where natural, productive streams once existed. . . . We have concerns that even the current policy may not adequately address stream and other impacts from the increasing number of very large valley fills and, as a result, we are assessing the overall valley fill situation, including mitigation, in the Eastern U.S. with other federal agencies.

*Id.* (quoting Letter from W. Michael McCabe, EPA Region III Administrator, to Governor Cecil Underwood (R-W. Va.) (March 1998)).

<sup>228</sup> *Strip-Mining Battle Resurfaces*, *supra* note 204. Ward noted that "[o]fficials of a few strip-mining companies welcomed a closer look. Arch Coal, for example, says scrutiny will show they mine without permanently scarring the land." *Id.*

<sup>229</sup> *Id.* (quoting John McDaniel, engineer for Arch Coal).

<sup>230</sup> *Id.* (quoting John Ailes, DEP Office of Mining and Reclamation).

<sup>231</sup> *Id.* (quoting Dan Sweeney, EPA Region III).

<sup>232</sup> 30 U.S.C. § 1265(b)(3) (2000). SMCRA defines "approximate original contour" as

that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the

however, allows the AOC requirement to be waived for mountaintop removal mining operations in certain narrowly circumscribed situations.<sup>233</sup> In order to qualify for an AOC waiver, a permit applicant is required by SMCRA to propose commercial, industrial, residential, agricultural, and/or public uses for the land after it has been stripped, leveled, and reclaimed.<sup>234</sup> The obvious goal of waiving the AOC restoration mandate was economic development that would bring new jobs and prime the pump for coalfield community economies.

The *Charleston Gazette* investigation raised serious questions about state and federal agency oversight of state decisions to waive AOC restoration requirements for mountaintop removal mines. Ken Ward Jr. described a visit to DEP's Logan County office and his discussions there with officials in charge of permitting mountaintop removal mines:

Ken Stollings points to the maps and charts on his office wall to show how Hobet Mining will turn the rugged peaks and valleys around Blair Mountain into flat plains and a few rolling hills.

Stollings, a Division of Environmental Protection engineer, shows the changes to his boss, agency permit supervisor Larry Alt. Asked if this proposal meets the legal mandate that mined land be reclaimed to its "approximate original contour," Alt and Stollings just laugh.

"We just can't stack it as high as God did," Alt says with a shrug.

Approximate original contour, or AOC, is the heart of the federal strip mining law. But among many West Virginia regulators, it's becoming a joke.<sup>235</sup>

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general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with [the rest of SMCRA].

*Id.* § 1291(2).

<sup>233</sup> *Id.* § 1265(c).

<sup>234</sup> *Id.* § 1265(c)(3).

<sup>235</sup> *As High As God Did*, *supra* note 176. A year later Larry Alt was cross-examined in a Federal court hearing on the way DEP defined AOC in making its permitting decisions. In his opinion, U.S. District Court Judge Charles H. Haden, II, who presided at the hearing, described Alt's testimony:

Relevant to the AOC issue, DEP Permit Supervisor, Larry Alt, explained how he educates new permit reviewers about determining AOC. Besides using chalkboard drawings, Alt draws contour lines around his knuckles. He then shows a closed fist as the original mountain and a semi-open fist as the restored mine site. Although his lessons include contour lines which, among other things, show elevation, Alt does not consider elevation in determining whether a permit meets AOC. Instead, Alt considers whether the site will have the same general contours as before and whether the site will be stable.

Bragg v. Robertson, 54 F. Supp. 2d 635, 647 (S.D.W. Va. 1999). In a deposition taken two months before his federal court hearing testimony, at which the author was present, Alt revealed that his "knuckle" explanation was "an old boy scout trick."

The *Gazette* reported that the AOC waiver rules were “routinely skirted by dozens of huge mountaintop-removal strip mines.”<sup>236</sup> After coal companies blasted and ripped apart mountain ridgetops to reach multiple coal seams, state regulators allowed them to avoid the expense of restoring the land to AOC. Instead, DEP permitted coal operators to take the cheapest path: shoving and dumping the remains of mountains—millions of cubic yards of rock and dirt—on top of headwater streams in nearby valleys.<sup>237</sup>

Information contained in DEP’s own files revealed a systemic failure on the part of state regulators to apply SMCRA’s AOC requirements to mountaintop removal mines.<sup>238</sup> The *Gazette*’s investigation found that in 1997 alone, DEP had authorized twenty permits for mountaintop removal mines to level twenty square miles.<sup>239</sup> However, the newspaper’s study showed that the companies obtaining these permits, “including [national coal production leaders] Arch Coal Inc., A.T. Massey Coal and Pittston Coal, rarely ask for or received approximate original contour exemptions for mountaintop removal.”<sup>240</sup> A West Virginia Freedom of Information Act request revealed that only one-quarter of active mountaintop removal mines had obtained the AOC exemption.<sup>241</sup> Thus, 75% of active mountaintop

<sup>236</sup> *As High As God Did*, *supra* note 176.

<sup>237</sup> Prior to enactment of SMCRA most coal companies operating on the steep mountain slopes in central Appalachia used the simplest, most inexpensive approach to disposing of “excess spoil”—after blasting a mountainside apart, dozers would push the fractured rock and dirt over the mountainside onto the downslope. OFFICE OF SURFACE MINING, PRE-SURFACE MINING LAW PHOTOS, at <http://www.osmre.gov/ocphotoz.htm> (last updated Jan. 23, 2002). This quick and dirty approach was referred to as “shoot and shove.” *Id.* When SMCRA was enacted, the goal was to eliminate the “shoot and shove” method, replacing it with the trucking of excess spoil to disposal sites where fills would be constructed from the bottom up in compacted layers. However, engineered construction of fills in this manner is more expensive than the indiscriminate shoot and shove approach. In the early 1990s, OSM promulgated rules which allowed operators of mountaintop removal mines to return to pre-SMCRA shoot and shove mining, conveniently calling rock and dirt shoved or dumped onto steep hillsides below a mine “controlled gravity transport” of spoil. *See* Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Areas Unsuitable for Mining; Special Categories of Mining; Surface Mining Activities; Underground Mining Activities, 56 Fed. Reg. 65,612, 65,622 (Dec. 17, 1991) (amending 30 C.F.R. § 816.81(a) to allow as an exception to the general rule that spoil be “hailed or conveyed” the use of “controlled gravity transport,” and stating, “OSM maintains . . . that the controlled gravity transport of coal mine waste is consistent with [SMCRA]”).

<sup>238</sup> The *Gazette* reported that in January 1998, DEP officials, did not know how many West Virginia strip mines had received exemptions from the AOC requirement for mountaintop removal mines. *As High As God Did*, *supra* note 176. The *Gazette* was not satisfied and filed a request under the West Virginia Freedom of Information Act (FOIA), W. Va. CODE ANN. §§ 29B-1-1 to 29B-1-7 (Michie 2002), which triggered agency staff to examine scores of mining permit files. *Id.* The agency revealed that 61 of 81 active mountaintop removal mines permitted since 1978 did not possess an AOC exemption; only 20 mines received the waiver. *Id.* Moreover, the FOIA response showed that the biggest mines did not receive waivers. *Id.* The 61 mines that failed to obtain AOC exemptions accounted for 70% of the total mine acreage. *Id.*

<sup>239</sup> *Id.* From 1995 to 1998, even fewer AOC exemptions were sought for mountaintop removal mines, although DEP continued to issue permits to flatten mountains and fill streams. In 1995, the newspaper found that only one third of mountaintop removal mines obtained the required exemption. *Id.* In 1997, only 25% obtained the exemption. *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *See id.* (noting that “three-quarters of the active mountaintop-removal mining permits in

removal mines in West Virginia were being operated in violation of state and federal law.

Additional digging into DEP files led the *Gazette* to a memorandum written in the early 1990s by OSM officials that, for the first time, resembled an agency AOC policy.<sup>242</sup> Because the policy contained no guidance for permit reviewers on how to define AOC, it served as the basis for state officials' later defense that they had no idea what AOC meant when it came to mountaintop removal mines.<sup>243</sup> The upshot of this bureaucratic sleight of hand was that operators could lop hundreds of feet off mountaintops, dump "excess spoil" into valleys, and level off thousands of acres—all under the guise of meeting SMCRA's AOC requirement.

By definition a mountaintop removal mine is one that removes entire coal seams running beneath a mountaintop. Many of the mines permitted without AOC variances reduced the elevation of mountain ridges by hundreds of feet. A mountaintop removal mine that reclaims mined land to its approximate original contours is obviously an oxymoron—but an oxymoron that regulators were willing to embrace so that coal operators could avoid SMCRA's strict economic development requirements applicable to mountaintop removal mining. The most egregious impact of DEP's failure to enforce the AOC requirement was the denial of jobs and permanent economic development that should have accompanied mountaintop removal mining operations.

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West Virginia were not granted the required exemption"). The *Gazette's* review of DEP permit files found that a significant amount of information relating to mountaintop removal mine permitting was either incomplete or missing altogether. *Id.*

<sup>242</sup> *Id.* The memorandum stated: "For mountaintop-removal mining, there is no minimum or maximum elevation requirement to which the final contour must be restored after mining[.] . . . There could be as much as 200 or 300 feet difference between the pre-mining and post-mining elevations." *Id.* (quoting Memorandum from OSM Morgantown Office (Oct. 1992)).

<sup>243</sup> In their defense, DEP officials claimed that a vague legal definition of AOC had tied their hands. In an interview with the *Gazette's* Ken Ward Jr., a DEP Office of Mining and Reclamation official asked: "Closely resembles the general surface configuration—who the hell knows what that means? . . . Nobody has ever defined it[.] . . . What's AOC to you might not be AOC to me. That is truly difficult for the agency. We're forced to make these interpretations without any guidance." *Id.* (quoting John Ailes, DEP Office of Surface Mining and Reclamation (internal quotation omitted)). A year later, in *Bragg v. Robertson*, the District Court showed little patience for DEP's difficulties:

The AOC requirement and definition undeniably allow the use of some discretion in determining whether a permit meets the standard. The agency must make a case-by-case determination of whether the requirement is satisfied. This does not, however, give the agency *carte blanche* in making the determination. "Approximate original contour" does have an inherent meaning, more fully embodied in the definition requiring the post-mining site to "closely resemble [] the general configuration" of the land prior to mining. . . . As [the agency director] admits, DEP is under a nondiscretionary obligation to require the operator to restore the land to AOC if a variance is not requested and approved.



*1. The Response of Industry and Regulators to the Revelation that AOC Requirements Had Been Ignored for Two Decades*

Upon learning the results of the *Gazette's* study of DEP's systemic violation of AOC permitting requirements, coal lobbyists at first admitted that problems might exist. However, they insisted that only technical matters were involved. The president of the West Virginia Coal Association told the *Gazette*: "It sounds like to me [like DEP] needs to take a look to see if they meet all the requirements[.] . . . Apparently, there are some issues to be addressed, but they have little [to] do with environmental compliance."<sup>244</sup>

An A.T. Massey public relations officer asserted, "Massey Coal companies have complied with the reclamation regulations[.] . . . On any permit that does not include an AOC variance, the plans for reclaiming the mine site meet state guidelines for AOC standards."<sup>245</sup> David Todd, an Arch Coal executive asserted, "We have been applying for mining permits and they have been reviewed by and granted by DEP, with oversight by OSM[.] . . . That's got to be pretty fair evidence that [mountaintop removal mines] are being approved and operated according to and in compliance with the law."<sup>246</sup>

Roger Calhoun, supervisor of the OSM Charleston field office was questioned at a press conference where he appeared with visiting OSM Director Kathy Karpan.<sup>247</sup> Calhoun maintained that DEP was not issuing mountaintop removal permits without AOC variances.<sup>248</sup> When later confronted with a list of such permits, Calhoun said OSM would look into the allegations.<sup>249</sup> "Maybe we should put the burden on the state to come up with some criteria," Calhoun said. "It's something we might want to tighten down on. I don't think the state has paid enough attention to AOC and postmining land uses and configurations."<sup>250</sup>

<sup>244</sup> *As High As God Did*, *supra* note 176 (quoting Bill Raney, President of the West Virginia Coal Association).

<sup>245</sup> *Id.* (quoting Bill Marcum, spokesperson for A.T. Massey Coal).

<sup>246</sup> *Id.* (quoting David Todd, Vice President of Arch Coal).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* OSM's lack of knowledge concerning DEP's mountaintop removal permitting record is not surprising given the fact that the coal industry-friendly Congress had "gutted" OSM's oversight and enforcement budget and had "slashed" the agency's staff by one-third. Galuszka, *supra* note 181, at 70.

<sup>249</sup> *As High As God Did*, *supra* note 176. Like DEP, federal officials also had their excuses. The *Gazette's* examination of government records revealed that high-ranking OSM officials had "declined requests by their own inspectors for more concrete guidance on what constitutes approximate original contour" and later had initiated a policy that made the term more vague. *Id.* In more than twenty years of federal oversight of DEP, OSM had never fully reviewed the state's administration of AOC and mountaintop removal requirements when permitting mines. *Id.*

<sup>250</sup> *Id.* (quoting Roger Calhoun, OSM Charleston, W. Va. Office).

## 2. *A Promise Broken: Systemic Waiver of Mountaintop Removal Requirements Negate SMCRA's Economic Development Goal*

### a. *Newspaper Investigation Discloses Agency Mifeasance*

The *Gazette* continued its investigation during the summer of 1998.<sup>251</sup> It examined the long-standing claims of coal industry advocates, government regulators, and politicians who had championed mountaintop removal as an economic development engine. In early August, the *Gazette* published a devastating article documenting how SMCRA's promise of economic development had been perverted by the West Virginia coal industry with the acquiescence of state and federal regulators.<sup>252</sup>

The *Gazette* found that for more than two decades, SMCRA's mountaintop removal requirements had been consistently ignored by regulators and coal operators.<sup>253</sup> Coal companies had been allowed to flatten mountains and dump hundreds of millions of cubic yards of "excess spoil" in valleys obliterating hundreds of miles of headwater streams. Reporting from a ridge above the Kanawha River near Charleston, West Virginia, Ken Ward Jr. wrote:

Bullpush Mountain isn't a mountain anymore. It's a flat, grassy meadow that stands out among the wooded hills along the Fayette-Kanawha County line.

More than 25 years ago, Cannelton Industries Inc. chopped the top off Bullpush to get at the coal underneath. The operation, started in 1970, was the first mountaintop removal mine in West Virginia.

Cannelton officials promised that if they flattened out the land, they could more easily develop it. The company drew up plans to turn Bullpush into a brand-new town, complete with churches, schools, shops and a hospital.

None of that ever happened. No schools. No churches or shopping centers. Cattle don't graze anymore on the pasture where Bullpush Mountain used to be. Hay isn't grown there, either.

