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Worth Its Weight in Gold: Legal Analysis of the Current Appraisal of Coal Property in West Virginia

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I. INTRODUCTION ........................................... 541

II. HISTORY ............................................. 542

III. THE PEOPLE’S CASE: SECRETARY OF STATE, KEN HECHLER LEADS AN ATTEMPT TO HAVE THE TAX DEPARTMENT REEVALUATE ITS APPRAISAL METHODOLOGY ................... 548

IV. LEGAL CHALLENGES TO THE TAX DEPARTMENT’S DETERMINATION OF COAL PROPERTY VALUES ................................ 551

V. ANALYSIS OF TAX COMMISSIONER’S LEGAL DUTY TO APPRAISE COAL PROPERTY ........................................ 554

VI. THE NEXT STEP ........................................ 557

VII. CONCLUDING REMARKS — WHAT IS AT STAKE .................. 560

[T]axation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.1

I. INTRODUCTION

The legacy of out-of-state coal barons buying up the vast wealth of our natural resources continues to echo through West Virginia’s rolling mountains. Much has been written of the continuing controversy between labor and the owners of the state’s coal mines. Indeed, one can hardly grow up in West Virginia without perceiving the subtle indoctrination about the injustice and the implicit class struggle that underlies the history of the Appalachian coal fields.

1 W. VA. CONST. art. X, § 1.
The critical mind must be cautious in accepting this argument too quickly because the coal companies make easy targets — the coal companies control the capital, the coal companies have a lot of money, and the working class sentiments of resentment are often quickly stirred against those who have succeeded in the capitalist system. The laborer is easily persuaded that the coal barons do not deserve their vast wealth and that these barons have made their fortune, not by fair play or hard work, but by some manipulation or exploitation of the working people.

The examination of the propriety of the tax appraisals made on natural resource properties in West Virginia raises an issue at the heart of these debates: are the modern coal barons paying their fair share? Specifically, do the coal property appraisals represent the true and actual value of the property in a meaningful way? Although no property appraisal perfectly reflects the market value, the issue is whether the coal appraisals are within an acceptable range as the meaning of acceptable is being applied to property appraisals of West Virginia’s citizens for homes, cars, real and personal property.

It is not a question of whether the standard is itself objectively fair, for all standards must to some degree be arbitrary. The question is whether the standard, once established, is being applied fairly to all parties in all circumstances. It is this question that will be addressed by focusing on the tax department’s recent appraisals of coal properties in West Virginia.

This Note begins with a historical review of natural resource property appraisal in West Virginia and then looks at the recent attempt being made to change tax department policy and application of the current regulations. One recent attempt to achieve this end has been a series of cases brought by citizen taxpayers against the tax department to declare current methodology unconstitutional and to have the courts mandate corrective action to bring the tax department’s appraisals in line with the constitutional mandate of equal taxation. Then, the analysis turns to the duty of the tax commissioner to appraise coal property, potential solutions to the current debate, and a conclusory look at why this issue should be brought to the attention of not only the legal community, but to the entire state.

II. HISTORY

To begin, it is helpful to quickly review the evolution of the legal process for establishing property appraisals for assessment by West Virginia’s fifty-five county assessors. When the first West Virginia legislature convened in 1863, the legislators established a county by county system of property appraisal for tax
purposes. Under the original system, each county (or district) elected a county assessor who would determine the “true value” of all real and personal property in that county. The county assessors used these appraisals to determine the amount of property taxes to be assessed against each property owner and placed these amounts in a tax list. Next, the assessor gave the tax list to a number of officers for verification and to the sheriff who was responsible for collection of taxes. This system remained largely unchanged for more than a century.

In 1932, the Legislature passed the Tax Limitation Amendment that established four classifications of property and set maximum levy rates for each classification. Then in 1953 the Legislature passed educational funding legislation that required the state tax commissioner to appraise all property in the state. In 1961, the Legislature rewrote the relevant sections of the education funding code that clarified the duty on the tax commissioner to set appraisal values for real

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2 W. VA. CODE § 29-1 (1870) (current version at W. VA. CODE § 11-2-1 (1995)). A few counties were actually divided into multiple districts, each with an individual assessor. That distinction disappeared, when the legislature amended the code to bring those counties in line with the majority by having one assessor in each county. Id.

3 W. VA. CODE §§ 29-1 to -8 (1870) (current version at W. VA. CODE §§ 11-1A-1, -1C-7, and -2-1 (1995)).

4 W. VA. CODE § 29-37 (1870) (current version at W. VA. CODE §§ 11-1A-4 and -1B-5 (1995)). The assessor was to make a list in his land books of each tract of land, its value and the tax due on that tract of land. Id.

5 W. VA. CODE §§ 29-77, -79 to -81 (1870) (current version at W. VA. CODE § 11-1A-15 (1995)). Originally, the assessor’s work was submitted to the recorder, the clerk of the board of supervisors of the county and the auditor. Id. By 1925, that work was being given to the board of equalization and review, the sheriff, the clerk of the county court and the state auditor. W. VA. CODE § 11-3-19 (1925).

6 W. VA. CONST. art. X, § 1. This section creates the following four classes of property: Class I is personal property used for agricultural purposes; Class II is property used for residential purposes; Class III is real and personal property outside of municipalities and not within Class I or Class II; Class IV is real and personal property inside of municipalities and not within Class I or Class II. Class III represents the natural resource properties, such as minable coal. Id.

