A Constitutional Analysis of the Surface Owner Consent Provisions in the Tennessee Surface Mining Law and the West Virginia Oil and Gas Conservation Act

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A CONSTITUTIONAL ANALYSIS OF THE SURFACE OWNER CONSENT PROVISIONS IN THE TENNESSEE SURFACE MINING LAW AND THE WEST VIRGINIA OIL AND GAS CONSERVATION ACT

I. INTRODUCTION

In 1972 the West Virginia Legislature amended chapter 22 of the state code, pertaining to mines and minerals, by adding article 4A, which relates generally to the conservation of oil and gas. The legislature declared that the public policy of the state was to encourage the maximum recovery of oil and gas resources and to protect the rights of both operators and royalty owners. To achieve these ends, section 7(a) provides for the establishment of drilling units, while section 7(b) allows for the pooling of separate tracts and interests in the drilling unit, and even allows forced (or involuntary) pooling in certain instances. The establishment of drilling units limits the number of wells which may be drilled, consequently retrenching the costs of production. Considering the large capital investment required to drill a deep well, limiting the number of wells to that which is reasonably necessary to achieve maximum recovery results in a quicker return on investment. The Act thus encourages maximum production of the

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   It is hereby declared to be the public policy of this State and in the public interest to:
   (1) Foster, encourage and promote exploration for and development, production, utilization and conservation of oil and gas resources;
   (2) Prohibit waste of oil and gas resources and unnecessary surface loss of oil and gas and their constituents;
   (3) Encourage the maximum recovery of oil and gas; and
   (4) Safeguard, protect and enforce the correlative rights of operators and royalty owners in a pool of oil or gas to the end that each such operator and royalty owner may obtain his just and equitable share of production from such pool of oil or gas.

3 Id. § 22-4A-7(a).

4 Id. § 22-4A-7(b).

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mineral while at the same time it inhibits economic waste and unnecessary displacement of surface land areas for use as drilling sites.

The requirement that a well not be drilled within a minimum distance from any boundary of the drilling unit protects the various owners and operators by assuring that no one will produce or receive more than his just and equitable share of the field's production. Pooling tracts and interests in the drilling unit assures recovery of the resources and provides for a pro rata share of the profits by the various owners and operators, while the number of deep wells that may be drilled is kept to a minimum. The provision for forced pooling prohibits a single owner from standing in the way of recovery by the other mineral owners in the same deposit. Furthermore, by providing that the costs of production be apportioned on the basis of mineral acreage contributed and that the profits be similarly shared by all owners of operating interests, the Act is intended to further public policy.

Certain provisions of the Act, however, pose possible constitutional problems. Section 7(b)(4) provides that a deep well may not be drilled or thereafter operated on a tract of land unless the operator obtains for valuable consideration the written consent of the surface owner. This consent requirement, imposed as a con-

5 Id. § 22-4A-7(b) (4) provides:
No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and place [sic] of record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy which consent and easement shall be submitted by the operator to the commission.

Oklahoma has a similar unitization statute, but with the significant difference that the Oklahoma Unitization Act does not require the unit operator to acquire the consent of the surface owner prior to the commencement of drilling operations. Okla. Stat. Ann. tit. 52, §§ 287.1 -.15 (West 1969). In Nelson v. Texaco Inc., 525 P.2d 1263 (Okla. Ct. App. 1974) the plaintiff contended that the Oklahoma statute required the operator to obtain an easement from the surface owner prior to developing the unit. The Oklahoma Court of Appeals found that

[i]f the plaintiff's contentions were upheld, the whole intent and purpose of the unitization law . . . could be defeated by one or more recalcitrant surface owners within a unit area. . . . [T]he Unit Operator has
dition to the operator’s exercise of his right to extract the minerals, might easily be found to violate the taking clause of the fifth amendment and the due process clause of the fourteenth amendment of the United States Constitution. These questions, although once specifically presented to the West Virginia Supreme Court of Appeals, nonetheless presently remain undecided since the court dismissed the case on other grounds, declining to rule on the constitutionality of section 7(b)(4). The consent provision also appears to contravene West Virginia common law whereby a mineral owner is entitled to those surface rights which are “fairly necessary” for the enjoyment of the mineral estate.

