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Constitutional Issues in the Reclamation of Orphaned Mined Lands under the Surface Mining Control and Reclamation Act of 1977

Betsy Clare Steinfeld
West Virginia University College of Law

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CONSTITUTIONAL ISSUES IN THE RECLAMATION OF ORPHANED MINED LANDS UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

The physical and chemical effects of surface mining on our nation's lands are all too evident. Removal of surface soil and rock material by means of blasting and power machinery changes original land contours, diverts natural water courses, and results in mass destruction of wildlife habitats. Vegetative cover is uprooted and soil is destroyed by exposure to rock and toxic materials. Acid and eroded sediment enter streams, rivers and lakes, destroying aquatic environments. In an effort to control these adverse environmental effects, Congress passed the Surface Mining Control and Reclamation Act of 1977 on August 3, 1977. The Act, which is basically the same as bills vetoed by President Ford in 1974 and 1975, imposes stringent uniform federal standards on surface mining operations. The Act establishes minimum environmental protection performance standards for exploration, mining and reclamation activities. Operators are required to restore mined land to its approximate original contour, revegetate, redistribute topsoil and control water pollution from mine seepage. Before engaging in surface mining or reclamation, operators must apply for permits which incorporate the above provisions. The Act establishes an Office of Surface Mining Reclamation and Enforcement in the Department of the Interior and charges this office with the responsibility of enforcing the Act's provisions. In compliance with the statutory directive, the Office has published rules and regulations describing the procedures for governmental supervision of surface mining.

Title IV of the Act outlines an Abandoned Mine Reclamation Program aimed at eliminating the continuing economic and environmental harm caused by abandoned and unreclaimed strip mine lands. This title establishes an industry-supported fund to be administered by the Secretary of the Interior. The fund is supported

3 30 U.S.C.A. § 1211(a) (West Supp. 1978) [hereinafter cited as the Office].
4 Id. § 1231(a).
through a reclamation fee of thirty-five cents per ton on coal pro-
duced by strip mining and fifteen cents per ton on coal extracted
from underground mines. These moneys are to be used for
"reclamation and restoration of land and water resources adversely
affected by past coal mining." States are expected to assume control
of reclamation activities within their boundaries, and pursuant to federal approval of state reclamation plans, the state is
"granted exclusive responsibility to implement the program."

Reclamation operations may be carried out on either private
or public land. The Secretary is authorized to enter private prop-
erty for inspection purposes to determine the existence of "adverse
effects of past coal mining practices and to determine the feasibil-
ity of restoration, reclamation, abatement, control, or prevention
of such adverse effect." Once a need for reclamation has been
established, authorized agents may enter and perform the neces-
sary work. Within six months after completion of projects which
have significantly increased the value of the land, the Secretary is
authorized to impose a lien on the land by filing a statement of the
money expended, along with a notarized appraisal by an indepen-
dent appraiser of the land's value before reclamation. This lien is
not to exceed that amount determined by the appraiser to be the
increase in value.

**Inspection Provisions**

The extent of government interference under the Abandoned
Mine Reclamation Program presents significant constitutional

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* Id. § 1232(a).

* Id. § 1231(c)(1).

* Id. § 1235(d). States may submit to the Secretary plans to carry out the
purposes of Title IV of the Act. Id. § 1235(b). The regulations provide lengthy
guidelines for complying with the statutory directive, and submitted plans must
include detailed provisions relating to "the areas to be reclaimed, the purposes
for which the reclamation is proposed, the relationship of the lands to be reclaimed and
the proposed reclamation projects to be funded, and the legal authority and pro-
grammatic capability to perform such work." Id. § 1235(e). Upon approval of the
state plan, the Secretary shall grant funds to the state annually for implementation
of the program. Id. § 1235(h).

* After approval of the state plan, the authority granted to the Secretary with
respect to the actual reclamation operations will be exercised by the appropriate
state agency. Id. § 1235(d).

* Id. § 1237(b).

* Id. § 1237(a).