Bullpush Mountain isn't alone. Across the Southern West Virginia coalfields, mountaintop removal mining is turning tens of thousands of acres of rugged hills and hollows—nobody knows how many—into flat pastures and rolling hayfields.<sup>254</sup>

The story of "development" of Bullpush Mountain, flattened by early mountaintop removal mining, is the tale of hollow promises, inflated

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<sup>251</sup> The *Gazette* investigation included a review of court records and thousands of pages of permit documents. "Many of the state's largest mountaintop removal complexes were visited, and industry experts were interviewed" in the course of the newspaper's study. Ken Ward Jr., *Flattened: Most Mountaintop Mines Left as Pasture Land in State*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Aug. 9, 1998, at 1A [hereinafter *Flattened*], available at 1998 WL 5967127.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* The few times operators sought and received the required AOC variances for mountaintop removal mines, they had proposed little or no postmining development. Thirty-four active and reclaimed mines had received AOC variances. *Id.* Of those, only one included a plan for future development—a prison built by the state on a small mountaintop removal site in Fayette County. *Id.*

expectations, and flat out lies. In 1970, Cannelton insisted that the postmining use of Bullpush Mountain would be “land development” and obtained a permit under the state law applicable prior to the enactment of SMCRA.<sup>255</sup> Hundreds of thousands of tons of coal were stripped and the area graded and seeded with grass. For a decade there was no development. In 1979, the county planning commission issued a report that said development on the site was simply not feasible because of the absence of services and utilities.<sup>256</sup>

Nevertheless, only a year later *Greenlands*, a coal industry trade association magazine, bragged of Bullpush Mountain’s potential for development.<sup>257</sup> The magazine included a map of the area, depicting “future locations of a light industrial zone, residential areas, a downtown business district, schools and a sewage treatment plant.”<sup>258</sup> The promoters bragged that the 2,000 acre area could become the site of a city with a population of 10,000 to 12,000.<sup>259</sup> But just two years later, the coal operator amended its Bullpush Mountain permit, pulling the plug on development plans.<sup>260</sup> State regulators quickly approved the new postmining land use for Bullpush Mountain—“pasture and hay lands.”<sup>261</sup>

Almost twenty years later, mountaintop removal proponents again were boosting Bullpush as a prime target for development. In June 1998, West Virginia officials, economic developers, and coal industry officials on a tour of mountaintop removal sites praised what they saw at Bullpush—a scene which had not changed during the almost thirty years since the ridge had been flattened.<sup>262</sup> According to the *Gazette*, former State Senator Tracy Hylton, whose company had originally stripped and flattened Bullpush, “gave a rousing defense of mountaintop removal.”<sup>263</sup> Hylton attacked the *Gazette*, saying, “I’m sick and tired of all this that goes on in the newspaper today[.] . . . There is a need for flat land for development in West Virginia. With mountaintop removal, we can get it.”<sup>264</sup>

The *Gazette* investigation examined far more than the false claims made about development potential of the flattened Bullpush Mountain. Its study found that over two decades, DEP had permitted more than fifty square miles for mountaintop removal mines; the plans for “economic development” at those mines were limited exclusively to pastures, hayfields,

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Greenlands* was published by the West Virginia Mining and Reclamation Association.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* (quoting Tracy Hylton). In relating this event, the *Gazette*’s Ken Ward Jr. observed the obvious: “What nobody said during the DEP-sponsored tour . . . was that people . . . have tossed ideas for Bullpush Mountain developments around for nearly 30 years—and none have materialized.” *Id.* Today, five years after mine tour participants predicted that Bullpush Mountain would soon sprout with new development, the grassy, flattened ridgetop still lies fallow.

forests, or range lands.<sup>265</sup> In the thirty years since Bullpush Mountain had been “removed,” not one West Virginia mountaintop removal permit has included plans for a manufacturing or industrial plant.<sup>266</sup> On the contrary, the *Gazette’s* investigation showed that the most popular land use proposed for mountaintop removal sites was “fish and wildlife habitat.”<sup>267</sup> Incredibly, while “fish and wildlife habitat” was not a postmining land use recognized by SMCRA, it accounted for almost one third of the total mountaintop removal acreage permitted by DEP.<sup>268</sup>

*b. The Response of Industry and Regulators to the Lack of Economic Development*

When confronted with the results of the *Gazette’s* postmining land-use investigation, the West Virginia Coal Association’s President agreed there had not been much development, but claimed it was not the fault of coal operators. “Are you going to have a Toyota plant at Wharncliffe, West Virginia?” Bill Raney asked.<sup>269</sup> Answering his own question, he said, “Probably not. But I don’t think the law obligates the mining industry to put up bricks and mortar. Our responsibility is to make sure the opportunity is there.”<sup>270</sup>

The President of the West Virginia Mining and Reclamation Association told the *Gazette* that SMCRA’s requirements were outdated and “too stringent for today’s large mountaintop removal mines.”<sup>271</sup> An official with DEP’s Office of Mining and Reclamation said that all the involved parties needed to look at postmining uses: “There’s not a lot of pre-planning done in terms of development[.] . . . There is a need for some long-term land use planning considerations. It’s hard for us to say what’s going to be out there and who is going to develop what and what the future holds.”<sup>272</sup>

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* Of course, the land subjected to mountaintop removal mining had been wildlife habitat before it was mined. At a deposition attended by the author in December 1998, a DEP official was asked what kind of “fish” habitat had been created on the flattened mountaintops where mountaintop removal is conducted. The official did not answer the question; he just laughed.

<sup>268</sup> The designation of “fish and wildlife habitat” as a postmining land use was one of the targets of a citizen suit filed against DEP in July 1998, which alleged the agency had “established a pattern and practice” of issuing mountaintop removal permits without required postmining land use plans. Second Amended Complaint for Declaratory and Injunctive Relief at 24, *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D.W. Va. 1999) (No. 2:98-0636).

<sup>269</sup> *Flattened*, *supra* note 251 (quoting Bill Raney, President, West Virginia Coal Association). Wharncliffe is located in the heart of southern West Virginia’s mountainous coalfields.

<sup>270</sup> *Id.* (quoting Bill Raney, President, West Virginia Coal Association).

<sup>271</sup> *Id.* (quoting Bill Greene, President, West Virginia Mining and Reclamation Association). Mountaintop removal mines of the 1970s operated for about five years, thus reclamation was not that far down the road. *Id.* (citing statement of Ben Greene, President, West Virginia Mining and Reclamation Association). In contrast, a mountaintop removal mine today might continue operations for fifteen or more years. *Id.*

<sup>272</sup> *Id.* (quoting John Ailes, DEP Office of Mining and Reclamation).

*E. Judicial Review: Coalfield Residents Turn to the Courts*

Contemporaneously with the media exposé of DEP's bogus permitting of mountaintop removal mines, eight coalfield residents living near valley fills and a statewide environmental organization filed a SMCRA citizen suit against DEP seeking declaratory and injunctive relief.<sup>273</sup> In *Bragg v. Robertson (Bragg)*,<sup>274</sup> the plaintiffs alleged, *inter alia*, that the Director of DEP was violating his nondiscretionary duties under SMCRA in issuing permits for mountaintop removal mines.<sup>275</sup> More particularly, they alleged that the Director consistently issued permits to mining operations without making requisite findings that assured the restoration of original mountain contours or, alternatively, economic development on flattened mountain tops.<sup>276</sup> They asserted the Director violated his federal- and state-law duties to "withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state and federal program."<sup>277</sup>

In the course of a hearing on the plaintiffs' motion for preliminary injunctive relief, the United States District Court Judge, Charles H. Haden, II, accepted the coal company intervenors' invitation to visit mountaintop removal mines to see for himself how well mountaintop removal mines had been reclaimed. The judge visited and flew over most of the mountaintop removal sites in southern West Virginia, observing in a subsequent opinion:

The Court's helicopter flyover of all mountaintop removal sites in southern West Virginia revealed the extent and permanence of environmental degradation this type of mining produces. On February 26, the ground was

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<sup>273</sup> SMCRA's citizen suit provision provides:

Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter . . . against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

30 U.S.C. § 1270(a)(2) (2000).

<sup>274</sup> *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D.W. Va. 1999). Judge Charles H. Haden II presided over the case. Appointed to the federal bench by Republican President Gerald Ford, Judge Haden had family ties to the coal industry. Rudy Abramson, *A Judge in Coal Country*, 20 APF REPORTER (2002), available at <http://www.aliciapatterson.org/APF2003/Abramson/Abramson.html>. Some in the coal industry believed that his conservative political background would bode ill for the coalfield citizen plaintiffs. *Id.* Judge Haden, however, did not meet those expectations. *See id.* ("Not since the late U.S. District Judge Frank Johnson desegregated Alabama buses and schools and opened voting booths to African Americans in the 1950s and '60s has a federal judge confronted the political and economic powers of his native state more conspicuously.").

<sup>275</sup> *Id.* at 638.

<sup>276</sup> *Id.* at 639.

<sup>277</sup> *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661 (S.D.W. Va. 1999), *rev'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

covered with light snow, and mined sites were visible from miles away. The sites stood out among the natural wooded ridges as huge white plateaus, and the valley fills appeared as massive, artificially landscaped stair steps. Some mine sites were twenty years old, yet tree growth was stunted or non-existent. Compared to the thick hardwoods of surrounding undisturbed hills, the mine sites appeared stark and barren and enormously different from the original topography.<sup>278</sup>

In a later opinion in the same case, the court discussed the impacts of mountaintop removal valley fills on the streams they bury:

When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.<sup>279</sup>

Ultimately, after first granting preliminary injunctive relief enjoining an Arch Coal subsidiary from initiating mountaintop removal mining on what was planned as the largest strip mine ever permitted in West Virginia, the district court granted the plaintiffs' motion for a permanent injunction.<sup>280</sup> The scope of the injunction was narrow; it "enjoin[ed] the Director from further violations of the nondiscretionary duties . . . and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal."<sup>281</sup> The court explained that this injunction was purely prospective and had no impact on permits that had already been issued.<sup>282</sup>

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<sup>278</sup> *Bragg*, 54 F. Supp. 2d at 646. Judge Haden also visited Pigeonroost Hollow in which an Arch Coal subsidiary planned to dump millions of cubic yards of mine spoil if the requested injunction were denied. Judge Haden's examination of the stream that ran down though the Hollow prompted the following additional observation:

If the forest canopy of Pigeonroost Hollow is leveled, exposing the stream to extreme temperatures, and aquatic life is destroyed, these harms cannot be undone. If the forest wildlife are driven away by the blasting, the noise, and the lack of safe nesting and eating areas, they cannot be coaxed back. If the mountaintop is removed, even Hobet's engineers will affirm that it cannot be reclaimed to its exact original contour. Destruction of the unique topography of southern West Virginia, and of Pigeonroost Hollow in particular, cannot be regarded as anything but permanent and irreversible. Such harms cannot be remedied through the availability of damages.

*Id.*

<sup>279</sup> *Bragg*, 72 F. Supp. 2d at 661-62.

<sup>280</sup> *Id.* at 663.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

Immediately, West Virginia's Governor, its congressional delegation, coal industry lobbyists, and the UMWA leadership attacked the court's decision.<sup>283</sup> Exhuming the well-worn jobs versus environment conflict, they argued that the decision would cripple West Virginia's economy and reduce mine production and jobs.<sup>284</sup> The director of DEP announced that no new permits for mountaintop removal mines would be granted.<sup>285</sup> Coal companies using mountaintop removal mining shut down their mines and laid off all of their miners.<sup>286</sup>

West Virginia's senior senator, Robert C. Byrd (D-W. Va.), unsuccessfully attempted to legislatively reverse the court's ruling, trying to attach a rider to a major appropriations bill.<sup>287</sup> The industry and the UMWA launched an expensive television and newspaper advertising campaign throughout the state forecasting doom for the state's economy and the loss of thousands of jobs.<sup>288</sup>

<sup>283</sup> See, e.g., *id.* (discussing the reaction of then-Governor Cecil Underwood (R-W. Va.), who proclaimed the State faced an economic crisis, instituted a government-wide hiring freeze, and required all state agencies to slash their budgets by ten percent).

<sup>284</sup> Ken Ward Jr., *Mining Rules May Be Tossed*, CHARLESTON GAZETTE, Oct. 22, 1999, at A1, available at 1999 WL 6752064. The statement of then-Governor Cecil Underwood (R-W. Va.) provides an example of the hyperbole: "October 20, 1999, will go down as the bleakest day in the recent history of our state of West Virginia." Ken Ward Jr., *Groups: Ban Affects New Permits—Judge's Ruling Should Not Stop Mining Allowed Under Current Permits, Environmentalists Say*, CHARLESTON GAZETTE, Oct. 23, 1999, at A1 (quoting statement of Gov. Cecil Underwood (R-W. Va.)), available at 1999 WL 6752303.

<sup>285</sup> Ken Ward Jr., *Valley Fill Mining Outlawed: Landmark Ruling Prohibits Mountaintop Coal Operators from Burying State Streams*, CHARLESTON GAZETTE, Oct. 21, 1999, at A1, available at 1999 WL 6751888.

<sup>286</sup> Ken Ward Jr., *More Mine Closures on Way*, CHARLESTON GAZETTE, Oct. 29, 1999, at A1, available at 1999 WL 6753444.

<sup>287</sup> See *Environmental Sneak Attack*, N.Y. TIMES, Nov. 10, 1999, at A22. ("The Byrd amendment would in effect overturn a decision by a federal judge in West Virginia that found the state's mining companies, with the complicity of the federal government, had for years violated clean water and surface mining laws by dumping rock waste into valleys and streams.")

<sup>288</sup> One UMWA advertisement said:

The judge's decision has far-reaching effects. As a result, enormous concern over the future of coal mining in the eastern coalfields has quickly spread. Both surface and underground mining would be affected by the decision, as well as the entire economies of the coal-producing communities and states themselves.

....

The judge's broad decision itself was uncompromising . . . ruling that most mountaintop mining broke the law and must stop.

UMWA, *An American Way of Life*, DOMINION POST (Morgantown, W. Va.), Nov. 10, 1999, at 8-C (second ellipsis original) (paid advertisement) (on file with author). A flyer circulated by the UMWA proclaimed:

We're not the enemy. Yet we—and those we love—have become the casualties in a battle we didn't even start.

Because of a recent court decision, 400 of us are about to lose our jobs. Four hundred of us will have to tell our wives and husbands we can't afford groceries . . . the car payment . . . clothes for the kids. Four hundred of us will have to try to erase the

DEP and the coal companies predicted that the injunction would cause serious economic harm. The district court replied that it was “in no position . . . to take an informed measure of the harms predicted,” and that these predictions were based on “invective” and “irrational fears,” observing that:

[A] firestorm of reaction has come forth from Defendants and state government officials, predicting that the Court’s injunction will cause unprecedented economic and social dislocation throughout West Virginia. These opinions are echoed in the affidavits filed by Defendants supplementing their motions to stay. The dire predictions are further bolstered by third party statements of what the Court’s Opinion holds. As noted, those “opinions” not originating with the Court reflect, at best, misunderstandings and, at worst, egregious misrepresentations, of significant portions of the ruling. Additionally, many coal workers have been laid off . . . and the Governor has ordered State government to budget-cut to accommodate a ten percent decrease in expected tax revenues.<sup>289</sup>

Although it rejected industry and DEP assertions, the district court granted a stay of the injunction pending appeal of its decision to the United States Court of Appeals for the Fourth Circuit.<sup>290</sup> In the spring of 2001, the Fourth

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devastating fear of our children. Four hundred of us will no longer pay taxes . . . will no longer have the spirit to support our community the way we do now.