7 W. VA. CODE § 18-9A-3 (1955) (current version at W. VA. CODE § 18-9A-11 (1994)). The 1951 version of the statute required the state board of school finance to base their determinations upon “the most recent survey of property valuation in the state determined by the tax commissioner” but did not set out a specific duty of the tax commissioner to maintain updated appraisals of all property. W. VA. CODE § 18-9A-3 (1953) (current version at W. VA. CODE §18-9A-11 (1994)). The 1953 amendment to that code section added two paragraphs assigning the tax commissioner the specific duty to prepare lists of all property for taxation and levy purposes and to “determine the appraised value thereof based upon the true and actual value thereof.” W. VA. CODE § 18-9A-3 (1955) (emphasis added). These reports were to be completed by January 1, 1956 and were to be annually updated and maintained. Id.
property. County assessors had to use this base value to assess property for taxation within their counties, within a range of fifty to one hundred percent of the actual appraised value, as determined by the tax commissioner. In Killen v. Logan County Commission, the Supreme Court of Appeals of West Virginia ruled that this use of varying rates of appraisal violated the requirement of equal taxation found in article X, section 1 of the constitution. Justice McGraw’s majority opinion stated that assessment of property at a fraction of its “true and actual value” was in plain violation of the constitution’s clear requirement that all taxation be based on market value. This holding is supported by West Virginia statutory law dating back to 1863 and reflects the clear meaning of the general assessment

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8 W. VA. CODE § 18-9A-4 (1963). In 1961, the relevant sections (sections 3 and 4) of the code were rewritten. The relevant part of chapter 18, article 9A, section 4 of the West Virginia Code as written in 1961 reads as follows:

The tax commissioner shall make or cause to be made an appraisal in the several counties of the state of all nonutility real property and of all nonutility personal property which shall be based upon true and actual value as set forth in article three, chapter eleven of this Code.

Id. (emphasis added). This duty was originally to be completed by January 1964, but a 1963 amendment to the statute extended that date to July 1966. Id. Upon completion of this statewide appraisal of property the statute also charged the tax commissioner with the duty of maintaining and updating the proper appraisal values on a yearly basis. Id.

9 W. VA. CODE § 18-9A-4. This section mandated that each county assessor “use such appraised valuations as the basis for determining the true and actual value for assessment purposes of the several classes of property.” Id.

10 295 S.E.2d 689 (W. Va. 1982).

11 Id. at 701. The court stated that “[a]ssessment at a percentage of appraisal value, with the percentage varying from county-to-county within and among the various classes of property, cannot achieve equal and uniform taxation.” Id.

12 Id. In relevant part, Justice McGraw wrote:

While assessment of property does not of itself result in taxation, it is an integral part of the taxation process. Therefore, in order to assure achievement of the constitutional mandate, assessment values must be determined at 100 percent of the market value as represented by the appraisal value. Any system which permits the setting of assessments at lower than 100 percent of “true and actual value” violates article 10, section 1 of the West Virginia Constitution.

Id. The taxpayers in that case stated their position that the county assessor was not assessing the property at a fraction of its actual value, but rather assessed it at his perception of the true and actual value, a figure that often differed from the appraisal of the state tax commissioner. Killen, 295 S.E.2d at 702. The majority found that argument unpersuasive, noting, “This contention stretches the limits of credibility.” Id.
statute.  Many county officials and legislators were uncomfortable with the changes implicitly required by the court's *Killen* decision. Consequently, a 1982 amendment changed the tax law and set forth an assessment rate of sixty percent of the true and actual value of property to be used as the basis for levy taxation. Following the 1982 amendment to the state constitution, West Virginia legislators amended the tax statutes to place the duty of statewide reappraisal in the hands of the state tax commissioner. That statute charged the tax commissioner with the duty of appraising all natural resource properties in West Virginia by March 31, 1985.

Then in 1990, the Legislature passed chapter 11, article 1C of the West Virginia Code to amend the tax code for “Fair and Equitable Property Valuation.”

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13 W. VA. CODE § 11-3-1 (1995). The pertinent part of this section reads:

> All property shall be assessed annually as of the first day of July at its *true and actual value*; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, upon such terms as such property, the value of which is sought to be ascertained, is usually sold.  

*Id.* (emphasis added). This statute is merely a legislative reiteration of a constitutional mandate. W. VA. CONST. art. X, § I.

14 W. VA. CONST. art. X, § 1b. The Property Tax Limitation and Homestead Amendment of 1982 effectively overturned *Killen* and set forth the following: “[A]ll property subject to ad valorem taxation shall be assessed at sixty percent of its value, as directed to be ascertained in this section.” *Id.*

15 W. VA. CODE § 11-1A-1 (1995). The 1982 amendment reads as follows: “The legislature shall provide by general law for periodic statewide reappraisal of all property” and instructed that “[t]he legislature shall further prescribe by general law the manner in which each statewide reappraisal shall be employed to establish the value” of real and personal property for ad valorem property taxation. W. VA. CONST. art. X, § 1b.

16 W. VA. CODE § 11-1A-14(c) (1995).

17 W. VA. CODE § 11-1C-1 to -13 (1995). Chapter 11, article 1C, section 1(a) of the West Virginia Code reads as follows:

> The Legislature hereby finds and declares that all property in this state should be fairly and equitably valued wherever it is situated so that all citizens will be treated fairly and no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.

W. VA. CODE § 11-1C-1(a). The first sentence of chapter 11, article 1C, section 1(b) of the West Virginia Code reads: “The Legislature by this article seeks to create a method to establish and maintain fair and equitable values for all property.” W. VA. CODE § 11-1C-1(b). That the Legislature would feel compelled to pass an entire article of the code to provide for fair and equal property valuation in the year 1990 is very telling. One hundred twenty-seven years after the West Virginia constitution first mandated equal and uniform taxation, the Legislature was still taking action to bring this about. W. VA. CODE § 11-1C-1 (1995).
In this statute, the legislature attempted to provide guidance in how to comply with the constitutional mandate of fair taxation of property and provided the tax commissioner with directives to establish methods to determine the "fair market value of all natural resources property in the state." The tax statutes leave the tax commissioner with the duty of providing appraisal figures for the county assessors, who then multiply these values by the constitutionally set sixty percent and enter that value on the land books for assessment purposes.