At this juncture it is useful to note that this is not a unique

the right to use any surface within the unit for the purpose of efficiently carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome to any particular surface area.

525 P.2d at 1266.


U.S. Const. amend. XIV provides in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The fifth amendment taking clause is applicable to the states through the fourteenth amendment. O’Neill v. Learner, 239 U.S. 244 (1915); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239 (1905); Missouri Pac. Ry. v. Nebraska ex rel. Bd. of Transp., 164 U.S. 403 (1896); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

7 Traverse Corp. v. Latimer, 157 W. Va. 855, 205 S.E.2d 133 (1974). In Latimer, the petitioner was denied an application for a drilling permit because, inter alia, he had failed to obtain the written consent and easement from the surface owner. On appeal, the petitioner argued that § 22-4A-7(b)(4), if applicable to petitioner’s drilling of a test well, was an unconstitutional deprivation of private property without due process of law. Without ruling on the constitutional issue, the court based its affirmation of the denial of the application upon a finding that the dispute was governed by a contract between the parties.

8 Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E.2d 633 (1950). The reasoning of the court in Adkins was based on Squires v. Lafferty, 35 W. Va. 307, 121 S.E. 90 (1924), wherein the plaintiff owned the coal, oil, and gas underlying the leasehold and was engaged in coal mining operations. The owner of a subdivision on the surface was hindering the operations by refusing to allow passage of equipment over the subdivision. In granting the injunction that the plaintiff sought, the court held that when property is granted, all of the means to obtain it and all of the benefits of it are granted as well. The use of the surface involved in Adkins and Squires was held to be not only a reasonable burden on the surface owner, but “fairly necessary” for the development and operation of the mineral estate.
approach in the attempt to balance the interests of mineral owners with those of the surface estate. For instance, the Tennessee General Assembly has enacted a similar consent provision as part of the Tennessee Surface Mining Law. The comparable Tennessee statute provides that an application for a surface mining permit shall not be granted without evidence of the operator's legal right to surface mine the coal. However, in the event that the deed, lease, or other document which severed the surface and mineral estates does not specifically provide for surface mining, then evidence of such a legal right must be in the form of an affidavit by the current surface owner consenting to the removal of the coal by surface mining techniques.

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10 Id. § 58-1544 provides in pertinent part:

No operator shall engage in surface mining without having first obtained from the commissioner a permit therefore.

(a) The granting of such permit shall . . . be subject to . . . submission of the following information:

(b)(B) Evidence of the operator's legal right to surface mine the minerals on the land affected by the permit. If the surface estate has been severed from the mineral estate, such evidence may be provided by either, (a) a deed, lease, or other document which severs the mineral rights and expressly permits the removal of minerals by surface mining or a certified extract of the appropriate provisions of such documents; or (b) a deed, lease or conveyance which severs the mineral rights without specific provisions for surface mining and an accompanying affidavit by the current surface estate owner agreeing to the removal of such minerals by surface mining. The provisions of this subdivision (B) shall only apply to mineral estates in coal.

11 Where the instrument severing the surface and mineral estates was executed prior to a time when surface mining had become a known mining method in the area, the surface mining operator may be precluded under contract law from commencing surface mining operations without the prior consent of the current surface owner. For cases disallowing surface mining as not within the contemplation of the parties when the severance was executed because it had not been known in the area, see Skevolocoki v. East Ohio Gas Co., 38 Ohio St. 2d 244, 313 N.E.2d 374 (1974) (surface mining not known in area when severance occurred); Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973); Wilkes-Barre Twp. School Dist. v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961) (surface mining not known in area at the time of an 1893 severance); Franklin v. Callicoat, 53 Ohio Op. 240, 119 N.E.2d 688 (1954) (unknown method at time of 1905 severance); West Virginia-Pittsburgh Coal Co. v. Strong, 129 W. Va. 832, 42 S.E.2d 46 (1947) (surface mining rights were not conveyed in a 1904 severance).