UNITED MINE WORKERS OF AMERICA ET AL., WE’RE NOT THE ENEMY, WE’RE YOUR NEIGHBORS (ellipses original) (flyer on file with author). An Arch Coal, Inc. advertisement stated:

Mountaintop mines are vital to West Virginia. . . . In some areas of West Virginia, the only economical way to recover coal is from mountaintop mining. This method represents 20% of the industry’s current employment. *The cold fact is that eliminating or placing a moratorium on mountaintop mining would result in loss of jobs and shutting down mines and would be devastating to many communities.*

Arch Coal, Inc., *To Most People, Coal Means Affordable Energy. But for 43,000 West Virginians, It Means a Way of Life*, DOMINION POST (Morgantown, W. Va.), Sept. 23, 1998, at 3-B (emphasis original) (paid advertisement) (on file with author).

<sup>289</sup> Bragg v. Robertson, 190 F.R.D. 194, 196 (S.D.W. Va. 1999).

<sup>290</sup> *Id.* The court’s terse opinion also observed that:

This Court is in no position to examine adequately the factual basis of these reactions so as to take an informed measure of the harms predicted and weigh them in the balance of equities required to adequately address the justice of issuing a stay at this time. The Court, however, is able to understand that the shrill atmosphere of discord must subside so that our Court of Appeals and this Court are able to address the crucially important legal issues that formed the basis of the October 20 ruling and that shape the remainder of the case calling for district court action.

In short, the Court believes it preferable to attempt to defuse invective and diminish irrational fears so that reasoned decisions can be made with all deliberate speed, but with distractions minimized.



Circuit reversed the District Court, holding that the Eleventh Amendment to the United States Constitution barred the suit against the state.<sup>291</sup>

Notwithstanding the Fourth Circuit's reversal, evidence uncovered in *Bragg* added to the accumulation of facts showing that coal industry lobbyists, politicians, and government regulators had perverted SMCRA to avoid meeting the economic development requirements attendant mountaintop removal mining. Often working in concert, these forces deprived coalfield communities of the economic development opportunities promised by SMCRA, even as they continued to spew propaganda about the need for flat land as a panacea that promised a new era of coalfield economic prosperity.

From its inception, the story of SMCRA's administration and enforcement is a tale of top federal and state officials ignoring their duty to protect the coalfield environment and the rights of coalfield citizens from coal operator excesses. Instead of embracing these duties, they chose to manipulate the interpretation of the law to curry favor with those whom they are required to regulate. In the process, decisions of OSM and state regulators allowed coal companies to greatly expand the use of mountaintop removal while avoiding the costs of compliance with SMCRA's strict mountaintop removal requirements.<sup>292</sup>

#### V. COALFIELD ENVIRONMENTAL INJUSTICE TAKES A NEW FORM

The inability or unwillingness of federal and state regulators to interpret and enforce SMCRA to effectuate the Act's promise to protect coalfield citizens and their property is not surprising. Indeed, as noted above, Congress expected regulatory failure to occur when it emphasized the historic tendencies of state governments to give short shrift to the interests of coalfield citizens while protecting local coal industry interests.<sup>293</sup> In light of this history, SMCRA contained two major components intended to neutralize states' natural tendency to favor coal companies over environmental protection and the rights of coalfield communities: 1) federal oversight of state mining regulatory programs, and 2) citizen rights to participate in the administration and enforcement of the Act. As discussed above, OSM has proved to be woefully ineffective in policing state regulatory programs, siding with the coal industry on many major issues.

The combined impacts of state and regulatory malfeasance and misfeasance and coal industry chutzpah has left coalfield citizens alone to fend off the incursions of property rights and environmental harm caused by

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<sup>291</sup> *Bragg v. Robertson*, 248 F.3d 275, 286 (4th Cir. 2001).

<sup>292</sup> This Essay focuses on the impacts of strip mining on the people and communities of the central Appalachian coalfields. However, the failure of OSM and state regulatory agencies to enforce SMCRA's mandate to limit the extensive damage caused by modern underground longwall mining provides a corollary tale of betrayal of the law's promise to protect coalfield communities and citizens. That story will be left to another day.

<sup>293</sup> H.R. REP. NO. 95-218, at 88-92 (noting the importance of citizen participation and that environmental concerns often receive "short shrift" as compared to the economic interests of the mining industry), *reprinted in* 1977 U.S.C.C.A.N. 539, 625-27.

modern, high-extraction mining techniques such as mountaintop removal. Thus, throughout the coalfields, citizens have organized at the grassroots level in an effort to protect their own interests.<sup>294</sup> Such organization would appear to be essential if the coal industry juggernaut, aided by politicians and regulators, is to be restrained from literally wiping out whole coalfield communities.

At first blush, the specter of wholesale destruction of entire communities might appear to some to be a gross exaggeration. It is not. The very existence of some former coal camps presents an obstacle to corporate plans to maximize the recovery of coal reserves and profits derived therefrom. Such communities are quite literally “targeted” for elimination. As discussed below, the evidence of such corporate plans and agency acquiescence is well documented.

Equally well documented is the approach of many coal companies to communities where elimination is not achievable—they simply carry on mining-related activities as if their coalfield neighbors do not exist. Thus, the corporate expectation, or at least the hope, is that communities will suffer in silence the infringements of private property rights that would never be tolerated in the upscale suburbs where most politicians, regulators, and coal company managers live. Among the tools available to coalfield communities for use in resisting the new wave of coal mining externalities are statutory citizen suits and time-tested common law remedies.

Three themes run throughout this Section: 1) the paradox of a jobless coal boom at the close of the twentieth century and the continued joblessness and poverty of coalfield communities; 2) the impacts of coal industry abuses and regulatory agency failures in the face of the highly disruptive forms of modern, full-extraction mining operations; and 3) the statutory and common law rights and remedies that hold out the promise of bringing at least a small modicum of environmental justice to coalfield citizens.

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<sup>294</sup> Throughout the nation's coal producing regions, grassroots citizen groups have organized. The Citizens Coal Council (CCC) is an umbrella organization which assists coalfield residents in communicating with each other and in pooling resources to address national mining issues. In West Virginia, these include such grassroots organizations as Coal River Mountain Watch, the West Virginia Organizing Project, and the Ohio Valley Environmental Coalition. See generally CITIZENS COAL COUNCIL, WELCOME TO THE CITIZENS COAL COUNCIL, at <http://www.citizenscoalcouncil.org> (last visited Feb. 22 2004). A perusal of CCC's member organizations gives an indication of the scope of coalfield citizen activism. CITIZEN'S COAL COUNCIL, CITIZEN'S COAL COUNCIL MEMBER GROUPS, at <http://www.citizenscoalcouncil.org/members.htm> (last visited Feb. 22, 2004). CCC's member organizations include many, but not all, of the grassroots groups that have been created at the local level to deal with coal mining excesses and regulatory agency failures. Other statewide citizen organizations like Kentuckians for the Commonwealth, Save Our Cumberland Mountains in Tennessee, and the West Virginia Highlands Conservancy have fought for coalfield environmental, social, and economic justice for decades.

*A. Paradox in the Coalfields: Coal Production Booms While New Mining Technology Alters the Environment and the Economy Stagnates*

The following discussion shifts the attention of this Essay to an examination of the paradox of record coal production attendant expansion of mountaintop removal mining operations and the reality of life in Appalachian coalfield communities where that coal is being produced.<sup>295</sup> Nowhere does the now century-old struggle of coalfield citizens for environmental, economic, and social justice come into clearer focus than in the former coal camp communities of southern West Virginia.

In an insightful op-ed piece, Dan Radmacher, former *Charleston Gazette* editorial page editor, observed that coal-producing counties in West Virginia, Kentucky, and Virginia are much poorer than coal-producing counties in western states.<sup>296</sup> Radmacher noted that in Mingo County, the heart of the so-called “Billion Dollar Coalfields,” the median household income is \$12,000 less than the national average.<sup>297</sup> “Those left in McDowell County[, West Virginia,]” Radmacher reported, “are surrounded by empty houses and businesses, which has to be a psychological burden as well as a barrier to economic development.”<sup>298</sup>

A recent “regional profile” published by a West Virginia business think tank asked: “Are West Virginia’s ‘billion dollar coalfields’ on the cusp of change and economic development?”<sup>299</sup> The profile observes that “Today, a large percentage of the coal mined in West Virginia is from strip [mining], requiring fewer people. This means fewer jobs, lack of a well-planned infrastructure for communities and an educational system that suffers from all of these factors.”<sup>300</sup>

The profile’s author candidly admits what is obvious to the most casual observer: “One of the most important things in courting corporations is to have a strong infrastructure, including roads, sanitary systems, water, airports and broadband cable, many are lacking here . . . .”<sup>301</sup> On this point R.W. Wilkinson, president of a coalfield bank, makes the point that “every business that looks to locate in any community expects that area to have basic services available. This has been ignored for many years and is today very expensive to develop.”<sup>302</sup>

<sup>295</sup> While the expanded use of mountaintop removal mining has made a substantial contribution to increased coal production, the other new technology—underground longwall mining—is equally responsible for the jobless coal boom experienced in central Appalachia.

<sup>296</sup> Dan Radmacher, *The Curse of Coal: Out West, Counties Fare Better*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), June 10, 2001, at 1C, available at 2001 WL 6672917.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Coalfield Counties Rich in Potential: Bank President Says Tourism Vital to Growth*, DISCOVER: THE REAL WEST VIRGINIA FOUND., SUMMER 2002, at 6, available at <http://www.drwvfoundation.org/pdf/DiscoverSummer02.pdf>.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 7.

<sup>302</sup> *Id.* at 7 (quoting R.W. Wilkinson, President, First Century Bank, Bluefield, W. Va.).

While billions of dollars of coal have been extracted from West Virginia's mountains, the coal industry's power has enabled it to funnel much of the wealth generated by mining to out-of-state interests, leaving little for the people whose labors produced that wealth. Historian John Alexander Williams finds the paradox to be a theme of West Virginia history.<sup>303</sup> "In its repetitive cycle of boom and bust, its savage exploitation of men and nature, in its seemingly endless series of disasters, the coal industry has brought grief and hardship to all but a small proportion of the people whose lives it has touched."<sup>304</sup>

As West Virginia enters the twenty-first century, one might ask where the money will come from to pay to catapult the coalfield infrastructure into the new century and fund woefully under-funded school systems? Coal is the only game in town, so to speak, and it is not hiring. Nor is it paying sufficient taxes to support modernization of coalfield infrastructure or the dire need for educational system improvements.

As Professor Williams observes, "Much of West Virginia's history has revolved around a struggle for the state's resources" including "struggles over the regulation and taxation of extractive industries" and challenges to the control of natural resources by absentee corporate owners.<sup>305</sup> "The enduring issue," he cogently argues, "is the extent to which the use of West Virginia resources will be governed by considerations of local benefits and needs."<sup>306</sup> As the following discussion reveals, politicians, the local elites, and the coal industry continue to give short shrift to considerations of local needs. Environmental, economic, and social justice in the coalfields remain goals yet to be achieved.

### *B. Targeting Coalfield Communities for Destruction*

As mentioned above, some coal companies targeted for destruction communities located near their mountaintop removal mines. The facts are irrefutable, such corporate plans are not apocryphal—they exist and have already been successful in eliminating some communities. Such plans find their origin in a century of time-honored disdain many coal industry managers have exhibited for miners, their families, and coalfield communities.

Of course such plans are not publicized and are camouflaged by corporate public relations specialists. The industry "PR" spin always seems to revolve around the threat of job losses if a company is held to account for operations which create nuisance conditions no middle-class community

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<sup>303</sup> WILLIAMS, WEST VIRGINIA: A HISTORY, *supra* note 103, at 200–03.

<sup>304</sup> *Id.* at 201. Williams identifies those few who have profited from coal: "There has been, of course, a tiny elite of smaller producers and middlemen who grew rich from coal exploitation although not as rich as the nonresident owners in whose shadow the local elite worked." *Id.*

<sup>305</sup> *Id.* at 202. Absentee corporate ownership continues in West Virginia; one study reported that at least two thirds of privately held land in the state, including most of the coal, is owned by such entities. *Id.* at 202–03 (citing Tom D. Miller, *Who Owns West Virginia?*, HUNTINGTON HERALD-ADVERTISER & HERALD-DISPATCH, 1974, at 2).

<sup>306</sup> *Id.* at 202.

would long endure. Nonetheless, evidence of such plans and tactics is not difficult to find.

Michael Janofsky of the *New York Times* visited West Virginia in 1998 to investigate and in a front page article reported:

Dynamite explosions that cause flying rocks as well as cracks in walls and ceilings far from the blast site are a constant problem for people living nearby. They have caused many residents to accept buyouts from the coal companies, who offer \$100,000 and more for some homes. While the price may seem generous, many residents say it barely compensates for the cost of moving to new communities, finding new jobs and buying other homes.

But the difficult choice of enduring months of noise, dust and rocks or abandoning towns where relatives have lived for generations is beyond reasonable for many residents of southern West Virginia.<sup>307</sup>

Patricia Bragg lived in a former coal camp at Pigeon Creek in Mingo County, West Virginia. Bragg told Janofsky that "The bottom line, whether they offer you a fair price or not, is why do I have to move? . . . As an American, I can choose where I want to live. If I choose to live in a hollow, call me a hick or a hillbilly, but that's where I want to live."<sup>308</sup> At the time of Janofsky's visit, 84-year-old Sylvia Weekley and her son James lived in Pigeon Roost Hollow near Blair Mountain in Logan County.<sup>309</sup> Janofsky found that "for the Weekleys [a buyout was] no longer an issue. Unlike dozens of their neighbors, they . . . refused all offers from Arch [Coal]. Even in the face of thunderous blasting and a reconstructed valley that could come within 300 feet of where they live, they have vowed to stick it out."<sup>310</sup> James Weekley told the reporter, "I'm not leaving[.] . . . This is my home, and they are destroying what God created. I'm beginning to know how the Indians felt, and I've told the coal companies that the only way they'll push me out is with a bulldozer. I'm too old to change my life style."<sup>311</sup>

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<sup>307</sup> Michael Janofsky, *As Hills Fill Hollows, Some West Virginia Residents Are Fighting King Coal*, N.Y. TIMES, May 7, 1998, at A24. The \$100,000 buyout figure Janofsky reports is most likely the amount offered to residents of former coal camps who have sued coal companies for damages. As discussed below, companies typically make no offer to residents whose lives and property is adversely impacted by mining activities, preferring to wait until residents come to the company indicating that they cannot endure the conditions and would like to leave. The usual scenario is a take it or leave it approach in which the resident has no bargaining power. Moreover, because the conditions created by the mining are so bad, there is no market for a home except to sell to the company at its nonnegotiable price. An example of this was the purchase offer made to Monclo resident Maxine Bella by operators of the huge Dal-Tex complex in Logan County, West Virginia. An article by *Charleston Gazette* Reporter Robert J. Byers reported that "Dal-Tex offered the Bellas \$20,000 for their house. After a letter appeared in a local newspaper telling of the hardships that Monclo residents face, Mrs. Bella said the company offered \$57,500." Robert J. Byers, *Dust Bad Now, Residents Say, Without New Mine*, CHARLESTON GAZETTE, June 20, 1991, at C1.