In addition to the general natural resource appraisal statutes, the West Virginia Code of State Regulations guides the tax commissioner in appraisal of coal properties, which are divided into active and reserve property for tax appraisal. Active mining property is valued by multiplying the value per active acre by the number of active acres being mined. However, reserve coal property value is not


19 Id. Chapter 11, article 1C, section (d) of the West Virginia Code sets forth the tax commissioner's duty to appraise natural resource property and chapter 11, article 1C, section (d)(2) of the West Virginia Code states that the 60% multiplier is to be applied to these appraised values. W. VA. CODE § 11-1C-10(d), (d)(2) (1995). Chapter 11, article 1C, section (g) of the West Virginia Code allows the county assessor to alter the tax commissioner's appraised value for any property provided he show just cause to the valuation commission for failing to accept and set forth an acceptable alternative method to compute the proper appraisal value. W. VA. CODE § 11-1C-10(g) (1995).

20 W. VA. CODE STATE R. § 110-11-1 to -4 (1997) (effective date July 26, 1991). This series sets forth the legislative rules for "valuation of active and reserve coal property for ad valorem property tax purposes." Id. These regulations were passed essentially as presented to the legislature by recommendation of the tax department.

21 W. VA. CODE STATE R. § 110-11-4.1.2 (1997) (effective date July 26, 1991). The regulation sets forth the valuation formula as follows:

\[
\text{Thickness (ft)} \\times 1800 \text{ tons per acre foot} \\times \text{Recovery rate} \\times \text{Royalty rate (steam) (deep or surface)} \\times \% \text{Steam coal market} \\times \text{Multiplier} \\div (\text{Mine life (yrs)}) \\times 1800 \text{ tons per acre foot} \\times \text{Recovery rate} \\times \text{Royalty rate (metallurgical)} \\times \% \text{Metallurgical coal market} \\times \text{Multiplier} \\div (\text{Mine life (yrs)})
\]

Id. Note that the regulations also state that "[n]o case will the active mining property be valued at
determined with such precision under these regulations. Rather, it is based upon a review of reserve coal property sales within the same region of the state. For purposes of reserve coal property valuation, the state regulations divide the state into five regions based on relevant factors suggesting rough similarity in value of the coal seams in those areas. Once the regional value per acre of reserve coal has been determined by applying the formula set forth in these regulations, the tax commissioner has asserted that he has discretion to adjust the actual appraised values in order to insure that property valuations do not violate the rights of property owners.

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22 W. VA. CODE STATE R. § 110-11-4.1.9.2 (1997) (effective date July 26, 1991). This regulation controls valuation of reserve coal property. It states:

Reserves shall be valued considering a review of sales reflecting arms-length, willing buyer-willing seller transactions of such properties, and the market conditions in the region within which the property is located. The coal reserve value shall be the product of the reserve acres multiplied by the regional reserve value per acre for the region in which the property is located.

Id.

23 W. VA. CODE STATE R. § 110-11-4.1.9.2.c (1997) (effective date July 26, 1991). This regulation sets forth the following criteria for determine the region in which a particular county belongs: “type of coal seems, location, ownership patterns, mining activity, and sales prices of reserves.” Id. This subsection goes on to divide the state into the following five regions:

Region 1-Brooke, Harrison, Marion, Marshall, Monongalia and Ohio Counties

Region 2 (no present mining)-Cabell, Calhoun, Doddridge, Hancock, Jackson, Pocahontas, Putnam, Roane, Tyler, Wetzel, Wirt, and Wood Counties and the northwest portion of Kanawha County (Jefferson, Union, Poca, and part of Big Sandy and Elk Districts that lie north of Elk River)

Region 3-Barbour, Grant, Mineral, Preston, Randolph, Taylor, Tucker and Upshur Counties

Region 4-Braxton, Clay, Gilmer, Greenbrier, Lewis, Mason, Nicholas and Webster Counties

Region 5-Boone, Fayette, Lincoln, Logan, McDowell, Mercer, Mingo, Raleigh, Summers, Wayne and Wyoming Counties and the southeast portion of Kanawha County (Washington, Malden, Louden, Cabin Creek Districts, and part of Big Sandy and Elk Districts which lie south of Elk River)

Id.

24 W. VA. CODE STATE R. § 110-11-4.1.9.2.b. (1997) (effective date July 26, 1991). This section states that values per acre shall be determined after the tax commissioner has reviewed the record of arms-length coal sales that have occurred in West Virginia in the five years preceding the appraisal date, and “through inspection of other appropriate information.” Id. The regulation states that the commissioner shall place greater emphasis on sales from the most recent years. Id. Once all the information has
III. THE PEOPLE'S CASE: SECRETARY OF STATE KEN HECHLER LEADS AN ATTEMPT TO HAVE THE TAX DEPARTMENT REEVALUATE ITS APPRAISAL METHODOLOGY

In 1990, attorney Michael Farber wrote a series of three articles that appeared as editorials in the Charleston Gazette criticizing the tax department’s appraisals of natural resources property. These articles were indicative of a growing sentiment that state tax department appraisals were not creating equitable taxation throughout West Virginia.

On March 29, 1994, this sentiment of unequitable taxation took the form of official action with the introduction of a resolution to the Board of Public Works that the tax department prepare a report detailing the “necessary steps to achieve the goal that commencing in tax year 1995 all natural resources property be assessed on an equal and uniform basis statewide in the same proportion to fair market value as homeowner property, automobiles and public service business.” That resolution was unanimously passed by the Board.