For cases allowing surface mining despite the fact that it was not practiced in the area at the time of the severance, see Roberts v. Twin Fork Coal Co., 222 F.
In those situations where the instrument which severs the surface and mineral estates does not specifically provide for surface mining, the Tennessee statute poses the same constitutional problem as the consent provision in the West Virginia oil and gas statute. To obtain the requisite consent, the mineral owner/operator is forced to pay further compensation to the owner of the surface estate. In effect, the operator is required to pay a second time in order to gain the rights for which he has already paid the surface owner or his predecessor in title. Of even greater concern is the possibility that the operator may be entirely precluded from recovering the minerals if the surface owner refuses to give his consent at any price.

II. THE LAW CONTROLLING THE TAKING ISSUE

Courts have long recognized that an exercise of governmental power which results in a diminution of value for the private property owner and in turn gives the government a property interest which it previously did not enjoy constitutes a taking and requires the payment of just compensation. As the taking doctrine began to develop in the latter part of the 19th century, only governmental actions which constituted physical acquisitions of pri-

Supp. 752 (E.D. Ky. 1963); Commonwealth v. Fisher, 364 Pa. 422, 72 A.2d 568 (1960) (involving an 1855 severance). In Fisher the court stated,

Where a way is granted or reserved without any limitation as to its use, it will not necessarily be confined to the purposes for which the land was used at the time the way was created, but may be used for any purpose to which the land accommodated by the way may naturally and reasonably be devoted . . . . The grantee is entitled to vary his mode of enjoying the same, and from time to time to avail himself of modern inventions if by so doing he can more fully exercise and enjoy or carry out the object for which the way was granted.

364 Pa. at 427, 72 A.2d at 570 (quoting from Dowgiel v. Reid, 359 Pa. 448, 453, 59 A.2d 115, 118 (1948) and from 28 C.J.S. Easements § 87 (1941)).

For an extensive analysis of this point see Annot., 70 A.L.R.3d 383 (1976).

18 See, e.g., Department for Natural Resources & Envt'l Protection v. No. 8 Ltd., 528 S.W.2d 684, 686 (Ky. 1975).

vate property were held to be takings. Under this early approach, developed by Justice Harlan, a taking was found only when governmental action diminished the private owner's quantum of property interests and in turn increased the government's quantum of property interests. The attention to physical acquisition continues to be important in the latest United States Supreme Court opinions: "A taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." However, the West Virginia and Tennessee statutes are not physical invasions of private property interests by the government. While the provisions interfere with the mineral owner's and operator's private property interests, they do not increase the quantum of the state's property interests.

The statutes are thus more appropriately viewed as regulating the use of private property rather than as effecting actual acquisitions. While in a wide variety of instances, the government may execute laws that adversely affect recognized economic values, such provisions are also subject to constitutional scrutiny, and it is a well settled principle that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Since there is no set formula for determining when a regulation becomes a taking, the inquiry is largely dependent upon the particular circumstances of each case. Although courts do attach particular significance to the character of the governmental action, and may thus more readily find a taking in the case of an actual physical acquisition than in the imposition of a regulatory control under an attempted exercise of the police power, they are further concerned in the latter case with the nature and extent of the interference in the individual's rights in the affected property.

A regulation will ultimately be found to constitute a taking if

14 Sax, supra note 13, at 36-39.
16 Id.
19 Id. at 130-31.
it cannot be said to be a reasonable exercise of the police power. Although a proper exercise of the police power must relate to the health, safety, morals or general welfare of the public, this finding is not determinative. The economic impact of the regulation on the owner's rights in the affected property is an additional consideration. A statute, furthermore, may not under the guise of the police power impose an arbitrary or unreasonable restriction upon the use of private property. The regulation must further a public purpose and in this regard the court must look to the actual purpose of the provision. The general, enumerated statement of purpose is given some weight but is not determinative.