<sup>308</sup> Janofsky, *supra* note 307 (quoting Patricia Bragg).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* (quoting Pigeon Roost resident James Weekley).

In a public forum series held at the University of Charleston (West Virginia) in the fall of 2003, Massey Energy CEO Don Blankenship saw the situation differently. "If you do away with any mining method . . . you take away jobs and the use of private property[.] . . . without coal, communities are devastated," Blankenship argued.<sup>312</sup> The comments of coalfield activist Julia Bonds of Coal River Mountain Watch put Blankenship's arguments into perspective.<sup>313</sup> Bonds and nine generations of her family had lived in Marfork Hollow fifty miles from Charleston.<sup>314</sup> Bond's family was the last to sell its Marfork home to Massey Energy.<sup>315</sup> No one else remains but Massey and its mining operation. Bonds related her experience with Massey:

Massey Coal [Company] moved in there around 1994. Now, I'm used to coal mining—I'm from a coal mining family—but I was not prepared for what Massey brought down on our heads in Marfork. The reserves they're mining now are not the clean reserves they were mining in the '40s, '50s, and '60s. These reserves create more waste than coal. The air pollution, the coal dust, is unbearable in that little community. My grandson now has asthma, and my home and my neighbors homes were damaged by coal dust.<sup>316</sup>

Bonds also told of the fish kills caused by Massey's mining in the stream near the hollow: "My family, for generations, has enjoyed that stream, but we never went back in the river again. We also witnessed several black water spills [of coal waste]. Those are so thick they're like pea soup, with big chunks in it."<sup>317</sup> Summarizing her feelings, Bonds told an interviewer, "That was my home. Living in a hollow in West Virginia is unique. You feel so protected, its so peaceful and quiet—until a mining company moves in, of course. They were completely indifferent to the people that lived there."<sup>318</sup> Finally, after every other family in Marfork had moved, Bonds retained a lawyer and negotiated the sale of her home to Massey.<sup>319</sup>

Another example of a coal company carrying out plans to eliminate old coal camp communities is Yolyn, located in Logan County, West Virginia,

<sup>312</sup> *Environmentalist, Massey Exec Debate Mountaintop Removal*, DOMINION POST (Morgantown, W. Va.), Oct. 29, 2003 (quoting Don Blankenship, CEO, Massey Energy), available at <http://www.dominionpost.com/a/news/2003/10/29/an>.

<sup>313</sup> Julia Bonds was a 2003 recipient of the Goldman Prize, the world's premier award for environmental activism. Michelle Nijhuis, *Coal Miner's Slaughter: West Virginia Activist Julia Bonds Takes On Mountaintop Removal Mining*, GRIST, Apr. 14, 2003, available at <http://gristmagazine.com/grist/maindish/bonds041403.asp>.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* (quoting Julia Bonds) (modification in original).

<sup>317</sup> *Id.* (quoting Julia Bonds) (modification in original).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* Bonds's encounters with Massey Coal turned her into a community activist. She articulates the feelings of many disempowered former coal camp residents who are faced with the impacts of modern large-scale mining operations: "Unless you live in the coalfield counties, you don't understand the oppression people live under. This a mono-economy . . . so we've had to rely on it. If it blasts, oozes, or gushes, its done near poor, oppressed, rural communities or minority communities. This is the dirty little secret that people are now speaking about." *Id.* (quoting Julia Bonds).

about 12 miles from the town of Logan, the county seat. In summer of 1997, Yolyn existed; by November of that year it was gone.<sup>320</sup> Residents attribute the destruction of their community to a nearby large mountaintop mine operated by Arch Coal.<sup>321</sup> An account of what happened to Yolyn is posted on a website dedicated to coalfield communities and their struggle for environmental justice:

The demise of Yolyn seems to have begun at the end of June when a hard rain fell in the area. Part of a valley fill about a mile beyond Yolyn collapsed into the road. So much earth and rocks filled the road that state highway equipment couldn't move it. The mine had to bring in its own larger shovels and trucks. The state Division of Environmental Protection issued a violation for the slide. Several of the residents filed complaints. Lawsuits were threatened.<sup>322</sup>

Shortly thereafter, the owner of the former company town began evicting its residents.<sup>323</sup> Many residents of Yolyn hold roots there extending back many decades.

Yolyn was a community containing a mixture of old coal camp houses and mobile homes.<sup>324</sup> The land upon which the village was located was owned by Dingess-Rum Land Co., one of the large landholding companies that own thousands of acres of surface and coal in southern West Virginia.<sup>325</sup> Dingess-Rum owned many of the old camp houses.<sup>326</sup> "According to one resident of nearby Chambers, the people who lived on Dingess-Rum property had been promised they could stay there by the former manager of the company."<sup>327</sup> Yolyn residents relied on the promises of the former manager, believing that they would always be able to live there.<sup>328</sup>

Many Yolyn residents received some monetary compensation from the land company, but many had difficulty finding affordable housing elsewhere.<sup>329</sup> "After the residents moved out, the houses were burnt in

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<sup>320</sup> PENNY LOEB, YOLYN, at <http://www.wvcoalfield.com/images/yolyn.htm> (last visited Feb. 22, 2004). The [www.wvcoalfield.com](http://www.wvcoalfield.com) site contains information concerning the struggles of many West Virginia coalfield residents and their attempts to deal with the impacts of large-scale mountaintop removal and longwall mining operations in their midst. The site is updated periodically. Included are postings relating to the following coalfield communities: Beech Creek, Belva, Big Ugly, Blair, Buffalo Creek, Chambers, Clear Creek, Cowen, Cyclone, Delbarton, Dingess, Duncan Fork, Erbacon, Foster, Francis Creek, Holden, Kayford Mountain, Laurel Creek, Lick Creek, McGraws, Mate Creek, Marrowbone, Mud River, Pigeon Creek, Ragland, Rawl, Riffe Brance, Seng Creek, Superior Bottom, Sylvester, 22 Mine Road, Varney, Thacker, Wharncliffe, White Oak, and Yolyn. PENNY LOEB, THE COALFIELD COMMUNITIES OF SOUTHERN WEST VIRGINIA, at <http://www.wvcoalfields.com> (last visited Feb. 22, 2004).

<sup>321</sup> LOEB, YOLYN, *supra* note 320.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* Dingess-Rum manager Greg Wooten claimed, "In Dehue Hollow alone, Dingess-Rum spent over \$200,000 assisting 84 families to relocate to the Rum Creek area. They spent another

suspected arson fires.”<sup>330</sup> About every three nights during the early fall, fire trucks would roar into the community.<sup>331</sup>

In a January 11, 1998 letter to the editor of *The Logan Banner*, Jane Dalrymple wrote about her experience of being evicted from her home in Yolyn:

I am one of the many people who rented a home from Dingess-Rum properties at Yolyn, that was forced to leave my home. [My] family has lived on Rum Creek for as long as I can remember and has attended Bethel Chapel for over 50 years. [R]um Creek has always been a family-oriented community, where our children were safe and happy.

The house we were renting was not falling down. My husband and I moved into the house, laid rugs, and put in ceiling fans. The house we left was in better shape than most of the houses we looked at to buy since our eviction notice. We were not paid any money to help remodel the house when we moved in, nor were we paid for these renovations when we were forced to leave.<sup>332</sup>

Dalrymple wrote emotionally of the impact of being forced from her home and community:

These communities hold so many memories for us. Now [when] you drive up Yolyn, you cannot even see where our homes had once been. [T]hese homes were torn down as soon as we moved out. [S]ome were torn down before we got all our personal belongings out.

The saddest part is that Dehue Church, Slagle Church, and our Bethel Chapel are gone or will be destroyed. The only thing left in this community are a few lonely trailers waiting for a place to go.<sup>333</sup>

The coal industry has long used the “jobs card” to frighten coalfield communities. Whether it has been fighting UMW organizing, fair taxation of coal reserves, limitation on the weight of overloaded coal trucks, black lung legislation, or mine safety and environmental regulation, this tactic has resonated among a populace desperate for decent jobs at a living wage. Thus, the industry and those who carry its water have achieved considerable success in portraying the public policy choice as a stark one between jobs and whatever measure has been proposed to advance broader public interests.<sup>334</sup>

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\$120,000 to assist 54 families.” Letter from Greg Wooten, Dingess-Rum Land Company, to the Editor of the *Logan Banner* [hereinafter Wooten Letter], available at LOEB, YOLYN, *supra* note 320.

<sup>330</sup> LOEB, YOLYN, *supra* note 320.

<sup>331</sup> *Id.*

<sup>332</sup> Letter from Jane Dalrymple, Monaville, W. Va., to the Editor of the *Logan Banner* (Jan. 18, 1998) [hereinafter Dalrymple Letter], available at LOEB, YOLYN, *supra* note 320.

<sup>333</sup> *Id.*

<sup>334</sup> See, e.g., Ken Ward Jr., *Miners Pack Hearing To Support Strip Permit: Area Needs the Jobs, UMW Member Says*, CHARLESTON GAZETTE, May 6, 1998, at 1A (noting that the coal company applying for a permit placed notices in employees’ pay envelopes which read: “There will be people [at an upcoming hearing] that don’t want this permit issued[.] . . . They don’t care about your job. Please attend this hearing to show you support the future of our jobs here[.] . . .



Jane Dalrymple's letter to the editor reflects community peer pressures grounded in the ever present fear of losing existing jobs. Like most coalfield residents adversely impacted by coal company decisions, Dalrymple took pains to make clear that she was a friend of coal; but, she concluded, "My opinion of coal mining is changing."<sup>335</sup>

Dingess-Rum manager Greg Wooten responded to Dalrymple and other critical letters that appeared in *The Logan Banner*, explaining that "just because there were a few letters to the editor I really don't feel they represent the majority. You are always going to have those that complain when you are running a business."<sup>336</sup> Wooten went on to explain that his company had the legal right to evict families from the company houses: "By allowing people to rent a house, in no way obligates this company to provide them with housing forever."<sup>337</sup> Wooten placed the blame squarely on the people of the community: "It is true that some have lived on our properties for many years, but that was their decision."<sup>338</sup>

Marfork Hollow, Dehue, and Yolyn are but examples of the respect coal company managers have for families still occupying old coal camp houses as month-to-month tenants.<sup>339</sup> As Greg Wooten argued, coal companies are well within their legal rights to evict long-time residents and demolish communities that have existed for a century. No question about it.<sup>340</sup>

But, Yolyn and Dehue fall within the category of old coal camps where the company houses were not sold to their occupants in the 1950s and 1960s, but were retained and rented to the occupants. Because residents of such communities pay rent and are essentially tenants at will, there are no legal impediments and corporate owners may destroy these communities with

Encourage your family and friends to join you. Arrive early and get your 'I'm proud to work at Dal-Tex' T-shirts while supplies last."), *available at* 1998 WL 5949401.

<sup>335</sup> Dalrymple Letter, *supra* note 332.

<sup>336</sup> Wooten Letter, *supra* note 329.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> See, e.g., *Scope of Massey Expansion Unclear*, *supra* note 73 (describing the treatment of month-to-month lease holders in Coon Hollow, W. Va.); LOEB, *THE COALFIELD COMMUNITIES OF SOUTHERN WEST VIRGINIA*, *supra* note 320 (describing the plight of residents of 36 coalfield communities).

<sup>340</sup> However, just because a coal company has the legal right to destroy entire communities in pursuit of maximization of profit does not mean that corporate managers have no choice in the matter. No one held a gun on Dingess-Rum's executives and ordered them to destroy Yolyn. Although Dingess-Rum and its corporate parent, Massey Energy, control thousands of acres of surface land and coal reserves near Yolyn and Dehue, no thought was likely given to simply leaving some coal unmined in a buffer zone to protect those communities. Such an approach would have meant slightly less profits—but no out of pocket expenses. Of course, to absentee executives and corporate shareholders, those communities are simply obstacles to maximizing profits and dividends. To them, human beings and communities are just as fungible as coal. Moreover, if a corporate decision had been made to let these two small communities survive, would not others similarly situated throughout the coalfields demand the same treatment? As Massey Energy CEO Don Blankenship suggests, it is the coal industry's patriotic duty to mine every ton of coal it can profitably reach. See Ken Ward Jr., *Executive, Activist Debate Merits of Coal*, CHARLESTON GAZETTE, Oct. 29, 2003, at 11A (noting that Blankenship's favorite argument is "that a healthy coal industry could keep the United States from fighting wars in the middle east" and that coal "is the key to homeland security").

impunity. But what of the houses no longer owned by “the company”—the homes that had been purchased by miners? Surely, the uninitiated might say, modern coal company managers will respect the rights of citizens who still live in those communities.

Arch Coal, one of the nation’s top coal producers, operates several huge dragline mountaintop removal operations in the “billion dollar coalfields” of southern West Virginia.<sup>341</sup> When allegations were made that Arch’s mining operations had devastated former coal camp communities near one of its largest mountaintop removal operations in Logan County, West Virginia the company flatly denied the charges.

Arch spokesman David Todd assured a *Washington Post* reporter that Arch was “committed to protecting the environment and respecting West Virginia’s mountain heritage.”<sup>342</sup> Interviewed on the nationally televised ABC News *Nightline* program, Todd told viewers that Arch Coal “continue[s] to try to work with that community and to find ways to minimize our temporary presence there.”<sup>343</sup> However, Todd’s statements were demonstrably at odds with reality. The following discussion reviews the history of the conflict between the coal companies operating a huge mountaintop removal complex near Blair Mountain in Logan County, West Virginia and home owners residing in former coal camps located in the midst of Arch’s Dal-Tex operations.

### *C. Mountaintop Removal at Blair Mountain: A Case Study of Environmental Injustice in the Coalfields*<sup>344</sup>

#### *1. The Dal-Tex Mountaintop Removal Complex and Neighboring Communities*

In the mid-1980s and early 1990s, vast, strippable coal reserves were purchased in the heart of the billion dollar coalfields of southern West Virginia, and strip mining of these coal seams began in earnest. The people of the old coal camps located near these mines began to feel the negative effects of coal mining—without the benefits. The loss of thousands of coal mining jobs during the previous three decades of industry decline was not reversed. Rather, as coal production began to rise to record levels, mining

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<sup>341</sup> See ARCH COAL, INC., ABOUT US: ARCH COAL OF WEST VIRGINIA (describing Arch Coal’s operations in West Virginia), at <http://www.archcoal.com/aboutus/archofwestvirginia.asp> (last visited Feb. 22, 2004).