* Id. § 1238(a).
LAND RECLAMATION

questions regarding the government’s authority to enter property, carry on reclamation activities, and impose liens on the reclaimed lands. The Act specifically mandates that such actions are to be construed as exercises of the police power, yet they might well be challenged as uncompensated takings of property under the fifth amendment. The standard for judging the police power is the health, safety and welfare of the public, and courts have acknowledged that if within this scope, laws or regulations which prevent the enjoyment of certain property rights without providing compensation are not necessarily unconstitutional takings of private property, but merely regulations which affect an owner’s use of the property. Defining specific government action as either a valid regulation or an unconstitutional taking, however, is a difficult task since there is no real standard for determining where the line is to be drawn. This conflict is emphasized by the reclamation provisions. For example, orphaned strip mined lands are menaces to the public welfare and thus can be properly remedied through the use of the police power. Yet at the same time, government agents are at least temporarily appropriating the owner’s land for exploration and reclamation work, and if a lien is imposed, an owner is definitely deprived of a substantial property interest.

Courts have struggled with the problem of distinguishing a taking from a valid exercise of the police power for years and have used a variety of tests and standards. Nonetheless, as recently as June 1978, in Penn Central Transportation Co. v. City of New York, the Supreme Court observed that it “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injury caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons.” This latest decision dealt with an attempt by the city of New York to prevent the

12 “Such entry [for exploratory studies and reclamation work] shall be construed as an exercise of the police power for the protection of public health, safety, and general welfare and shall not be construed as an act of condemnation of property nor of trespass thereon.” Id. § 1237(a) and (b).

13 The pertinent section of the fifth amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

14 Munn v. Illinois, 94 U.S. 113 (1876).


owners of Grand Central Terminal from constructing a multi-story office building above the terminal. The terminal had been designated a landmark site according to the city's landmark preservation law, which was enacted to protect historic neighborhoods and landmarks from destruction or fundamental alteration. The plaintiffs argued that the prohibition against building was a taking of their property in violation of the fifth amendment.

The Court pointed out that the validity of the state's police power depends upon the "reasonableness" of a regulation in effectuating a substantial public benefit. The public benefit must be commensurate with the burden imposed on the individual, and if the regulation goes too far in interfering, injuring or impairing property rights in a way not "reasonably" necessary to serve a public purpose for the general welfare, it will be struck down. The

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17 Id. at 127.

18 Takings cases have used a number of theories in evaluating claims, but four main approaches can be identified. Early cases relied on the literal language of the Constitution and looked for an outright appropriation of an owner's property. Thus when an owner's property was flooded pursuant to construction of a state dam project, the damage was viewed as a physical invasion and consequently as a taking of that property. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). In this context, any loss of property value which resulted not from appropriation, but from mere "regulation" or limitation on the use of property was considered a proper exercise of the police power. Prohibition of the sale of intoxicating beverages, for example, is within the scope of the police power. Mugler v. Kansas, 123 U.S. 623 (1887). Defining the scope of that power, however, was considered a judicial function rather than a legislative one, and the courts strictly construed the concept of public health, safety, and welfare.

In addition to the physical appropriation test, regulation with respect to private property has been upheld on nuisance theory. Government power to abate the noxious use of property has been traditionally recognized as a valid exercise of the police power. An owner cannot be permitted to use his or her property or allow it to remain in a state which causes injury or harm to other persons or their property. The state, for example, is justified in ordering the destruction of a landowner's diseased cedar trees in order to prevent the condition from spreading to nearby apple orchards. Miller v. Schoene, 276 U.S. 272 (1928).

Near the beginning of the twentieth century, the courts realized the need for a broader interpretation of the scope of the police power. An increasingly complex society had resulted in an expansion of the scope of government regulations. Due to the narrow judicial interpretation of the public safety and health, however, lawmakers found themselves hampered in their efforts to legislate for improved community standards. Consequently, courts began to recognize the police power as an expression of public necessity which must be capable of expanding or contracting to meet increased or decreased public needs. Chicago & Alton R.R. v. Tranbarger, 288 U.S. 67 (1915). Since the legislature is the only branch of government capable of expressing public demands, its determination on matters of public wel-
fare should be sufficient. To a greater degree, courts assumed the constitutionality of regulatory statutes, and the burden was on plaintiffs to show an unconstitutional deprivation. The key concern for the courts became that of assuring that regulations did not intrude within the broad bounds set by the fifth amendment.