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20 Whether the taking of private property will accomplish the end proposed, and whether the taking is beneficial to the public are legislative questions. State ex rel. Ashworth v. State Road Comm'n, 147 W. Va. 430, 128 S.E.2d 471 (1962); State ex rel. Schroath v. Condry, 139 W. Va. 827, 83 S.E.2d 470 (1954); State ex rel. United Fuel Gas Co. v. DeBerry, 130 W. Va. 418, 43 S.E.2d 408 (1947). Consequently, the role of the judiciary in determining whether the taking is for a public purpose is an extremely narrow one. Berman v. Parker, 348 U.S. 26 (1954); United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946); Old Dominion Land Co. v. United States, 269 U.S. 55 (1925). As long as a legislative classification is fairly debatable, it is not wholly arbitrary and will be given great deference by the courts. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Amber Realty Co., 272 U.S. 385 (1926).

Here the legislative determination that requiring the consent of the surface owner furthers maximum recovery of oil and gas resources and curbs the adverse affects of surface mining is not fairly debatable. Rather, it is wholly arbitrary.

A finding of public purpose will not be defeated simply because the regulation confers an ancillary or incidental private benefit. Washington-Summers, Inc. v. City of Charleston, 439 F. Supp. 1013 (S.D. W. Va. 1977). Thus the substantial benefit to the individual surface owner standing alone is not determinative of the absence of a public purpose behind the regulations. Where there is no public purpose to be found, however, the regulation is wholly arbitrary and beyond the scope of the police power.


23 See, e.g., Department for Natural Resources & Envt'l Protection v. No. 8 Ltd., 528 S.W.2d 684, 686-87 (Ky. 1975). In reaching its conclusion as to whether a use is public, the court is not bound by the designation of the use in the statute, but may look to the statute as a whole to discover its dominant purpose. Id.

tive in such an inquiry. When a particular provision bears no relation to the ends specified in the statute, reason dictates that the legislature had some unmentioned purpose in mind when it included the provision. In addition, even if the regulation can fairly be said to be directed toward such a public purpose, this only means that it falls within the scope of the police power. This finding, standing alone, is insufficient to sustain the regulation, since an exercise of the police power must be reasonable in order to be valid. Thus, while the purpose may be valid, further inquiry is necessary regarding the availability and effectiveness of less drastic steps to achieve the same purpose.

Furthermore, even though a particular regulation is a reasonable exercise of the police power, it may still constitute a taking if its economic impact on the private property owner goes too far. Diminution in value of private property is an important factor in determining this question. In Pennsylvania Coal Co. v. Mahon, Justice Holmes states, "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." More recently, the Court has similarly held that while a comparison of values before and after is relevant, though not conclusive, a regulation can be so onerous as to amount to a taking. It is not enough that substantial harm results from the prohibition against existing beneficial uses, since courts will further inquire into possible benefits to be derived from uses which are still

part:

The general assembly finds that the unregulated surface mining of minerals can cause soil erosion and landslides, stream pollution, and accumulation and seepage of contaminated water; contributes to floods; impairs the value of land for agricultural or other purposes; affects fish and wildlife and their habitats; counteracts efforts for the conservation of soil, water and other natural resources; impairs the owners' rights in neighboring property; creates fire hazards, and in general creates conditions inimical to life, property and the public welfare so as to require the exercise of the state's police power in the regulation of surface mining.

37 For a review of Holmes' taking theory, see Sax, supra note 13, at 37.
38 260 U.S. at 413.
allowed under the regulation. However, the economic impact of a regulation goes too far when the regulation not only bars existing uses but also precludes every reasonable basis for the owner's beneficial use and enjoyment of the property.