The Board of Public Works asserted two theories of authority to send a mandate to the tax commissioner directing him to properly appraise the natural resource properties in West Virginia. First, the Board explained that they were

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26 Michael Farber, Tax Reform: A Lesson in Governmental Ineptitude, THE CHARLESTON GAZETTE, Mar. 21, 1990, at 5A; Michael Farber, State Sidetracked on the Road to Real Tax Reform, THE CHARLESTON GAZETTE, Mar. 22, 1990, at 5A; Michael Farber, Class Levy Rate Must Fall Equally on All Taxpayers, THE CHARLESTON GAZETTE, Mar. 23, 1990, at 5A.

27 Board of Public Works Resolution on Appraisal of Natural Resources (Mar. 29, 1994). Governor Caperton and Secretary of State Hechler differed as to their interpretation as to the authority of the Board of Public Works to give a directive requiring this report to the tax commissioner. Ken Hechler, Notes on Conversation with Governor Caperton (June 28, 1994). The Governor based his conclusion on the presumption that as the directive related to taxation, such direction could only come from the Legislature. Id. Consequently, he had directed the report to be referred to the Legislature, rather than to the Board who had ordered it. Id.

28 Board of Public Works Resolution on Appraisal of Natural Resources (Mar. 29, 1994). It is interesting to note that Governor Caperton was not present for discussion or vote on this resolution. Id.
charged to “assess and fix the true and actual value of all property” of public utilities.\textsuperscript{29} The United States Supreme Court had previously held that it would be unconstitutional for West Virginia property to be valued at one rate while similar property was valued at a much lower rate.\textsuperscript{30} Thus, if the Board assessed natural resource property belonging to public utilities at a rate inconsistent with the values placed upon similarly situated property of equal value owned by private persons, they would be violating the equal protection rights of the utilities. Second, the Board’s authority over the tax commissioner comes from the broad directive providing that the commissioner “shall give such assistance to the said board as it or the governor may direct, in making any assessment to be made by it.”\textsuperscript{31}

On April 15, 1994, the Board passed a second resolution setting forth appraisal methodology for the tax commissioner to implement so that the Board’s assessment and taxation of public utilities would conform with both West Virginia constitutional requirements of equal and uniform taxation based upon actual value and the United States constitutional requirement of equal protection for individual owners.\textsuperscript{32} On June 30, the state tax department released a report setting forth its

\textsuperscript{29} W. VA. CODE § 11-6-11 (1995). This section required the Board to consider the information and recommendations provided to it by the tax commissioner. \textit{Id.} In order for the Board to set forth valuation based on true and actual value, such appraisals would have to be consistent with values set by the tax department for non-utility natural resource properties to avoid violation of the equal and uniform language of the West Virginia Constitution. See W. VA. CONST. art. X, § 1.

\textsuperscript{30} Allegheny Pittsburgh Coal v. County Comm’n, 488 U.S. 336, 343 (1988). The court stated that the Equal Protection Clause demanded “rough equality in tax treatment of similarly situated property owners.” \textit{Id.} at 336. The court went on to state that the State’s ability to show that the instant property was properly valued at fair market value was of no moment against a claim of equal protection violation; rather, the state must show equal treatment of similarly situated properties. \textit{Id.} at 343.

When dealing with the constitutional infirmity of tax appraisal and assessment, the Court also intimated that the state could cure the violation of equal protection by ensuring that values of systematically and intentionally undervalued property in the same class were being raised to comparable levels within a short period of time. \textit{Id.} at 343. However, the Court provided the important distinction that while this action was the State’s response to allow the higher assessment based upon actual market value to withstand equal protection challenge, the State could not make such action the remedy for a plaintiff who had been the subject of discriminatory taxation. \textit{Id.} at 346. The plaintiff’s remedy must be the lowering of its property taxation to levels of “rough equality.” \textit{Allegheny Pittsburgh Coal}, 488 U.S. at 346.

\textsuperscript{31} W. VA. CODE § 11-1-3 (1995).

\textsuperscript{32} Board of Public Works Resolution (Apr. 15, 1994). This Resolution read in pertinent part:

That the Tax Department be directed to move expeditiously toward abandoning the seam-acre approach to valuing coal reserves and to replace it with per ton valuations;

That the Tax Department be directed to take the necessary steps to
defense to charges of improper valuations of natural resource property. In that report, the tax department stated that natural resource properties were being properly valued and taxed.

The information contained within the report was examined by Charleston reporter, Paul Nyden, who released his findings in an August article criticizing the tax commissioner’s report. After the discovery of numerous errors that effectively invalidated the findings of the report, the Board of Public Works rejected the report as “unacceptable,” and Governor Caperton ordered the tax department to redo the report with valid information. In addition, the Board adopted a resolution establishing a committee to review the tax department’s reporting process and make recommendations as to how the process could be improved in an effort to ensure fair and equitable taxation. The Natural Resource Property Valuations Task Force

replace the current methodology of appraising coal reserves by a dollar value per region by the more equitable use of yardsticks of mineability, marketability and characteristics of the coal itself;

That the Tax Department place a high priority on revision of the current legislative rules to meet the above objectives, as well as to include the valuation of leases and royalties;

Id. at 1. The resolution passed by a four to three majority. Phil Kabler, Hechler will press for Tax shake-up, CHARLESTON GAZETTE, Aug. 23, 1994, at 7A. Governor Caperton, Auditor Gainer, and Commissioner of Agriculture Douglas voted against the resolution. Id.

Secretary James Paige, III, TAX DEPARTMENT REPORT (June 30, 1994).