<sup>342</sup> Joby Warrick, “Mountaintop Removal” Shakes Coal State: Cost of Prosperity Hits Close to Home, WASH. POST, Aug. 31, 1998, at A1 (quoting David Todd, Vice President, Arch Coal, Inc.), available at 1998 WL 16552987.

<sup>343</sup> *Nightline: Digging Deep, The Cost of Cheap Energy: Removing Mountaintops to Mine for Coal* (ABC television broadcast, Apr. 21, 1998) [hereinafter *Nightline*] (transcript on file with author).

<sup>344</sup> The Author represented several plaintiffs in litigation stemming from mining activities around Blair Mountain. The settlement agreements to that litigation included confidentiality agreements. Thus, the authority for this Section primarily comes from media accounts of the events at Blair.

jobs continued to be lost to a new era of mechanization in underground and strip mining.

Communities located near these new, highly mechanized mines experienced increased adverse impacts from larger and larger mines that invaded the peace and solitude that they had begun to enjoy. Coal camp residents struggled to maintain some semblance of normality as small communities were engulfed in blasting vibrations, dust, noise, and flooding emanating from mine operations.<sup>345</sup>

In 1992, Ashland Coal, Inc. purchased Dal-Tex Coal Corp. and 22,000 acres of property near historic Blair Mountain, the site of the last battle of the mine wars.<sup>346</sup> In the deal, Ashland paid \$242 million for 220 million tons of low-sulfur coal.<sup>347</sup> Ashland Coal and Arch Mineral Corp. merged in July 1997, forming Arch Coal, Inc., one of the nation's biggest coal producers.<sup>348</sup>

At the time of its 1992 purchase, Ashland Coal executives had big plans for the Dal-Tex complex. Using high explosives and enormous equipment, including giant, twenty-story-high crane-like draglines, huge rock trucks, and gigantic bulldozers, these mines would apply state-of-the-art mountaintop removal mining techniques to turn the huge tract into what would be one of the largest contiguous mountaintop removal mines in Appalachian history.

First, as many as twenty coal seams underlying high mountain ridges would be peeled off. Preceding the extraction of each seam, miners would drill into underlying rock layers and insert explosives and then blast this "overburden" apart.<sup>349</sup> The fractured rock overburden, or "spoil," would then be scraped off by the dragline bucket and dumped into the narrow valleys running out from the main ridges. This process would be repeated as the overburden of each coal seam was blasted apart, coal extracted, and spoil dumped into valleys containing headwater streams. The extracted coal would be hauled to coal stockpile areas and eventually loaded onto 120-car coal trains on a track that ran through the small former coal camp of Monclo.

As is typical in such large corporate acquisitions, before inking the Dal-Tex acquisition, Ashland performed a "due diligence" evaluation to

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<sup>345</sup> See generally Loeb, *supra* note 199.

<sup>346</sup> Ken Ward Jr., *Buying Blair*, SUNDAY GAZETTE-MAIL (Charleston, W. Va.), Nov. 22, 1998 [hereinafter *Buying Blair*], available at <http://www.wvgazette.com/static/series/mining/MINE1122.html>.

<sup>347</sup> *Id.* Included in the purchase were the vast coal reserves and several active Dal-Tex strip and underground mines. The reserves and Dal-Tex mines were located in close proximity to a number of small communities that had once been company towns. Blair, Sharples, Five-Block, Monclo, and a dozen others were located up hollows adjacent to the acquired reserves and along the narrow valley bottom through which West Virginia Route 17 runs from Madison, in Boone County, to Logan, the county seat of Logan County—the same path taken by the army of union miners as they marched toward Blair Mountain and the biggest of the West Virginia Mine War battles. *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> Penny Loeb's *U.S. News & World Report* article discussed the enormous blasts detonated by mines located near former coal camps. "Blasts are made with the same mixture . . . used in the bomb that killed 168 people in Oklahoma City [in 1995], but the mining explosions are 10 to 100 times stronger." Loeb, *supra* note 199, at 32.

determine potential risks and costs attendant the property to be acquired. Like the astute businessmen they were, Ashland executives had done their homework. They knew that Dal-Tex's enlarged stripping operations had not been well received by the residents of nearby former coal camps like Monclo. Some families in Monclo had even filed lawsuits alleging that mining operations had disrupted their lives.<sup>350</sup>

In 1991, Monclo residents had protested "choking" dust blowing from the Dal-Tex mine complex into nearby communities.<sup>351</sup> "Blasting, heavy equipment operation and coal trucks leave a film of dust on the area that reappears after every cleaning. Cases of asthma, allergies and bronchitis are reported," said a newspaper article.<sup>352</sup> At the time, Dal-Tex's mine manager attempted to minimize residents' complaints, asserting that "At any facility such as this one, dust and coal traffic are going to be issues[.] . . . We work around the clock to try to alleviate any of the problems that come up concerning dust or trucks or any other community complaints."<sup>353</sup>

After their purchase, Ashland Coal officials immediately began to expand the mine, according to United States Securities and Exchange Commission financial disclosure statements.<sup>354</sup> The company spent millions on bigger earth-moving equipment.<sup>355</sup> To increase production in 1993, the company began round the clock operations every day of the year at the Dal-Tex complex.<sup>356</sup>

## 2. Mountaintop Removal Mining Impacts Stir Community Resistance

People who lived near Dal-Tex felt the full impact of the transformation of their quiet rural communities into the epicenter of a major industrial complex.<sup>357</sup> Blair resident Tommy Moore described the dust as "a constant haze all the time."<sup>358</sup> In a sworn statement, Moore said, "I've seen times

<sup>350</sup> *Buying Blair*, *supra* note 346.

<sup>351</sup> Byers, *supra* note 307.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* (quoting Allen Workman, President, ACR Service Corp., the entity contracted by Dal-Tex to manage the mine). However, one 62-year-old woman who had lived in Monclo for 26 years disagreed, telling the reporter that "nobody will listen. Nobody will come and talk to you about it." *Id.* (quoting coal camp resident Reva Podunavacs). Mrs. Podunavacs told the reporter they were fed up with the 24-hour a day coal truck traffic: "I have grandkids, and I'd like to see them married, not smashed on the road." *Id.* (quoting Reva Podunavacs).

<sup>354</sup> *Buying Blair*, *supra* note 346.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* This schedule allowed Ashland to mine an additional one million tons of coal annually. *Id.*

<sup>357</sup> In the early 1980s, before the Dal-Tex complex began to evolve, the small former coal camp communities in the area were quiet and isolated, surrounded by a dense second growth deciduous hardwood forest. One resident recalled what it had been like in Monclo before the transformation: "This was a beautiful hollow when we came here twenty years ago[.] . . . There was just one small tipple down there [at the bottom of the hollow] and the railroad, which had trains running through a couple of times a week." Byers, *supra* note 307 (quoting Lorean Stollings, resident of Monclo, W. Va.).

<sup>358</sup> Ken Ward Jr., *State, Firms Slow to Correct Dust, Blasting Problems, Records Show*, CHARLESTON GAZETTE, Nov. 23, 1998, at 1A [hereinafter *State, Firms Slow to Correct Dust*,

where vehicles driving down the road would have to turn on headlights during the day."<sup>359</sup> Brenda Rollins told a state administrative board that:

Every day it's blast and it's blast it's blast and it's dust and it's dust. . . . I'm a nurse. I see people with . . . asthma. [Victoria Moore's] son has allergies. I see people come in with these. And I know by looking in the community that this dust is affecting everybody in the community. . . . The elderly, we have lots of elderly people that live in our community, and it is affecting them drastically.<sup>360</sup>

Those affected by the blasting and dust did not find speedy help from either the state or the coal company.<sup>361</sup> Five Block resident Victoria Moore explained the "runaround" she received from State regulators on a day when she sought to report heavy dust coming off the mine:

I called the air quality people and they put me in touch with Jeff Hancock. And he couldn't tell me nothing, so he told me to call abandoned mines and reclamation. Well, I couldn't get nothing done there, so I called back at forty-five and they told me to talk to James Robertson. And he took my complaint and they said that they would get in touch with the DEP in Logan and, you know, find out more about it. I've never heard nothing from the air control people. And what [DEP officials] told me is . . . there is no law about how much [dust] can come down into a community from blasting from a mine.<sup>362</sup>

DEP officials bemoaned the fact that agency inspectors could never seem to be able to get to the Blair area in time to observe the dust coming off the mine. Without actually seeing the dust blowing from the mine, DEP claimed an inability to take enforcement action.<sup>363</sup> For its part, the company repeatedly pointed to steps it was taking to protect Blair residents from mine blasting.<sup>364</sup>

Residents of the former coal camps near the Dal-Tex complex rejected mine manager excuses. State regulators' repeated refusals to take enforcement action to curtail the impact of mining operations on their communities were rendered untenable by the outraged residents who effectively used home video equipment to document what they were

*Blasting Problems*] (quoting Tommy Moore, resident of Blair, W. Va.), available at 1998 WL 5982779.

<sup>359</sup> *Id.* (quoting Deposition of Tommy Moore in his lawsuit against Arch Coal, Inc. for nuisance).

<sup>360</sup> Transcript of Proceedings at 66-67, *Dal-Tex Coal Co. v. Div. Env'tl. Prot.*, Appeal No. 96-6-SMB (W. Va. Surface Mine Bd. April 4, 1996). At the same Surface Mine Board hearing, Victoria Moore testified about the dust: "You can feel it on your skin. You can feel it in your eyes. . . . If you go out and stand in the yard it's falling, you can feel [it] becoming hard[er] to breathe. It's on your cars. You can see it on your porch." *Id.* at 22.

<sup>361</sup> *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358.

<sup>362</sup> Transcript of Proceedings at 12-13, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB).

<sup>363</sup> *See id.* at 27 ("[W]e can't be there all the time. . . . They shoot probably four blasts every day.") (statement of Darcy White, DEP Environmental Supervisor before the West Virginia Surface Mine Board).

<sup>364</sup> *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358.

experiencing.<sup>365</sup> Armed with irrefutable video evidence, local residents demanded action.<sup>366</sup>

Finally responding to unrelenting pressure from local residents, state inspectors issued four notices of violation (NOVs) to the company for its fugitive dust emissions.<sup>367</sup> The company appealed the NOVs to the state's Surface Mine Board (SMB).<sup>368</sup> The coal company's defense was that "DEP inspectors could not prove that Dal-Tex violated any legal dust limits."<sup>369</sup> But before SMB could reach the merits, the company and DEP secretly negotiated a consent settlement agreement.<sup>370</sup> The settlement required the coal company to pay a \$2,000 fine every time company-installed dust monitors detected dust in excess of specified limits.<sup>371</sup>

A hearing was held for purposes of submitting the agreement to SMB for its approval. Appearing without counsel in front of SMB, citizen intervenors picked apart the agreement, raising numerous questions about the limits it placed on dust emissions and how its terms would be implemented by DEP.<sup>372</sup> The citizens zeroed in on the provision of the agreement that seemed to tie DEP's hands and prevent it from taking alternate enforcement action in the event the company failed to achieve abatement.<sup>373</sup>

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<sup>365</sup> Parts of videotapes taken by Blair residents were shown on ABC's *Nightline* on April 22, 1998. The video clips confirmed Moore's statement, showing vehicles moving slowly through air thick with dust along West Virginia Highway 17. The video also showed that the dust permeated the air to such a degree that a man standing on his front porch could not see a neighbor's home located only a few hundred feet away.

<sup>366</sup> In a two-year period, Blair residents filed 200 complaints with DEP about dust and blasting problems at the mine. *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358. Victoria Moore testified at a state Surface Mine Board hearing that the dust was not "a one time thing. This is every day. We can take videos for them and show them . . . . But [DEP inspectors are] saying it ain't doing this, you know, we can't look at them. We can show them it is every day. If it's not in the afternoon, it will be in the evening." Transcript of Proceedings at 33, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB). Interestingly, the residents' videotapes recorded dust falling on their homes at all hours of the day and night. Much of the dust could be seen on the videos coming from the dragline, huge trucks, shovels, and loaders used as part of the mine's mountaintop removal operation. Thus, the heavy dust falling on adjacent communities had many sources in addition to blasting. The audio portion of the videos also documented the constant, loud noises of the mine's giant machinery and bright lights from the dragline flooding nearby residences throughout the night. Copies of the videotapes are on file with the author.

<sup>367</sup> Transcript of Proceedings at 26, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB).

<sup>368</sup> SMB is an administrative body created to hear appeals from final decisions of DEP. SMB conducts formal adjudication and the scope of its review is *de novo*. See W. VA. CODE ANN. § 22B-1-7 (Michie 2002) (setting forth procedures for appeal to the SMB).

<sup>369</sup> *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358.

<sup>370</sup> Once the agency and the company agreed on the basic terms of the agreement, the draft document was released to the citizen intervenors. The intervenors were permitted to comment on the agreement at the time it was presented to SMB for approval. Transcript of Proceedings at 4, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB).

<sup>371</sup> *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358.

<sup>372</sup> Transcript of Proceedings at 7-8, 10-12, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB).

<sup>373</sup> *Id.* at 56. See *infra* note 379 for a discussion of alternative enforcement actions to civil penalties under West Virginia law.

One SMB member echoed the citizens' concerns, asking, "Why does the State agree that [the company] can willfully exceed the dust emission limits?"<sup>374</sup> After receiving unsatisfactory responses from DEP and company representatives, he expressed the concern that the company might conduct a cost-benefit analysis and conclude that the benefits of unchecked blasting might outweigh the costs of any future fines.<sup>375</sup>

Dismissing this concern, SMB approved the settlement over the objection of the citizen intervenors.<sup>376</sup> Subsequently, the company's dust monitors repeatedly identified violations of the agreement's numerical emission limits.<sup>377</sup> The company was obliged to pay fines totaling tens of thousands of dollars.<sup>378</sup> DEP took no alternative enforcement action despite these repeated violations.<sup>379</sup>

<sup>374</sup> Transcript of Proceedings at 57, *Dal-Tex Coal Co.* (Appeal No. 96-6-SMB) (statement of SMB Member Thomas Michael). At that point an interesting colloquy occurred between SMB Member Thomas Michael, DEP Attorney Jay Lazell, and DEP Environmental Supervisor Darcy White:

MS. WHITE:	They can't willfully exceed the dust emission limits.
MR. LAZELL:	No, they can't.
MR. MICHAEL:	Well, they can too. They'll get an NOV for it and pay two-thousand dollars, but that's the end of it.
MS. WHITE:	This paragraph is written, I believe, to say that so long as [the company] continues the practices of working with the DEP and trying new techniques and monitoring the dust and analyzing the data and working in conjunction with our inspectors, if they continue to try those new practices in blasting shots, then we agree that their negligence is not . . . willful or unwarranted.
MR. MICHAEL:	Well, that sounds good, but that's not what it says. . . . . What it says is they can violate the standard and pay two-thousand dollars and get an NOV and it will never be considered willful.