III. Discussion

It is questionable whether the enumerated purpose behind the West Virginia oil and gas conservation provisions bears a reasonable relation to the requirement that the operator obtain the written consent of the surface owner before commencing to drill a deep oil or gas well. Similarly, while the enumerated purpose of the Tennessee Surface Mining Law is the control of surface mining in order to curb its adverse effects on life, property, and the public welfare, the existence of a reasonable or substantial relation between this purpose and the requirement that the operator obtain the surface owner's consent to surface mine is tenuous at best. While there can be no doubt that promoting maximum recovery and conservation of oil and gas resources and curbing the

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52 It is difficult to rationally connect the relation between requiring the surface owner's consent to the drilling of deep wells and the maximum recovery and conservation of oil and gas resources, or between the requirement of his consent to surface mining and the curbing of such mining's adverse effects on life, property, and the public welfare. Even if the consent requirement did bear a reasonable relation to the supposedly legitimate public purpose behind the regulation, such as those enumerated in the two acts, the availability and effectiveness of measures with a less drastic impact on the mineral owner and operator would preclude finding a valid exercise of the police power. The availability and effectiveness of less drastic means to accomplish the purpose behind the general regulatory scheme of these two acts is demonstrated by a review of their other provisions, particularly W. VA. CODE § 22-4A-7 (1978 Replacement Vol.) and TENN. CODE ANN. §§ 58-1547, 1548, 1553, 1560, 1561 (Cum. Supp. 1979).

adverse effects that surface mining could cause to life, property and the public welfare are proper reasons for the exercise of police power, it is difficult to discern the relation between these goals and the requirement of the surface owner’s consent as a condition to the operator’s right to extract the minerals. The public health, safety, morals or general welfare are not in the least bit enhanced by the surface owner consent requirements found in the two statutes. Though politically expedient, these requirements simply do not fall within the scope of the police power. Consequently, they are arbitrary impositions upon the mineral owner’s and operator’s rights to the beneficial use and enjoyment of their property, violating the taking clause of the fifth amendment and the due process clause of the fourteenth amendment.

This analysis has recently been applied in a neighboring Appalachian state. The Kentucky General Assembly enacted a comparable measure which required that an application for a surface mining permit be accompanied by a statement of consent signed by each holder of a freehold interest in the surface rights of the affected land. The declared purpose of the statute, inter alia, was “to provide such regulation and control of the strip mining of coal as to minimize or prevent its injurious effects on the people and resources of the commonwealth.” In 1975, the Court of Ap-

34 See, e.g., Village of Spillertown v. Prewitt, 21 Ill.2d 228, 171 N.E.2d 582 (1961).
36 By making the consent of the surface owner a condition precedent to the mineral operator's right to extract the minerals, these provisions give the surface owner predominant control over the mineral owner's enjoyment of his property. They grant the surface owner more property rights than he is actually entitled to, while conversely diminishing the mineral owner's property rights.
38 Ky. Rev. Stat. § 350.060(8) (Cum. Supp. 1978) provides in pertinent part: Each application shall . . . be accompanied by a statement of consent to have strip mining conducted upon the area of land described in the application for a permit. The statement of consent shall be signed by each holder of a freehold interest in such land. Each signature shall be notarized. No permit shall be issued if the application therefor is not accompanied by a statement of consent.
peals of Kentucky addressed the constitutionality of this consent statute in *Department for Natural Resources & Environmental Protection v. No. 8 Ltd.*\(^4^0\) The court first noted that the public health, safety, morals or general welfare *could* be served by an act which stood as an environmental conservation measure. It then reasoned that, under its police power, the General Assembly could properly strike its own balance between environmental interests and the interests of mineral owners by, for example, prohibiting surface mining entirely, or by prohibiting surface mining where tillable soil would be removed from agricultural production, or limiting surface mining to areas that have less than a given percentage of grade, or by requiring extensive restoration or reforestation of the disturbed land, or by limiting the activity in areas where the watershed and wildlife might be adversely affected or even where aesthetic beauty might be spoiled.\(^4^1\) However, the court probed beyond the declared purpose of the enactment and held that the statute, while ostensibly an environmental measure, did no more than delegate to private individuals\(^4^2\) a veto power over the use of the land, a power with indeterminable effect and bearing no definitely rational relation-

\(^{40}\) 528 S.W.2d 684 (Ky. 1975).