Paul Nyden, THE SUNDAY GAZETTE MAIL, Aug. 21, 1994, at 4A. Nyden examined 65 transactions from the tax department’s database of 928 sales. Id. These 65 transactions represented 88% of the total price and acreage contained in the database. Id. Nearly a third of the transactions were between companies and subsidiaries or between family members, not the arms length transactions required by regulations. W. VA. CODE STATE R. § 110-11-4.1.9.2.b (1997) (effective date July 26, 1991). Half of these sales came from Braxton county and 90% of those took place before 1985. Paul Nyden, THE SUNDAY GAZETTE MAIL, Aug. 21, 1994, at 4A. Regulations specifically state that transactions to be considered should be those that have occurred “during the five (5) years prior to the appraisal date.” W. VA. CODE STATE R. § 110-11-4.1.9.2.b (1997) (effective date July 26, 1991). Finally, many large transactions in the southern counties were conspicuously missing from the database. Paul Nyden, THE SUNDAY GAZETTE MAIL, Aug. 21, 1994, at 4A.

Paul Owens, Officials Dismiss Coal Tax System, CHARLESTON DAILY MAIL, Aug. 23, 1994, at 1A.

Board of Public Works Resolution (Aug. 23, 1994). This committee was to consist of “three county assessors, three county clerks, three County Commission members, and the Board of Public Works or its designee” and was charged with preparing a report by January 8, 1995. Id.
made a number of findings in its January 18, 1995 report that were critical of the action taken by the tax department since the 1990 legislation which charged the department with the duty of statewide appraisal of natural resources.\(^{38}\) To date, neither the Legislature nor the tax department have taken any action on these recommendations.

IV. LEGAL CHALLENGES TO THE TAX DEPARTMENT'S DETERMINATION OF COAL PROPERTY VALUES

Through the years, a number of suits have challenged the tax department's appraisal of individual coal properties.\(^{39}\) However, in 1995, a group of West Virginia citizens sued the tax department, alleging that the tax commissioner had developed inaccurate lists of coal property values, and consequently, reserve coal property owners did not pay a fair and equitable share of their tax burden in violation of the West Virginia constitution, the tax code, and the rules and regulations related to market value appraisals.\(^{40}\) In settling the case, the tax department agreed "to solicit review of and comments on the procedures it uses to value reserve coal for ad valorem property tax purposes from Petitioners' experts," and to address both the concerns of the plaintiffs and the recommendations of their experts within the scope of existing law.\(^{41}\)

Two independent experts were retained to review the tax department's appraisal lists and to evaluate the effectiveness of the tax department's existing

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\(^{38}\) NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE, NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE REPORT 1-5 (1995). The task force found that the department had made only "meaningless changes" to property valuations and that the mineral data used to make the appraisals was "quite inadequate." \textit{Id.} The task force made a number of recommendations. \textit{Id.} at 6-8. Significant among them were a call for legislative support for a broader information data base, such as Geographic Information System (GIS) and Global Positioning System (GPS) databases, the creation of an oversight committee to review the department's natural resource valuations, and the suggestion that the tax commissioner be made an elected official. \textit{Id.}


\(^{41}\) Lawson v. Paige, No. 95-Misc.-43 (13th Cir. W. Va. agreed order June 24, 1995). This agreement was made in order to allow the tax department to mail tax tickets in a timely manner so as not to disrupt the annual assessment and collection of property taxes in the several counties of West Virginia. \textit{Id.}
appraisal methodology for the true and actual value of reserve coal property. Both of the independent experts were critical of the tax department's methodology and suggested in their reports that serious revision of the methodology would be needed to produce acceptable valuation results. From the time the Commissioner received the reports to the date when the tax department released its list of coal properties used in 1996 tax valuations, no suggestion was made to the Legislature to amend or to improve any of the regulations controlling how reserve coal property values were determined.

As part of the agreement in settling the lawsuit, the tax commission developed a new list of properties to be used in determination of 1996 reserve coal values. In January of 1996, the tax commission issued an administrative notice that outlined the department's procedure for developing regional values of reserve coal properties by means of "arithmetic mean" methodology. This methodology

42 Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunctive Relief at 16-17, Adkins v. Paige, No. 96-C-742 (1996). The two experts were Resource Technologies Corporation (RTC) and Thomas F. Torries and Dale Colyer (Torrie & Colyer). Id. Each of these two experts filed their written reports with the Tax commissioner on October 16 and 17, 1995, respectively. Id.

43 Id. at 17. The first report stated that the tax department's database was "not statistically valid by any acceptable measure of confidence", and that the database "as currently comprised is not useful." Id. (quoting RTC report at 14). The second report stated that the department's methodology "results in predicted values that differ from actual values on an average of plus or minus 50 percent, but can range up to 600 percent from the actual values." Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunctive Relief at 16-17, Adkins v. Paige, No. 96-C-742 (1996) (quoting from Torries Report at 37).

44 Tr. at 31-32, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va. hearing Apr. 9, 1996) (relating testimony of Jerry Knight, Director of the Property Tax Division, Department of Tax and Revenue).


46 James Paige, tax commissioner, explains the valuation process as follows:

Once the sales have been subjected to the above validity tests, sales that appear to be arms-length are used to generate measures of central tendency. In this regard, different measures are developed to provide guidance in selecting the price per acre that best typifies the most probable selling price per acre for each region. First the Department develops a weighted arithmetic mean of sales--giving the more recent sales greater weighting. Second, an arithmetic mean of the sales is developed by dividing the aggregate of the sale prices by the aggregate acres transferred. Third, a straight average of the annual arithmetic means is developed.