*Id.*

<sup>375</sup> *Id.* at 61.

<sup>376</sup> *Id.* at 85-86.

<sup>377</sup> See *State, Firms Slow to Correct Dust, Blasting Problems*, *supra* note 358 ("In 1996 and 1997 . . . DEP inspectors cited the mine 56 times for violating the settlement agreement.").

<sup>378</sup> In 1998, an engineer at the mine asserted "that he believed the citizen's complaints were, 'a method to maneuver the regulatory agencies into putting leverage on the companies. Well, the regulatory agencies are sensitive, and I think a political body, and they are subject to outside pressure . . .'" *Id.* (quoting John McDaniel, Chief Engineer for Hobet Mining). Copies of the notices of violation are on file with the author.

<sup>379</sup> Under SMCRA and its state counterpart, the West Virginia Surface Coal Mining and Reclamation Act, W. VA. CODE ANN. §§ 22-3-1 to 22-3-32 (Michie 2002) (WVSCMRA), regulatory agencies possess a variety of enforcement tools in addition to the civil penalty remedy exclusively used by DEP against the Dal-Tex mine. When monetary fines proved ineffective in persuading the company to utilize effective dust abatement measures, DEP could have sought injunctive relief, *id.* § 22-3-17(j), suspended the applicable mining permits, *id.* § 22-3-17(b), or even filed criminal charges against the company and company managers responsible for insuring compliance with the WVSCMRA. *Id.* § 22-3-17(g). DEP's failure to utilize such alternatives is not unusual. These available law enforcement techniques are seldom used by OSM or the state regulatory agencies in the Appalachian coal fields.

Company officials were not happy with this turn of events. In 1997, the company appealed the penalties to SMB.<sup>380</sup> Company lawyers from the largest and most influential defense firm in West Virginia admitted that the company's own monitoring data had documented large amounts of airborne matter.<sup>381</sup> But, they argued, the detected material did not come from the company's mining operations.<sup>382</sup>

Terah Burdette, who ran the coal company's monitoring program, testified before SMB that "the company monitored all materials in the air, not just dust from the mine."<sup>383</sup> She told the panel that the bulk of what the company's monitors had detected was actually naturally occurring material.<sup>384</sup> She testified that the company had run highly sophisticated electron spectrographic analyses. Those analyses had detected "carbonaceous materials," which she said were simply pollen and mold spores.<sup>385</sup> According to Burdette, when this biological material was deducted from the total dust reading, the dust levels were in compliance with the limits set in the settlement agreement.<sup>386</sup> Thus, Arch Coal's lawyer argued, there had been no violations of the settlement agreement and no fines should have been imposed.<sup>387</sup>

However, once again SMB never ruled on the merits. Without explanation, the coal company dropped the appeal.<sup>388</sup>

### *3. National Attention Is Drawn to Mountaintop Removal Mining at Blair Mountain*

While residents of Blair were fighting DEP and the operator of the Dal-Tex complex in SMB proceedings in 1996 and 1997, the operators of the Dal-Tex complex were carrying out a surreptitious plan. Throughout the period from 1992 to 1997, Ashland and its successor were buying the homes of Blair residents.

Sales of Blair homes to the Dal-Tex operators drew significant national media attention.<sup>389</sup> In a September 1997 article in *U.S. News and World Report*, journalist Penny Loeb wrote, "The mining operation has bombarded the houses below with dust, noise, and occasional rocks."<sup>390</sup> Loeb reported

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<sup>380</sup> *State, Firms Slow to Correct Dust, Blasting Problems. supra* note 358.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* In an interview in late 1998, Arch Coal Vice President David Todd admitted, "We had some dust problems, absolutely[.] . . . We've tried damned hard to fix them." *Id.* (quoting David Todd, Vice President of Arch Coal). However, in a deposition earlier that year, the blasting supervisor at the mine confessed that management never let him know when they were cited for problems, and thus he was unable to make adjustments in his blasting methods. *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> See, e.g., Loeb, *supra* note 199, at 26-36 (reporting on the events in Blair in a national news magazine).

<sup>390</sup> *Id.* at 28.



that “rather than fight constant complaints from homeowners, Arch Coal Inc., the mine’s owner, had bought more than half of the 231 houses in Blair.”<sup>391</sup> The houses were “[v]acated and quickly stripped” and more than 24 homes were burned.<sup>392</sup>

Loeb’s article was critical of both coal operators and the regulatory agencies. Arch Coal and industry lobbyists responded quickly and furiously. Arch Coal President and CEO Steven F. Leer wrote to Loeb’s editors asserting that Loeb had

“strung together a handful of isolated incidents and portrayed them as a pattern of abuse. . . . The reality is this: Coal mining is carried out in close proximity to hundreds of communities in Central Appalachia. . . . With few exceptions this mining is conducted in a careful, safe and responsible manner, and with the full support of the communities in which it is carried out.”<sup>393</sup>

National Mining Association President Richard Lawson joined a chorus of industry criticism of Loeb’s reporting, declaring it “an insult to the mining industry and the hundreds of dedicated federal and state mine inspectors.”<sup>394</sup> Lawson continued, “By drawing upon a handful of isolated incidents, you reach several very general and incorrect conclusions. . . . After mining, the law requires land restoration to either premining or better uses, which the industry and its highly skilled workforce have accomplished with the reclamation of millions of acres.”<sup>395</sup>

#### *4. Facts Emerge About the Coal Company’s Plan for “Working with the Community to Minimize Its Temporary Presence There” When Citizens Seek Relief in Court*

Victoria and Tommy Moore and their two young children, aged four and nine, lived in a mobile home located next to West Virginia Route 17 in Five Block, a small former coal camp close to Blair and the center of Arch Coal’s Dal-Tex complex in Monclo.<sup>396</sup> In 1994, they began to feel the impacts of the enlarged mountaintop removal mining operation at the nearby Dal-Tex complex. In 1996, Arch Coal’s twenty-story-tall dragline appeared on a nearby ridgeline towering above their small home. The mining operations

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Strip-Mining Battle Resurfaces, supra* note 204 (quoting Steven F. Leer, President and CEO of Arch Coal, Inc.).

<sup>394</sup> *Id.* (quoting Richard Lawson, President of the National Mining Association).

<sup>395</sup> *Id.* (quoting Richard Lawson, President of the National Mining Association). Interviewed a month after Loeb’s controversial article appeared, then-Governor Cecil Underwood (R-W. Va.) told the *Gazette’s* Ken Ward Jr., that he had not had time to read the article. *Id.* Underwood did offer his general opinion of strip mining, returning to the same two decades old theme that coal industry cheerleaders continue to rely upon: “My view of mountaintop removal is it creates a lot of artificially flat land in places we don’t have flat land.” *Id.* (quoting then-Governor Cecil Underwood (R-W. Va.)).

<sup>396</sup> The author was part of the legal team representing the Moores in their legal struggles with the Dal-Tex mine operators.

moved down the ridge blasting it apart. For several years the Moore's home was constantly inundated with thick layers of dust blown down from the Dal-Tex complex.

The Moores were outraged by the nearby blasts that rattled their windows and rocked their home.<sup>397</sup> The Moores' nine-year-old son, Justin, suffered from asthma and was being treated by a respiratory specialist. They saw their son's asthma grow worse in the pervasive dust.<sup>398</sup> In a deposition in 1998, Victoria Moore said, "If you were inside, it interrupted your life. If you were outside, it interrupted your life."<sup>399</sup> "I couldn't sit on my porch without getting dust on me. . . . I couldn't even walk in my grass. I couldn't get in my car. I couldn't even let my kids go out and play without the dust."<sup>400</sup>

All around their home and up and down West Virginia Route 17 there were vacant houses of neighbors, most of whom had sold their property to the coal company. Investigative journalist Ken Ward Jr. researched the county real estate records in Logan County and discovered that in the five-year period between 1993 and 1998, affiliates of the operator of the Dal-Tex mine had purchased more than 200 properties in that county.<sup>401</sup> In the Blair area alone, Ward discovered that the coal operator had spent at least \$6 million to acquire properties.<sup>402</sup>

As Penny Loeb reported, many of the homes near the Moores had been purchased by the company and had mysteriously been burned to the ground.<sup>403</sup> Many who remained in the community suspected that Arch had arranged to have their own buildings torched. Arch Coal blamed arsonists for torching the homes, disclaiming any knowledge of the responsible parties.<sup>404</sup> Whether or not the coal company was behind the burnings, it did little to clean up the charred remains. The communities located along Route 17 and up the hollows radiating from the main highway were littered with dozens of the burned hulks of what once were part of former thriving coal camp communities. It was not until Loeb's article appeared that Arch made any real effort to begin removing the mess left in the community by the fires.<sup>405</sup>

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<sup>397</sup> *Buying Blair*, *supra* note 346.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* (quoting deposition of Victoria Moore).

<sup>400</sup> *Id.* (quoting deposition of Victoria Moore).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> Loeb, *supra* note 199, at 28.

<sup>404</sup> While visiting the nearby town of Monclo, West Virginia, in 1992, the author interviewed agents of Arch Coal's predecessor, Dal-Tex, Inc., who were burning homes the company had purchased there from local residents. Curiously, although Arch Coal's Arc Land Company subsidiary had paid a substantial amount of money for the Blair homes, company officials admitted that it made no attempt to protect the homes from the "arsonists"—choosing to simply lock the doors as the only security measure. The company never assigned any of the full-time security guards who worked at the mine to monitor the purchased homes, although the homes were no more than a few minutes drive away from the company's offices.

<sup>405</sup> The charred remains of the home of the Moores' nearest neighbor, located less than fifty feet away, were left there by the company for four years and still had not been removed more

In April 1998, ABC News's *Nightline* prominently displayed the burned rubble of what remained of the homes Arch had purchased in the communities near Dal-Tex.<sup>406</sup> David Todd, Arch Coal's Vice President for external relations, assured the *Nightline* audience that his company knew nothing of the cause of the fires and was "work[ing] with [that] community . . . to minimize [its] temporary presence" at its Dal Tex complex.<sup>407</sup>

Arch Coal land agents offered what the Moores believed was an inadequate amount to purchase their property. They viewed Arch's offer as little short of extortion. Unwilling to accept Arch's offer, the Moores filed suit against the mine operator, disputing its claims of community cooperation.<sup>408</sup> The complaint set forth allegations of what the Moore family had experienced while living within several hundred yards of Arch's mammoth mountaintop removal mining operation. The Moores sought injunctive relief and compensatory damages for harm caused by the huge mountaintop removal operation located close to their home.<sup>409</sup> In the course of four short months of discovery in the case, Arch Coal's public relations veneer was peeled away and a quite different picture emerged from the mouths of Arch's own executives and employees.

##### *5. A Plan for "Working with the Community" Is Developed at the Beginning*

Before its 1992 acquisition of the Dal-Tex complex and its vast coal reserves, Arch Coal predecessor Ashland Coal ordered its land agents to study the mine and the residential communities upon which it would have an impact.<sup>410</sup> In his deposition, Terrence Irons, a land agent for an Arch Coal subsidiary, said, "When we look at a corporation, we look at their mining operations, we look to see how many properties we think we may need in our mining operation, and also homes that could be impacted by those mining operations."<sup>411</sup>

Ashland managers knew that Dal-Tex had already turned nearby Monclo into a huge industrial mining, trucking, and railroad complex. In the process, Dal-Tex had created conditions so bad that most Monclo families

than a year after Loeb's article appeared in *U.S. News & World Report*.

<sup>406</sup> *Nightline*, *supra* note 343.

<sup>407</sup> *Id.* Hewing to the same theme, in 1998 Arch Coal conducted "a massive public relations campaign to promote itself as a good corporate neighbor to the communities where it operates." *Buying Blair*, *supra* note 346. That campaign purchased expensive full-page ads in many of the state's newspapers, proclaiming: "Responsible mountaintop mining: It's good for West Virginia, and it's the right thing to do." *Id.* (quoting Arch Coal newspaper ads).

<sup>408</sup> First Amended Complaint, *Moore v. Hobet Mining, Inc.*, No. 97-C-266-0 (Cir. Ct. Logan County, W. Va. July 1998) (on file with author).

<sup>409</sup> *Id.* at 18-19. In addition to claims under the WVSCMRA's citizen suit provision, the complaint contained common law trespass, nuisance, negligence, and strict liability counts. *Id.* at 10-14. The author of this Essay was one of three lawyers representing the Moores in the action. He took more than a dozen depositions of Arch Coal executives and employees in the discovery phase of the case.

<sup>410</sup> *Buying Blair*, *supra* note 346.

<sup>411</sup> *Id.* (quoting Terrence Irons, land agent with Arc Land Company).

had left—voluntarily or involuntarily.<sup>412</sup> When Ashland bought Dal-Tex in 1992, the little village was well on its way to extinction. By the time of the merger of Ashland Coal and Arch Mineral several years later, Monclo ceased to exist; most of the homes had been burned and bulldozed. The few homes left standing had been purchased by and were being used by Dal-Tex or its employees.<sup>413</sup>

Ashland Coal executives developed a plan to deal with the former coal camp communities and those who lived there: “buy out nearby residents so there would be no one left to complain about blasting, dust and flyrock.”<sup>414</sup> Company land agent Irons stated in his deposition, “When we were purchasing Dal-Tex, there was some concern expressed that there were homes that would be close to the mining and that there was potential for dust problems and there probably would be blasting complaints.”<sup>415</sup> Because under both SMCRA and the corresponding state law, coal companies are prohibited from mining within 300 feet of an occupied dwelling without a waiver,<sup>416</sup> Ashland decided to buy all of the homes within 300 feet of any active or future mining site.<sup>417</sup>

In his deposition, Irons stated that the company was concerned about homes located beyond the 300 foot limit.<sup>418</sup> Thus, on September 18, 1992, company officials sat down with a topographical map they titled “Target Acquisition Areas” and drew circles around homes the company needed to purchase to make way for mining.<sup>419</sup> Irons described these homes as belonging to “people living within proximity of the mining area who might not like living close to a mining operation.”<sup>420</sup>

Company executives, after reading Irons’s report, directed land agents to buyout the residents.<sup>421</sup> But what was odd about the company’s plan was that land agents were not sent out into the nearby communities with offers to buy homes and land (except to those within the 300 foot limit). Instead, the company ratcheted up the intensity of its strip mining operations. Typically, at Dal-Tex no offer was made to buy residents whose lives and property had been adversely impacted by mining activities. Company

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<sup>412</sup> See Byers, *supra* note 307 (describing the mine’s impacts on Monclo and the mining company’s purchase, and subsequent destruction, of Monclo homes). In conversations in 1992 with Monclo residents including Willie and Lorean Stollings, the author was told that some homeowners had sold their properties to Dal-Tex; others, especially elderly people, simply moved in with relatives who lived elsewhere, leaving their homes vacant. In any event, anyone looking at residential property in Monclo in the early 1990s would have quickly discerned that because Dal-Tex had constructed a huge industrial mining complex within and surrounding the town, there would be no buyers for the homes other than the coal company.