As the courts began to pay deference to legislative judgment, a third standard emerged for evaluating takings claims. In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), Mr. Justice Holmes identified the crucial factor as the "extent of diminution." Once a legitimate public purpose has been established, the need for compensation is viewed in relation to the diminution caused to the property's value. In Pennsylvania Coal, the coal company had deeded away surface rights to land containing coal deposits. Several years later, Pennsylvania passed a law to prohibit the mining of coal which would cause the subsidence of any structure used as human habitation. Pennsylvania Coal argued that by depriving the company of its mining rights the statute had deprived it of property rights in contravention of the fifth amendment. The Court agreed on the theory that the impact of the regulation adversely affected the value of the property to such a degree as to constitute a taking. In the words of the Court, "if regulation goes too far it will be recognized as a taking." Id. at 415. "To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." Id. at 414.

By focusing solely on the economic harm to individual owners, however, courts tended to ignore the public aspects and purposes of regulatory legislation. In Goldblatt v. Hempstead, 369 U.S. 590 (1962), the owner of a sand and gravel concern was forced to discontinue operation due to an ordinance banning excavations below the water table. The Court announced that the reasonableness of regulations should be examined in view of the public benefit rather than solely in terms of the owners' economic injury. Consequently, regulations which adversely affect—or even destroy—economic property values can be upheld, provided a substantial public benefit is the result.

In the Penn Central case, the Court identified all of the above standards as significant factors in evaluating takings claims and based its decision on varying considerations. While the Court followed Goldblatt in emphasizing the effectuation of a substantial public benefit, the traditional proprietary concept of Pennsylvania Coal was used as a basis for determining the reasonableness of the regulation. 438 U.S. at 136. Both concepts were important to the Court, and indeed it seems that despite the existence of a legitimate public purpose, if the loss of economic value to plaintiffs' property had been extensive, the government action might have been struck down as a taking. Thus the Court devoted extensive discussion to the fact that plaintiffs' property retained its economic usefulness. The Court in fact noted that in the case before it, the question of a taking could be "narrowed to the question of the severity of the impact of the law on appellants' parcel, and . . . a careful assessment of the impact of the regulation on the Terminal site." Id. The Court further stated:

Unlike the government acts in Goldblatt, Miller, Causby, Griggs, and Hadacheck, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has for the past 65 years. . . . So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

Id. While the opinion may not clarify any of the confusion surrounding takings
Court concluded that the impact on the plaintiffs' property was not of such a magnitude as to require compensation. Plaintiffs were still entitled to the existing use of the building, and the cultural and educational benefits to the public outweighed any burden borne by the terminal owners. In view of the Court's analysis, reclamation provisions under the Surface Mining Act would appear to be legitimate exercises of the police power provided that the burden upon the individual is "reasonably necessary to the effectuation of a substantial public purpose." Since there is certainly no question about the substantial public benefits of reclamation operations, the focus of inquiry is the "reasonableness" of the owner's burden.

The takings issue under the Act initially arises with respect to the authority given to the Secretary to enter private property for exploratory purposes to determine the existence of adverse effects and the feasibility of reclamation projects. This entry clearly involves a physical invasion and a temporary appropriation of an owner's property. In similar instances where government agencies, public utilities or railroad corporations have entered private land to conduct inspections or surveys prior to eminent domain proceedings, however, courts have overwhelmingly found since as far back as 1830 that such entries do not constitute takings. Property may be entered and temporarily occupied for purposes of preliminary examinations to determine whether public needs require appropriation. Although the majority of these cases concern condemnation proceedings, their reasoning is persuasive here since reclamation surveys are likewise being made to determine whether public needs require state action. Furthermore, the Act does vest the Secretary with powers of condemnation. Thus, if a power to