ADMINISTRATIVE NOTICE 96-11 2 (Jan. 26, 1996). Within the constrictions of the legislative regulations, the tax department seeks to find a fair valuation of coal property. Id.
had been applied consistently in previous years to determine the region values of these properties. However, in 1996, the tax department determined that application of this formula would systematically overvalue reserve coal properties. Consequently, tax department officials examined alternative methods and employed median ratio analysis — a process that had the result of significantly lowering the valuations used to set taxes for reserve coal properties in most counties throughout the state.

In order to do this, it tries to discern a measure of "central tendency." This term means nothing more than a number (value) that is representative of the group. So for reserve coal properties within a given region, the central tendency would be the value that is most representative of the various values of individual properties.

47 Tr. at 52, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va. hearing Apr. 9, 1996) (relating testimony of Jerry Knight). Speaking of the "arithmetic mean" analysis, attorney Patrick McGinley questioned Jerry Knight:

Q: But that's precisely the process you had used in the past, and it's consistent with the process outlined in not only the Administrative Notice 9611 but in prior years Administrative Notices, correct?

A: That's correct, but those numbers in the past did not yield those kind of over-valuations. Id.

48 Id. at 48-60. Mr. Knight's testimony makes clear that what he terms "systematic overvaluation" refers only to the fact that more properties would be appraised at a value higher than the purchase price than would be appraised at a value lower than the purchase price. Id. This analysis did not concern itself with the amount of overvaluation or undervaluation, nor the extent to which actual values (as represented as the purchase price) deviated from the central tendency determined by application of the "arithmetic mean" method. Id. The following is excerpted from Mr. Knight's answer to a question of attorney McGinley:

A: I didn't look at the extent of over-valuation. I just looked to see if the properties were over-valued or not. That was the extent of the comparison. Tr. at 59, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va. hearing Apr. 9, 1996).

49 Id. at 48-78. Median ratio analysis is performed by taking the list of all individual values and placing them in ascending or descending order and then selecting the number that is in the middle of that list, or if the total number of values is even, then a number between the two located in the center of the list. Id.

The use of median ratio analysis resulted in a significant decrease in reserve coal property valuations from the levels that would have been achieved by application of the "arithmetic mean" method:

<table>
<thead>
<tr>
<th>Region</th>
<th>Arithmetic Mean Value</th>
<th>Median Ratio Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Region 1</td>
<td>837.40</td>
<td>400.00</td>
</tr>
<tr>
<td>Region 2</td>
<td>13.38</td>
<td>200.00</td>
</tr>
<tr>
<td>Region 3</td>
<td>1,731.24</td>
<td>375.00</td>
</tr>
</tbody>
</table>
In response to the values set forth by the tax department, a new citizen challenge was filed against the tax commissioner in the Circuit Court of Kanawha County in the spring of 1996. The case challenged the validity of the reserve coal valuations for the 1996 tax year and sought equitable relief to enjoin the tax commissioner from using the regional valuations he had set and to issue a writ of mandamus requiring values to be based on fair market value of the reserve coal properties.

In response to what he called "new analysis" of recent coal sales, the tax commissioner increased the regional values for two of the regions in August. This action indicates a potential for movement toward higher valuations on reserve coal properties. The impact the current civil case will have on the direction and speed in which the tax department moves remains to be seen.

V. ANALYSIS OF TAX COMMISSIONER'S LEGAL DUTY TO APPRAISE COAL PROPERTY

The tax commissioner is bound to uphold the duty of the chief tax officer in the state. However, in recent years it has become apparent that exactly what that duty demands is open to some debate. The uncertainty occurs because the duty placed upon the tax commissioner arises not from one source, but from at least three separate authorities: the West Virginia constitution, the West Virginia Code, and

<table>
<thead>
<tr>
<th>Region 4</th>
<th>727.82</th>
<th>400.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Region 5</td>
<td>642.13</td>
<td>425.00</td>
</tr>
</tbody>
</table>

Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunctive Relief at 3-4, Adkins v. Paige, No. 96-C-742 (1996).


52 Paul Nyden, Coal Land Tax May Rise 75%, THE SUNDAY GAZETTE MAIL, Aug. 25, 1996, at 1A. Values for Region 5 will be increased “from $450 per seam-acre to $800 per seam-acre, an increase of 77 percent.” Id. at 1A. In addition, values for Region 4 will be increased “from $400 to $450 per seam-acre, a 12.5 percent increase.” Id. at 19A. These values are set to become final on October 1, 1996. Id. West Virginia Coal Association president, Bill Raney indicated that the figures may not be accurate and Mr. Nyden stated, “The coal industry plans to challenge the state tax department’s proposed 77 percent increase.” Paul Nyden, Coal Industry to Challenge Tax Appraisals, THE SUNDAY GAZETTE MAIL, Sep. 1, 1996.

the legislative regulations.\textsuperscript{54}

The constitution, as the ultimate law of the state, provides general guidance to the tax commissioner in the requirement of “equal and uniform” taxation throughout the state.\textsuperscript{55} Furthermore, the constitution requires the tax commissioner to tax property in proportion to its value “to be ascertained as directed by law” indicating that the legislature shall be authorized to set forth how he is to determine what property is worth.\textsuperscript{56}

The tax statutes in chapter 11 of the West Virginia Code set forth more specifically the duty of the tax commissioner.\textsuperscript{57} Chapter 11 article 1A of the West Virginia Code pronounces the tax commissioner’s duty of statewide appraisal.\textsuperscript{58} In addition to these statutes, chapter 11, article 1C of the West Virginia Code focuses on the tax commissioner’s duty to assure fair and equitable property valuations for all citizens of West Virginia.\textsuperscript{59}

Finally, the legislative regulations set forth in Title 110-II outline the specific valuation processes to be used.\textsuperscript{60} These regulations detail what is to be considered and how these various factors are to be weighed in order to preserve equity and satisfy the tax commissioner’s greater statutory and constitutional duties.\textsuperscript{61} The specificity of these regulations provide little room for discretion and interpretation except where such is specifically provided for in the regulations.