\(^{41}\) *Id.* at 686.


A law delegating to a private property owner a veto right over land use by another is not a part of that public power. Obviously, the police power is not served by the delegation of a discretionary power to a particular private property owner.

Furthermore, since the consent requirement did not apply to situations in which the owner of the mineral rights also owned the surface rights nor to those situations in which the owner of the mineral rights had been previously granted specific authority to conduct strip mining, then as applied to others it constituted "an obvious retrospective diminution of rights granted by a specific form of contract bare of any attempt to control the noxious aspects of . . . strip mining operation." *Department for Natural Resources & Env'l Protection v. No. 8 Ltd.*, 528 S.W.2d 684, 685 (Ky. 1975).
If the operator is unable to obtain the consent of the surface owner, as required by these sections, he is barred from extracting the minerals. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*:

'For practical purposes, the right to coal consists in the right to mine it' . . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. 43

Certainly the same reasoning applies to oil and gas; the right to oil and gas consists of the right to drill wells to extract it. When one is prohibited from mining coal in a commercially practicable manner or from drilling wells to recover oil and gas, one's estate in the coal, oil or gas is rendered wholly useless. A regulation which precludes extracting the minerals would certainly appear to be so oppressive as to amount to a taking of the mineral owner's property. 44

Furthermore, a closer examination of the consent requirements suggests that only private uses and purposes are furthered by the provisions. Consequently, not only are the restrictions unconstitutional because they do not provide for the payment of just compensation, but since they effect takings for private uses,

43 260 U.S. 393, 414 (1922) (partially quoting from Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 A. 820, 820 (1917)).

44 "[W]hile government may properly diminish values somewhat under the police power, if the exercise of that power makes the affected property 'wholly useless,' the right of property would prevail over the public interest, and the police power would fail." Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) (Holmes, J.).

Should the operator be able to purchase the consent of the surface owner, he will then be entitled to extract the minerals, provided there is compliance with the other provisions of the acts. The regulation would then no longer render the mineral estate wholly worthless, but would instead effectively diminish its value by the amount which the operator pays to secure the surface owner's consent. Without consideration of whether this itself is within the scope of the police power, and whether it is a reasonable exercise of such power, this diminution in value standing alone would not render the regulation unconstitutional. See generally Andrus v. Allard, 100 S. Ct. 318, 327 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).
not even the payment of just compensation can sustain them. Where the mineral operator cannot obtain the requisite consent of the surface owner, he is barred from extracting the minerals in a commercially practicable manner, and the mineral estate is rendered wholly valueless. In such instance the limitation on the extent to which the police power can be exercised to diminish the value of property has been exceeded, requiring the use of the power of eminent domain to achieve the desired statutory goal. Eminent domain, however, can only be exercised if the mineral estate is taken for a public use, as opposed to use for the private benefit of the surface owner.

While there is a strong presumption that when property is taken by the state it is taken for a public use, it is equally as certain that a mere declaration of public purpose by the legislature cannot make a private use a public one. The constitutional protection against the taking of private property for a private use cannot be evaded by any such declaration, however formal or official. In each instance, the question of whether the use is public or private must be determined by the judiciary from the facts and circumstances of that case. But even though the characterization of a particular use is ultimately a judicial function, yet if a particular use is declared by the legislature to be a public one,

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46 Supra note 20. The taking of private property, by authority of the state, for a private use is violative of the due process clause of the fourteenth amendment.

47 "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." Berman v. Parker, 348 U.S. 26, 32 (1954). See also United States ex rel. TVA v. Welch, 327 U.S. 546, 552 (1946).