<sup>413</sup> Personal observations of the author.

<sup>414</sup> *Buying Blair*, *supra* note 346.

<sup>415</sup> *Id.* (quoting deposition of Terrence Irons).

<sup>416</sup> 30 U.S.C. § 1272(e)(5) (2000); W. VA. CODE ANN. § 22-3-22(d)(4) (Michie 2002).

<sup>417</sup> *Buying Blair*, *supra* note 346.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* (quoting deposition of Terrence Irons).

<sup>421</sup> *Id.*

managers preferred to wait until residents came to the company indicating that they could not endure the conditions and would like to leave.

### 6. *Option to Purchase Agreements*

When homeowners like the Moores got fed up with the conditions created by mining operations, some would approach the company asking to be bought out.<sup>422</sup> Such visits set the stage for the company to execute the next step in its target acquisition plan. Company land agents would respond, telling the anxious home owners that the company would pay them the “fair market value” of their property based on an appraisal. The promise of a buyout at fair market value was, however, illusory because the conditions created by the mining were inimical to residential living—there was no market for the homes except to sell to the company.<sup>423</sup> In most cases, neither the price nor the terms of such deals were negotiable.

Company land agent James Stephens testified in his deposition that the company required sellers to sign a five-page “Option to Purchase” agreement.<sup>424</sup> The terms of that agreement clearly reveal the “end game” of the company’s target acquisition plan. In return for the sale of a home and surrounding property, families were required to promise to leave their homes—former coal camps in hollows that had been home to some for generations.<sup>425</sup>

The agreement identified eleven communities and eleven hollows from the crest of Blair Mountain to the boundary between Boone and Logan Counties at Clothier that would be off-limits to the sellers for the rest of their lives.<sup>426</sup> According to the proffered agreement, they could neither live in nor purchase property anywhere within the designated area that bordered the company’s vast 22,000 acre coal reserve.<sup>427</sup> In his deposition, company land agent Ron Vermillion said, “If we buy somebody in Blair, obviously we don’t want them moving back to Blair[.] . . . We wouldn’t buy them in the first place if they were going to move right back to Blair.”<sup>428</sup> His colleague,

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<sup>422</sup> *Id.* (citing deposition of Terrence Irons). Some people, more often than not elderly residents that had lived their whole lives in a particular hollow, did not have the energy or the courage to seek out company managers to ask for the favor of a buyout. For many coalfield residents who have known the power of “King Coal” their whole lives, a visit to coal company offices to ask a “favor” of the company is a daunting, even frightening task. If there is one expression that characterizes the attitude of elderly coalfield residents who have lived the history of the coal camps it is that “you can’t fight the coal company.” Thus, of those who did not approach the company seeking a buyout, most were elderly or infirm.

<sup>423</sup> *See id.* (“Anyone would have to say that market is controlled by the desirability of living in the neighborhood, and the desirability [of the Blair neighborhood] has been diminished [by the proximity to the mine.]” (quoting deposition of mining company land appraiser Ronna Hatfield)).

<sup>424</sup> *Id.* (citing deposition of James Stephens).

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* (quoting deposition of land agent Ron Vermillion). The seller paid no additional consideration to the buyer for the seller’s promise to adhere to the ban.

James Stephens, testified, “The problem is you relocate one person and he moves right back in . . . eventually you end up buying them twice.”<sup>429</sup>

The lifetime ban on living near the mine was not the only nonnegotiable condition the company placed on the purchase of a resident’s home. Sellers also had to agree to give up their right to speak out against strip mining and take back prior protests.<sup>430</sup> The Option to Purchase agreement stated that the seller “will withdraw any permit protests or citizen complaints which they may have filed related to the mining permits or applications for such permits of Dal-Tex Coal Corporation . . . and that they will not file any further permit protests or citizen complaints in the future.”<sup>431</sup>

To effectuate this goal, Stephens and other company land agents provided the sellers with a form letter to send to DEP.<sup>432</sup> The letter put DEP on notice that the person whose signature appeared at the bottom desired to drop all complaints he or she had filed.<sup>433</sup> In his deposition, land agent Terrence Irons explained that the relocation ban and the protest-revocation requirement worked hand in hand: “That’s the primary reason that we don’t want anybody back in there, is because citizens have the right to protest mining permits. Some citizens protest whether they are impacted or not.”<sup>434</sup>

Interviews with numerous residents who signed the Option to Purchase agreements revealed that they felt honor-bound by its terms, which they naively believed were legally enforceable. Those knowledgeable about real estate and the law know better. In July 1998, the Moores’ attorneys deposed Donald Mueller.<sup>435</sup> Mueller had been hired by Arch Coal to testify as a company expert witness on the value of the Moores’ land and home.<sup>436</sup> When asked if he had ever seen a contract for the sale of a single family residence similar to the coal company’s Option to Purchase agreement, he testified that he had not and he did not believe it would be enforceable in a court of law.<sup>437</sup> Moreover, he admitted that as a licensed professional real estate broker, “he would have ethical problems asking anyone to sign such an agreement.”<sup>438</sup>

Finally, as he sat staring at the agreement—which the company’s lawyers apparently had not revealed to him prior to the deposition—Mueller blurted out:

I have seen some funky deed provisions at times, but never something in a contract like that[.] . . . I don’t think it does prohibit anyone from purchasing property in that area. I don’t think you can take that right away from someone.

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<sup>429</sup> *Id.* (quoting deposition of land agent James Stephens) (modification in original).

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* (quoting Option to Purchase agreement) (modification in original).

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* (quoting deposition of Terrence Irons).

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Id.* (citing deposition of Donald Mueller).

It's like putting in a deed restriction that if you are black, you can't live in this property, or whatever.<sup>439</sup>

In addition to proof that Arch Coal and related companies had drawn up secret plans designed to cause the wholesale exodus of families from the communities located near the Dal-Tex complex, discovery in the Moores' case revealed another equally surprising set of facts. These revelations draw into question statements Arch Coal CEO Steven Leer made in the mass mailings that were part of the company's 1998 public relations campaign to offset criticism of its mountaintop removal mining activities. In a pamphlet Arch mailed to thousands of coalfield residents, Leer asserted, "We are constantly seeking new ways to lessen any adverse impacts our operations might have on surrounding communities."<sup>440</sup> One way that Arch had claimed to lessen these adverse impacts was the dust monitoring program that it had agreed to implement as part of the state Surface Mine Board consent agreement discussed above.<sup>441</sup>

### *7. Bogus Dust Monitoring Program*

As mentioned above, one claim in the Moores' complaint was that mine activities had caused their home and the community to be constantly inundated with heavy and pervasive dust.<sup>442</sup> When the Moores' counsel reviewed the transcripts of SMB hearings on DEP notices of violations, it became evident that Arch Coal would claim, as it had before the SMB, that the dust picked up by the company's dust monitors had not come from mining operations. Rather, as Arch's expert Terah Burdette had testified before SMB, the company would likely argue that the source of the high dust levels recorded on the monitor had been caused by pollen and mold spores, not mining activities.<sup>443</sup>

The Moores' attorneys deposed Terah Burdette regarding the company's dust monitoring.<sup>444</sup> She testified that she had no real expertise in air pollution monitoring and that her educational background was limited to a two-year associate's degree in a mining-related discipline. She was competent to run the coal company's dust monitoring program, she asserted, because a manufacturer's representative of the monitor manufacturer had instructed her on proper procedures.

Ms. Burdette's deposition was not completed but adjourned to be resumed several weeks later. In the interim, the Moores' counsel consulted with an expert on air pollution monitoring asking him to review the

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<sup>439</sup> *Id.* (quoting deposition of Donald Mueller).

<sup>440</sup> *Id.* (quoting Arch Coal mass mailing).

<sup>441</sup> See *supra* notes 367-71 and accompanying text.

<sup>442</sup> *State, Firms Slow to Correct Dust, Blasting Problems, supra* note 358.

<sup>443</sup> *Id.* The Moores and their neighbors used video cameras to document numerous days of the pervasive dust that was the subject of the allegations in their complaint. An expert, hired by the plaintiffs, reviewed those video tapes and found the assertion that what was shown was pollen and mold spores to be bizarre at best.

<sup>444</sup> *Id.*

transcript of Burdette's first day of deposition. The plaintiffs' expert concluded, after reading the transcript and the dust monitoring data filed with DEP, that it was impossible Ms. Burdette was operating the equipment properly.

The monitors placed by Arch Coal in communities adjacent to the Dal-Tex complex are highly sensitive and they must be calibrated frequently and carefully. The plaintiffs' expert told the Moores' attorneys that the monitoring data showed that such calibration could not have been performed. He pointed out that on some days the monitor readings showed such low levels of dust that the air near the Dal-Tex complex would have been more pristine than the air at West Virginia's Dolly Sods Federal Wilderness Area—an absolute impossibility. Moreover, the expert found that the reports Burdette sent to the Surface Mine Board contained a major mathematical miscalculation—they grossly underestimated the amount of dust because Burdette had converted dust concentrations from milligrams to micrograms by multiplying by 100, instead of by the proper conversion factor of 1,000.<sup>445</sup>

When Burdette's deposition resumed, the Moores' counsel went armed with the instruction manual for the dust monitors with which Burdette had been working. Prompted by a suggestion from the plaintiffs' expert, Burdette was asked how she had calibrated the monitors. Not only did she have no idea how to perform the crucial calibration, she could not even understand basic terms used in the instruction manual. Contradicting her sworn testimony before the West Virginia Surface Mine Board two years earlier, Burdette proceeded to acknowledge in the deposition that the company's monitoring data "did not prove the dust was mostly pollen and mold spores, rather than mine dust."<sup>446</sup>

On the basis of what had been uncovered in discovery, the Moores filed a motion seeking to amend their complaint.<sup>447</sup> The amended complaint sought to add as defendants the two companies employing the land agents and to add new causes of action for civil conspiracy and civil fraud.<sup>448</sup> The amended complaint also sought punitive damages.<sup>449</sup>

The Circuit Court of Logan County never had an opportunity to rule on the plaintiffs' motion to amend their complaint.<sup>450</sup> Within days of Mueller's deposition and the filing of the amended complaint, the defendant offered to settle the case and the Moores agreed.<sup>451</sup> Although the settlement agreement required the amount of the settlement to be confidential, the agreement was placed in a public file by the court clerk's office and the *Charleston Gazette's* Ken Ward Jr. wrote a story reporting that the settlement amount was

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<sup>445</sup> Burdette admitted as much when the deposition resumed. *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> *Buying Blair, supra* note 346.

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*



\$225,000, far more than any offer the company's land agents had made to the Moores prior to the lawsuit.<sup>452</sup>

In October 1998, two months after the Moores settled their case, EPA held a public hearing on Arch Coal's planned expansion of the Dal-Tex complex.<sup>453</sup> Hundreds of people attended the meeting, most of them company employees who did not live in Blair or the other small communities near Dal-Tex.<sup>454</sup> The *Gazette's* Ken Ward Jr. described what happened when Victoria Moore entered the gymnasium where the hearing was held:

Dal-Tex General Manager Mark White confronted her. White reminded Moore that, when her family settled their lawsuit against the company, she agreed not to talk about the settlement or to protest against the [expanded] permit.

When her turn came, Moore got up to speak anyway.

Moore told the crowd that she tried to get DEP or some other agency to help her family. No one would stop Dal-Tex from blasting rocks and dust into the community, she said.

"Everybody tells us 'you have a problem, but there's nothing we can do,'" Moore said. "Go hire yourself a lawyer"—that's what you're leaving us to."<sup>455</sup>

Moore's comment belies the fact that she and a few of her neighbors began to organize and through their efforts forced a regulatory agency to take enforcement actions against one of the nation's largest coal producers. Those citizens' complaints and their effective participation, without benefit of counsel, in adjudicatory hearings before the state SMB triggered the generation of a paper trail. With the assistance of lawyers, that paper trail ultimately revealed the truth.

Arch Coal's CEO Steven Leer told thousands of West Virginians, "We are constantly seeking new ways to lessen any adverse impacts our operations might have on surrounding communities."<sup>456</sup> Arch Coal's Vice President David Todd told the national audience of ABC's *Nightline*, "We continue to try to work with the community and to find ways to minimize our temporary presence nearby,"<sup>457</sup> and later told a *Washington Post* reporter, "We're committed to protecting the environment and respecting West Virginia's mountain heritage."<sup>458</sup> Unlike the coal barons of a much earlier time, these modern coal executives can literally move and remove mountains. But what these modern captains of industry seem unable to

<sup>452</sup> *Id.* The agreement required that the Moores sell their lot and mobile home to the company. They chose to sell because there was little left of the community they had known and because they were concerned that if they returned to their home their son would be again exposed to dust that would aggravate his asthma. Unlike the burned refuse of other homes that had lain for years in the communities surrounding Dal-Tex, the company quickly moved in and demolished the Moores' home shortly after the settlement agreement was executed.

<sup>453</sup> *State, Firms Slow to Correct Dust, Blasting Problems, supra* note 358.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Buying Blair, supra* note 346 (quoting an Arch Coal mass mailing).

<sup>457</sup> *Nightline, supra* note 343 (quoting David Todd, Vice President, Arch Coal).

<sup>458</sup> Warrick, *supra* note 342 (quoting David Todd, Vice President, Arch Coal).

grasp is the simple meaning of words like “protect,” “respect,” and “minimize.”

Their company clearcut and blasted apart thousands of acres surrounding the small communities adjacent to their vast coal mining operations. Millions of tons of coal were mined and shipped to market each year. But the record is clear, Arch Coal and its predecessors at Dal-Tex did not protect mountain heritage, respect their neighbors, or work with the communities to lessen the impacts of mining. Rather, they formulated a specific plan with a target goal of eliminating as many families as possible. As David Todd told the *Gazette*, “Our philosophy is not to impact people[.] . . . And if there are no people to impact, that is consistent with our philosophy.”<sup>459</sup>

## VI. CONCLUSION

The introduction to this Essay identifies a paradox. The counties of southern West Virginia’s so-called “billion dollar coalfields” contain enormously valuable coal reserves. Coal production from huge, highly efficient mountaintop removal and longwall mines has reached record levels, a fact that belies the dismal economic reality of the coalfield communities where coal production is greatest.<sup>460</sup> This Essay was intended to provide insight as one attempts to answer the obvious question: How is it that so many communities in the “billion dollar coalfields” are still mired in poverty and stagnant local economies continue to record some of the highest unemployment rates in the United States?

The Essay places the present condition of the central Appalachian coalfield communities in historical context. The lessons of that history are clear. The coalfield struggle pitting communities against the oppressive coal

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<sup>459</sup> *Buying Blair*, *supra* note 346 (quoting David Todd, Vice President, Arch Coal). A drive down West Virginia Route 17 where Blair, Monclo, Five Block, and other small former coal camps survived for the better part of a century or more reveals the success of the company’s plan. Little if anything is left of those communities.