Examining the tax commissioner’s duties through this three-tiered lens yields guidance for proper preparation of coal property valuations. The commissioner must take no action that he determines would not yield equal taxation

\textsuperscript{54} W. VA. CONST. art X, § 1; W. VA. CODE §§ 11-1-2, -1A-1, -1A-29a, -1C-5 (1995); W. VA. CODE STATE R. § 110-II-1 to -4 (1997) (effective date July 26, 1991).

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} W. VA. CODE § 11-1-2 (1995). This statute states the general duties and powers of the commissioner, in part as “to see that the laws concerning the assessment and collection of all taxes and levies... are faithfully enforced.” Id.

\textsuperscript{58} W. VA. CODE § 11-1A-1.

\textsuperscript{59} W. VA. CODE § 11-1C-5 (1995).

\textsuperscript{60} W. VA. CODE STATE R. § 110-II-1 to -4 (1997) (effective date July 26, 1991). This section is specifically focused on valuation for active and reserve coal property. Id.

\textsuperscript{61} Id.
“both within species of property and among different species of property.” The required valuations must represent “true and actual value,” or the market value, of the property. Any system designed by the Legislature and implemented by the tax commissioner “must accomplish the constitutional requirement of ‘equal and uniform taxation.’”

The existing system presents potential conflicts with the requirement set forth in Killen. By the very nature of the regulations that place reserve coal properties into large groups, values are applied to seams of coal that bear little or no comparison to the actual sale price for which such properties have been transferred at market. Although it is tautological to state that whenever one averages a set of values there will be a difference between the sale prices of some of these reserve coal properties and their appraised value seems to fly in the face of possible compliance with the constitutional mandate of true value taxation. If this

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62 Killen v. Logan County Com’n, 295 S.E.2d 689, 704 (W. Va. 1982). This statement of the meaning of article 10, section 1 of the West Virginia constitution was reiterated in the West Virginia Code which made it the commissioner’s duty to ensure fair taxation so that “no individual species or class of property will be overvalued or undervalued in relation to all other similar property within each county and throughout the state.” W. VA. CODE § 11-1C-1(a) (1995).

63 W. VA. CODE § 11-1A-1, -3 (1995). These statutes require the value to be that which the property would sell for if sold by a willing seller to a willing buyer. Id. Thus, the property must not only be valued as similarly situated properties, but both must be at market value.

64 Killen, 295 S.E.2d at 693. That case also clarified that “both the method and the result of taxation are essential to compliance with the constitution.” Id. at 707.

65 Tr. at 35-39, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va. hearing Apr. 9, 1996) (relating testimony of Jerry Knight). His testimony sets out a few of the more glaring disparities between the value per seam-acre of the actual sale price and the tax commissioner’s final appraisal per seam-acre for the corresponding region of the state. Id. In addition, the following table provides a comparison between the average cost per seam-acre based on the actual sale price and the value at which the property is being appraised under the current tax department plan:

<table>
<thead>
<tr>
<th>Sale number</th>
<th>Avg./acre (sale)</th>
<th>value/acre (tax dept.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>2,062</td>
<td>400</td>
</tr>
<tr>
<td>24</td>
<td>48</td>
<td>450</td>
</tr>
<tr>
<td>31</td>
<td>2,245</td>
<td>400</td>
</tr>
<tr>
<td>35</td>
<td>14</td>
<td>400</td>
</tr>
<tr>
<td>53</td>
<td>6,756</td>
<td>450</td>
</tr>
<tr>
<td>55</td>
<td>2,214</td>
<td>450</td>
</tr>
<tr>
<td>64</td>
<td>23</td>
<td>400</td>
</tr>
<tr>
<td>71</td>
<td>16,126</td>
<td>400</td>
</tr>
</tbody>
</table>

TAX DEPARTMENT, TY96 COAL SALES SURVEY (1996). These figures are rounded and come from the list of sales prepared by the tax department to be used to calculate regional values. Id. As such, they
perception is valid, it would not be sufficient for the tax commissioner or others working in the tax department to respond to criticism by saying that legislative regulations mandate their procedure or methodology. There is an obvious and well-established hierarchy of authority in our law, and the constitution is the proverbial trump card. So, if the tax commissioner is currently operating within a constitutionally offensive position, what possible remedies are available?

VI. THE NEXT STEP

No criticism can be considered completely thought out without some effort at suggesting improvement on the status quo. There are basically two potential theories of how the tax commissioner could remedy the current situation. His action might be corrected by the use of discretion within the existing structure. If that does not prove effective, the structure must be changed to allow constitutional enforcement of the tax appraisal laws as they relate to valuation of coal properties. There is considerable debate about what the next step should be in resolving the issues raised in this work. State policy makers must consider both how West Virginia can create a more accurate appraisal system and criticism that alteration of the current system will have harmful effects on our state.

The citizens currently suing the tax department assert that the tax commissioner could receive accurate and useful data to allow equitable, fair market taxation. They contend that the tax commissioner has failed to make use of the power given him which allows the collection of coal property owners' analysis of the "coal location, quality, seam thickness, and recoverable tons per acre." Although members of the tax department have argued that such information gathering is beyond the scope of the tax commissioner's powers, the language of chapter 11, article 1C, section 10 of the West Virginia Code refutes that

have been deemed by the tax department as valid arms-length transactions. In other words, the prices paid should represent the value that two willing parties agreed upon without being artificially inflated or deflated, as is common when a company would sell to its own subsidiary.