48 See note 23 supra. A statutory attempt to deprive the courts of the right to pass upon the question of public use is a nullity. Railroad Co. v. Iron-Works, 31 W. Va. 710, 8 S.E. 453 (1888).

courts will normally show deference to this declaration unless they are persuaded otherwise.50

Courts have given "public use" an increasingly expansive construction and may consider the public use test satisfied by a taking for the benefit of the public, rather than for a resulting actual use by the public.51 And while the term public benefit implies use by many, or use by the public, it may be limited to the inhabitants of a small or restricted locality.52 Therefore, whether a use be public or private is determined by the character of the use, and not by the number of persons who enjoy it. Even so, however, the use must be in common and not for a particular individual.53 A merely incidental private use or benefit will not defeat the exercise of eminent domain if the primary purpose is a public one,54 but conversely, if the dominant purpose is private, the mere fact that a public use or benefit is also incidentally derived will not warrant the exercise of this sovereign power.55


The issue posed to the courts is not whether a use is actually a public one in the opinion of the court, but whether the legislature could reasonably consider it public. Shelton v. State Road Comm'n, 113 W. Va. 191, 167 S.E. 444 (1932); Southern Ry. v. Memphis, 126 Tenn. 267, 148 S.W. 662 (1912).


53 Id.


55 Ryan v. Louisville & N. Terminal Co., 102 Tenn. 111, 50 S.W. 744 (1899). See also Annot., 53 A.L.R. 9 (1928) (discusses invoking eminent domain for a combination of public and private uses or purposes).
CONSENT PROVISIONS

These statutes attempt to resolve the conflict between the owners of the surface estate and the mineral estate by subjugating the rights of the latter to those of the former. They bestow a benefit upon the surface owner. The question presented is whether this benefit is the dominant purpose for a consent requirement, or whether this private benefit is merely incidental to a primary, public purpose.

One could argue that the purpose for these statutes is the improvement of the public condition through the resolution of conflict between these competing interests within society. If one accepts this argument, conceivably there is a public purpose behind these statutory provisions. Considering the one-sidedness and unpredictability of the resolution, however, it is inconceivable that such a public purpose is the primary motivation behind these restrictions. The acts elevate the rights of surface owners to a status of total domination over mineral owners/operators. The surface owner, by withholding consent, can completely preclude the mineral owner/operator's enjoyment of his property, or alternatively he can extract a fee for the consent, in which case the mining would occur with no use or benefit having accrued to the public whatsoever.

Moreover, the consent requirement does not actually resolve the conflicting interests of the owners of the surface and mineral estates. Instead, they are purely limitations upon the mineral owner/operator's use of his property, imposed primarily to benefit the individual surface owner.66 The private use or benefit which these statutory provisions yield to the surface owner cannot with certainty be even incidental to a public purpose. If the operator is unable to purchase the surface owner's consent, the minerals are effectively taken, but are put to no use by the public, and whether the public incidentally benefits would fortuitously depend upon the circumstances of each individual case. On the other hand, if the operator is able to purchase the surface owner's consent, the payment inures not to the benefit of the public, but to the sole use and benefit of the surface owner. Such private benefits would seem to be the primary motivation behind these consent requirements, with the furtherance of environmental protec-

66 Department for Natural Resources & Envt'l Protection v. No. 8 Ltd., 528 S.W.2d 684, 686 (Ky. 1975).
tion a mere incidental public benefit in the event that it occurs at all.

IV. Conclusion

These consent provisions, although they offer a politically expedient solution from a legislative perspective, suffer rather obvious and serious constitutional infirmities. Although a great many legislative efforts in the fields of environmental protection and oil and gas conservation have been held constitutional, few of those laws have sought their desired ends in such an obtuse and incidental fashion. In addition, the statutes examined here delegate to private parties the power to gain potentially major revisions of vested contract and property rights that traditionally receive special protection from the courts, and it is thus doubtful that a mere recital of a conservational or environmental purpose would persuade a court that was confronted with the constitutional issues raised by the application of these laws.

James M. O'Brien