<sup>460</sup> The following table reveals a startling comparison between coal production and unemployment in 2002 for seven southern West Virginia counties in the billion dollar coalfields:

County	Tons of Coal Produced, 2002	Unemployment Rate, 2002
Boone County	31,817,818	9.7%
Mingo County	19,995,196	10.7%
Logan County	11,676,259	8.4%
Wyoming County	8,196,399	6.5%
McDowell County	4,514,677	10.0%
Clay County	4,174,280	11.1%
Fayette County	3,955,524	8.6%

industry forces that began in the coal camps of the nineteenth century continues today. Historians have documented a century of exploitation of coalfield communities by an economic and political system which perpetuated conditions reminiscent of colonial powers treatment of third world communities. Any objective observer traveling the narrow winding roads to visit the former coal camps of the "billion dollar coalfields" must conclude that the coal industry, absentee owners, and middlemen have not shared the region's wealth equitably.

In his 1976 book, *West Virginia: A History*, Professor John Alexander Williams used coalfield history to inform his prediction of the state's future:

The managers and stockholders of [out-of-state coal and land holding companies] have little to gain and much to lose by preservation of West Virginia's environmental resources, and yet the reverse is true for the overwhelming majority of residents of the state. Thus the environmental battles of the future . . . are likely to pit weak and poorly organized coalitions of local reformers and interest groups against powerful and well-disciplined combinations of absentee owners and middlemen.<sup>461</sup>

As Professor Williams predicted, the battles of coalfield citizens for environmental and economic justice has pitted the powerful against those whose ability to fight back has historically been limited. Opposition to the encroachment of modern mountaintop removal operations in communities like those bordering Arch Coal's Dal-Tex complex have revealed coal industry motives and regulatory agency misfeasance. But, for the most part, the former coal camp communities near the Dal-Tex Complex have ceased to exist, the residents having sold their homes and land to encroaching coal companies.

Thus, the observation that "the more things change the more they seem to stay the same," is one that might be made about the future of the communities of the Central Appalachian coalfields. In addition to the destruction of coalfield communities, conflicts between union and nonunion mine operators, poverty, high unemployment, underfunded schools, lack of community infrastructure, and the fear and intimidation generated by industry threats to close mines and layoff workers persist in the region. Federal and state regulatory agencies often show more concern for those whom they are supposed to regulate than for the coalfield communities and their environment. As tens of thousands of coal miners' jobs have evaporated, bundles of campaign contributions maintain King Coal's grip on state politicians.

But the future of coalfield communities is not as bleak as it may seem. Modern communication technology, including the internet, allows people and organizations in remote and isolated coalfield venues to share information and work together toward the common goal of economic, environmental, and social justice. Across the coalfields people are coming together in grassroots organizations. In West Virginia, the West Virginia

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<sup>461</sup> WILLIAMS, WEST VIRGINIA: A HISTORY, *supra* note 103, at 202-03.

Organizing Project and Coal River Mountain Watch have made strides in drawing attention to conflicts between coalfield citizens and coal mining operations. These and other established and new grass roots organizations throughout Appalachia continue to seek justice in the coalfields.

Moreover, public interest and plaintiffs' lawyers representing coalfield families and communities have, for the first time, garnered a considerable measure of success.<sup>462</sup> No longer do coal companies go to court with the expectation of favorable treatment by judges and juries.<sup>463</sup> The fact that

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<sup>462</sup> Lawsuits based on statutory citizen suit and common law claims, such as those utilized in the *Moore* case, have found considerable success. For example, in the fall of 2003, a jury returned a \$473,000 verdict against A.T. Massey Energy in a class action suit brought by residents of Sylvester, West Virginia. Ken Ward Jr., *Coal Company Liable for Dust: Sylvester Residents Awarded \$473,000*, CHARLESTON GAZETTE, Feb. 8, 2003, at 1A, available at 2003 WL 5445017. The suit sought damages and injunctive relief to enjoin the operation of Massey's huge Elk Run coal preparation plant, which had spewed clouds of dust into the community for years. *Id.* In addition to monetary damages, the trial court ordered the company to install air pollution abatement equipment that cost the company more than \$500,000 and awarded the plaintiffs more than \$1.5 million in attorney and expert witness fees. Ken Ward Jr., *Massey Ordered to Pay Sylvester Residents' Lawyers*, CHARLESTON GAZETTE, Sept. 19, 2003, at 8A, available at 2003 WL 5494644. In a suit against Arch Coal subsidiary Mingo Logan Coal Co., Mingo Logan agreed to settle claims related to well-water loss and other damage from longwall mining. Ken Ward Jr., *Arch Coal Settles in Mingo Well-Water Loss Suit*, CHARLESTON GAZETTE, February 7, 2002, at 7A, available at 2002 WL 5181084. As a result of the citizen suit brought by coalfield residents in *Bragg*, DEP agreed to correct multiple programmatic violations of SMCRA's mountaintop removal permitting requirements. These are but a few examples of the successes coalfield citizens have achieved recently as public interest and plaintiffs' lawyers have begun to utilize common law and statutory citizen suits in tandem to redress the injuries caused by mining.

<sup>463</sup> For most of the last century, coal-camp residents could expect a less than favorable response to suits filed against a coal company in local courts. An excellent example of what such plaintiffs faced is a case brought in 1978 in the Circuit Court of Wyoming County, West Virginia. In that case, an elderly former miner suffering from black lung disease sought injunctive relief and damages relating to dust generated by heavy coal truck traffic. *West v. Nat'l Mines Corp.*, 285 S.E.2d 670, 672-74 (W. Va. 1981). The circuit court denied the plaintiffs' request for injunctive relief and granted the defendant's motion to dismiss; the West Virginia Supreme Court of Appeals reversed and remanded for a trial on the merits. *Id.* at 672, 679. At trial, the closing argument made by defense counsel is indicative of the job-extortion strategy commonly used by coal interests throughout the twentieth century:

I would say that [the plaintiffs] have tried to trump up a pretty good case here for a whole lot of money. I don't think this jury is going to make a decision which will result in the destruction of the coal industry as it exists today in southern West Virginia. . . . If there is no coal dust on the streets of Pineville, there is nobody in the stores. . . . There is no money to pay income taxes with, there is no money to pay social security, there is no money to pay black lung, there is no money to pay Workmen's Compensation, there is no money to pay unemployment compensation, there is no money to pay truckers to get their trucks repaired, to buy fuel, there is no money to support the schools, there is no money to build roads, and that is the truth and you know it, and I am glad to leave this case in your hands.

*West v. Nat'l Mines Corp.*, 336 S.E.2d 190, 198 (W. Va. 1985) (McGraw, J., concurring in part and dissenting in part) (quoting National Mines Corp. counsel's closing argument at trial). The jury found that the plaintiffs had suffered no compensable damages. *Id.* at 192. In addition, the circuit court dissolved a preliminary injunction that had required the coal truck operator to abate the air pollution nuisance. *Id.* at 191. The West Virginia Supreme Court of Appeals upheld

citizen plaintiffs are achieving success as they challenge the excesses of the coal industry should encourage a second look by plaintiffs' lawyers whom in the past have shown little interest in taking on such clients.<sup>464</sup>

Coalfield citizen activism and lawsuits, however, will not bring jobs to the region. Coal is the only game in town, so to speak, and it is not hiring. Nor is it paying sufficient taxes to support modernization of coalfield infrastructure or the dire need for improvements in education. As discussed above, SMCRA's provisions pertaining to mountaintop removal mining were intended to promote economic development in those areas where the technique is permitted.<sup>465</sup> For more than a quarter of a century, federal and state regulators and politicians squandered the economic development opportunities offered by SMCRA. They chose to ignore SMCRA's mandate in favor of granting *carte blanche* to a coal industry whose adoption of new mountaintop removal and longwall mining technologies was decimating mining jobs and tax revenues.

Given history, hope is slim that these players will finally take advantage of SMCRA's mountaintop removal provisions to bring needed industrial, commercial, and residential development to the region.<sup>466</sup> Indeed, there is an emerging view among "some" business leaders, politicians, and academics that advances the coal companies' desire to rid themselves of the old coal camp communities. A recent article written by the senior staff writer of the *State Journal*, West Virginia's only business weekly, reported:

Economists say [West Virginia] may have five years before it is totally broke. Extending infrastructure to every ridge and hollow is simply too expensive.

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the jury verdict but remanded, ordering the circuit court to reinstate the injunction. *Id.* at 192.

<sup>464</sup> The necessity of being able to "pay the bills" motivates plaintiffs' counsel to limit their representation to cases in which there is a substantial likelihood of recovery. In the past, such a likelihood did not apply to most cases brought against coal companies by coalfield citizens in local courts. Today, recent successes in citizen suits and property damage cases indicate that courts are no longer hostile to such claims against coal companies. An additional encouragement to lawyers to represent coalfield residents in such cases is a unique provision contained in the citizen suit provision of SMCRA and its state corollaries. The statutes provide a cause of action for personal injury and property damage resulting from a violation of the act by a coal operator. 30 U.S.C. § 1270(f) (2000); W. VA. CODE ANN. § 22-3-25(f) (Michie 2002). No similar provision is found in any other federal environmental regulatory statute. In addition, SMCRA allows the recovery of attorney and expert witness fees if the court determines such an award is appropriate. 30 U.S.C. § 1270(d) (2000); W. VA. CODE ANN. § 22-3-25(d) (Michie 2002).

<sup>465</sup> See 30 U.S.C. § 1265(c)(3) (2000) (setting forth the postmining land uses required to obtain an exemption from the AOC requirement); *id.* § 1265(c)(3)(B) (requiring specifically that the mountaintop removal permit applicant give certain assurances to the regulatory agency regarding the postmining land use).

<sup>466</sup> Politicians and the coal industry continue to tout the need for mining-flattened land. In Mingo County, a plan promoted by the West Virginia School Building Authority is afoot to build a new high school on a reclaimed mountaintop removal site to replace three county high schools. *Dozens Protest Mingo Consolidation*, CHARLESTON GAZETTE, Feb. 6, 2004, at 12A, available at 2004 WL 59623861. Questioning the plan which would require students from coalfield communities to be bussed long distances, Williamson, West Virginia Mayor Charles West asked, "Why do these communities need to lose their schools so we can build a \$23 million blue goose on top of Red Jacket Mountain with the nearest fire station ten miles away, no police protection, no sewage and water service, and no highway to get to it?" *Id.*

But if the state wants to develop some of its more rural and economically depressed areas, extending infrastructure is essential. Many areas of the state lack roads, sewer systems or access to county water, let alone internet connections. Attracting businesses to those areas is nearly impossible without those basic elements.<sup>467</sup>

The solution to such a dilemma, the article continues, is Darwinian:

Rather than struggle to keep shrinking areas vibrant, some people have suggested that the state let natural selection play out. Communities that are viable survive. Those that are not become ghost towns like so many towns of the Old West. Through policies and careful fiscal selection, the state can encourage people to move to more viable areas from the remote hills and hollows where they currently live.<sup>468</sup>

“Some say” that by moving from their ancestral homeplaces, the residents of rural West Virginia “would end up saving the state money and help [themselves] improve the[ir] quality of life . . . .”<sup>469</sup>

An economist at one of West Virginia’s largest universities places a patina of expert authority on this proposal. An economist with Marshall University, Mark Burton said:

“We may need to look at relocation policies to tackle rural sprawl because we can’t continue to provide everything to everyone[.] . . . If someone wants to live on the backside of a mountain, that’s fine, but they can’t expect the state and county to come out to them. They can’t expect school buses to come pick their children up. People are free to live where they want, but the state doesn’t have to help them.”<sup>470</sup>

The history of Central Appalachia’s coalfield communities is replete with betrayal and injustice. As those communities view the future from the brink of a new millennium, the lessons of this history suggest their struggle for environmental, economic, and social justice will continue. The innate strength and decency of the hardworking people of those communities will be tested anew as coal companies and other powerful interests pursue “relocation policies” intended to transform them into Appalachian ghost towns. Those who would destroy these communities in the name of eliminating “rural sprawl” or maximizing profits may be surprised at their resilience. Faced with plans for “hillbilly cleansing”<sup>471</sup> and steeled by a

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<sup>467</sup> Beth Gorczyca, *Energy Can Remain a Key Economic Force*, STATE JOURNAL, Jan. 16, 2004, at 4, available at <http://www.statejournal.com/jan2.cfm>.

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* (quoting Mark Burton, Economist at Marshall University in Huntington, West Virginia).

<sup>471</sup> The phrase “hillbilly cleansing” is used advisedly. “Hillbilly” was first used pejoratively to describe Appalachian mountain culture and the people who reside in the region. See Phyllis Rossiter Modeland, *He Who Laughs Last: The Truth About Hillbillies*, OZARKS MOUNTAINEER, available at <http://www.runningriver.com/truth.htm> (last visited Mar. 2, 2004) (“Perhaps the first time [the term] appeared in print was April 23, 1900, when a piece in the *New York Journal*

century of oppression, the people of coalfield communities are likely to fight back.

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defined a 'hill-billie' as a free white man 'who lives in the hills, has no means to speak of, dresses as he can, talks as he please, drinks whiskey when he gets it, and fires off his revolver as the fancy takes him.'). Today, although "hillbilly" continues to have negative connotations, it has also been embraced by many people of the region who take pride in the accomplishments of the culture and the people. *See, e.g.*, VONDA SHEETS, *THE NEW HILLBILLY* (2001), at <http://www.yesteryearhollow.com/newhillbilly.html> ("Our ancestors sometimes believed 'hillbilly' was a derogatory term. Most of us don't feel that way. We know the truth behind the word, and it is only fools that think the stereotype truly exists."); C. BOWLES, *CAN YOU HEAR ME NOW? WHAT IS A HILLBILLY?* (Feb. 6, 2004), at [http://canyouhearmenow.typepad.com/index/2004/02/what\\_is\\_a\\_hillb.html](http://canyouhearmenow.typepad.com/index/2004/02/what_is_a_hillb.html) ("I for one am proud to be an American and a Hillbilly."); *WELCOME TO HILLBILLY DAYS 2003!*, at <http://www.hillbilldays.com> (last visited Mar. 2, 2004) (An annual "Hillbilly Days" festival is held in Pikeville, Ky., celebrating mountain culture.).

"Hillbilly cleansing" in Appalachia should not be equated with the tragic "ethnic cleansing" events in such places as Kosovo and Rwanda. The use of murder, torture, and armed expulsion that accompanied those events certainly is not present in Appalachia. Nonetheless, the phrase "hillbilly cleansing" is used here to describe the goal of some corporate managers and others to eliminate old coal camp communities for the sake of profit or to reduce government costs. Thus, in the context of this Essay, "hillbilly cleansing" is a term that recognizes that these plans, sometimes accompanied by violations of law acquiesced in by federal and state regulators, may wipe out not only communities, but an entire culture. In a democracy, citizens should be able to choose where to live of their own volition. The residents of coalfield communities, proud of their mountain heritage, should not be viewed as obstacles to the bottom line of a coal company nor as unfortunate burdens on the state treasury.