66 Petitioner's Memorandum in Support of Request for Relief in Mandamus and for Declaratory and Injunctive Relief at 17, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va. 1996). W. VA. CODE § 11-1-2 (1995) specifically gives the tax commissioner the power to "examine, under oath, the owner or owners, of any property subject to taxation in this State as to any matters touching the value thereof." Id. (emphasis added).

Critics cite the potential difficulties with requesting privileged information, but the tax commissioner could clearly stipulate that all information received for valuation purposes would remain confidential — in fact the statute already requires him to do so.69

Establishing accurate mapping systems is a solution that is frequently suggested.70 These mapping systems would actually consider the coal present in each piece of property as a basis for individualized tax appraisals.71 Critics of this idea suggest that such a system is prohibitively expensive and difficult to implement; however, experience does not support that conclusion.72 In neighboring Kentucky, twenty-two people were employed to develop a mapping system at a cost of around a million dollars annually.73 The development of a Geographic Information System (GIS), as the system is labeled, provides a computerized data base of all mineral property within a state and allows the state to generate appraisals each year without the existing requirement of relying on property owners to report the presence and quantity of natural resources on their land.74 Not only does this system eliminate the conflict of interest naturally occurring under the current system, but it holds the potential of vastly increasing the total tax base once the

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68 Petitioner’s Memorandum in Support of Request for Relief in Mandamus and for Declaratory and Injunctive Relief at 17, Adkins v. Paige, No. 96-C-742 (13th Cir. W. Va 1996). W. VA. CODE § 11-1C-10 (1995) sets out the tax commissioner’s broad power to request information. Under this code section, owners of natural resource property must submit a return to the state tax commission each year. W. VA. CODE § 11-1C-10(b) (1995). The tax commissioner “may require any information to be filed which would be useful in valuing the property covered in the return.” Id. (emphasis added). The statute specifically mentions as proper sources for valuation “exploratory, drilling, mining and other information supplied by natural resources property owners.” W. VA. CODE § 11-1C-10(d)(2) (1995).

69 W. VA. CODE § 11-1C-10(d)(2) (1995). The referenced language of the statute reads as follows: “Any information supplied by natural resources property owners or any proprietary or otherwise privileged information supplied by the state division of environmental protection and the office of miner’s health, safety and training shall be kept confidential unless needed to defend an appraisal challenged by the natural resources owner.” Id.

70 See, e.g. NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE, NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE REPORT 9 (1995).

71 Ken Hechler, Notes on Conversation with Governor Caperton, 1 (June 28, 1994).


73 Id. at 2.

74 NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE, NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE REPORT 6-7 (1995).
program has been fully implemented. Although such a system would require a significant commitment of resources from the Legislature, the potential increase in revenue made available through accurate and complete appraisal promises to vastly exceed these short-run costs.

Another challenge to the proposal to increase all coal taxes to true value is that such action would force small land owners, who have no intention of mining their land, to sell their property thereby increasing the undesired situation of having a state increasingly owned by out of state interests. To avoid forcing small land owners to sell their property, the legislators could adopt regulations that specifically exempt qualified farm land from having coal property therein appraised. Another possible solution is to have the owner sign a sworn statement that he or she shall not use the coal properties on his land for mining purposes. Any violation of such a writing would result in the collection of all appropriate back taxes with interest and penalty fees.

A third challenge to the rationale behind full value appraisal of individual coal properties is that such action will lead to a flight of coal producers and with them many of the jobs that provide such an important part of the local economies. Again, the Kentucky experience does not bear out that prediction. Concerned citizens from Kentucky report that the coal industry continues to thrive just as it had done prior to the implementation of their GIS project. In fact, economic theory and common experience would suggest that the large coal companies would pass on increases in their costs to coal purchasers, who in turn would pass that cost on to those using their services. This “trickle down” of increased expense truly distributes the burden of higher taxation on a broad sector of society.

76 Id.
77 NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE, NATURAL RESOURCE PROPERTY VALUATIONS TASK FORCE REPORT 10 (1995).
79 Id.
80 Id.
VII. CONCLUDING REMARKS — WHAT IS AT STAKE

Why is the issue of fair taxation for coal properties a recurring theme in our state’s history? More importantly, why should the citizens and the legal counsel of the state be concerned with the resolution of this debate? Reflect on the 1884 report of the West Virginia Tax Commission:

The wealth of this state is immense; the development of this wealth will earn vast private fortunes far beyond the dreams even of a modern Croesus; the question is, whether this vast wealth shall belong to persons who live here and who are permanently identified with the future of West Virginia, or whether it shall pass into the hands of persons who do not live here and who care nothing for our state except to pocket the treasures which lie buried in our hills.  

More recently, in *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, the Supreme Court of Appeals of West Virginia stated that any citizen could bring a suit to challenge assessments “to insure that their own properties are not disproportionately taxed and to further insure that the county government is receiving all revenues that it is properly entitled to in order that all residents of the county will enjoy the *maximum legal level of tax supported services and educational facilities*."

What this is all about, in other words, is the unfair burdening of one group to the benefit of another, and more importantly, the quality of education and infrastructure we can provide for the future generations. The investment of our time and energy to improve the method of reserve coal property valuation is not only an investment worth making, it is one that demands our making with all deliberate speed and utmost conviction.

*Ryan J. Morgan*

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84 Ken Hechler, Your Taxes Are a Subsidy to Absentee Landlords (citing WEST VIRGINIA TAX COMMISSION REPORT (Nov. 22, 1884)).


86 *Id.* at 170 (emphasis added).

* I would like to thank Ken Hechler, a friend and an inspiration, for his encouragement and undying commitment to service. This Note is dedicated to my parents who have given me life and love, and who taught me to appreciate knowledge and use it with compassion.