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1. 438 U.S. at 136.
4. "The Secretary or the State pursuant to an approved State program, may acquire any land, by purchase, donation, or condemnation, which is adversely affected by past coal mining practices if the Secretary determines that acquisition
enter and inspect is contingent on a co-existing right of condemnation, there is no restriction in applying the rationale of these cases. To hold that compensation must be paid before a survey could be made or other preparatory steps taken would be a construction of the Constitution not required by its language or necessary to the protection of private rights.23

Although it is unlikely that the Secretary's power to enter and inspect private lands will run afoul of the takings clause, a more serious possibility of constitutional infirmity arises under the fourth amendment. Attempts by government agencies and officials to exercise inspection powers similar to those granted the Secretary under the Surface Mining Act have been successfully challenged on fourth amendment grounds.24 Various statutes have authorized government agents such as building inspectors25 or inspectors under the Occupational Safety and Health Act26 to enter premises without a warrant and search for violations of statutory health and safety standards. In view of the privacy guarantees of the fourth amendment and the right of citizens to limit the circumstances of such land is necessary to successful reclamation.” 30 U.S.C.A. § 1237(c) (West Supp. 1978).


24 The fourth amendment guards against unreasonable searches and seizures and against searches conducted without probable cause:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONg. amend. IV.

The probable cause requirement, however, has been relaxed for purposes of administrative searches conducted in accordance with federal regulatory legislation. Recognizing the importance and necessity of administrative searches, the Supreme Court has acknowledged that to allow warrants to issue only upon a showing of probable cause in the criminal sense would defeat the safety goals of the legislation. Thus, in cases where Congress has determined that administrative searches are necessary in order to assure compliance with statutory safety or health and welfare standards, the Court has held that the probable cause requirement is satisfied by “a showing that 'reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular [establishment].’” Camara v. Municipal Court, 387 U.S. 523, 538 (1967). The constitutionality of administrative searches thus turns on the "reasonableness" requirement of the fourth amendment.


under which their property may be invaded, warrantless entries for these purposes have generally been declared unreasonable.27 There are, however, recognized exceptions to the general rule. One such exception is emergency conditions.28 A second exception applies to the regulation of industries with a long tradition of close government control and supervision. An essential element in the regulated industry exception is that proprietors of such concerns be aware of the extent of government regulation before they enter such businesses. In effect, such owners have "consented" to the government interference and have no reasonable expectation of privacy.29 Thus, due to the history of government oversight, warrantless administrative searches are reasonable in areas such as the sale of liquor30 or firearms.31 If the statute demonstrates the urgent federal interest, and the owner has knowledge of the likelihood of search, then there is no violation of privacy.

The most recent decision on administrative searches is the 1978 case of Marshall v. Barlow's, Inc.32 which examined OSHA's authority to conduct warrantless searches. In Marshall, the Government argued that the regulated industry exception should apply because all businesses engaged in interstate commerce have long been subject to close government supervision of employee


In his dissent in the Marshall case, Justice Stevens noted the dual character of the fourth amendment guarantee. See note 24 supra. By acknowledging that administrative searches are necessary and important to the enforcement of federal regulatory legislation, the court has already recognized the "reasonableness" of such searches. The function of a warrant has no connection with the "reasonableness" of a search, but instead protects against searches conducted without probable cause. Thus, according to Justice Stevens, the protective function of a warrant serves no constitutional purpose in administrative searches, since authority for these inspections is not dependent upon a demonstration of probable cause, but rather upon a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." 436 U.S. at 331, quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

28 The emergency exception to the warrant requirement was recognized by way of dicta in Camara where the court declared that seizure of unwholesome food products, health quarantines, or destruction of diseased cattle would be constitutionally permitted. 387 U.S. at 539.


health and safety conditions. The Court, however, pointed out that the degree of federal involvement in employee working conditions has never been of the specificity and pervasiveness which OSHA mandates. The Court explained:

Nor can any but the most fictional sense of voluntary consent to later searches be found in the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be conducted without having some effect on interstate commerce.

Furthermore, since OSHA's jurisdiction is not limited to one single industry, an exception based on recognition of a closely regulated industry is inapplicable. The Court thus ruled that the search was unreasonable under the fourth amendment. If the decision in Marshall stands for the proposition that search warrants are necessary whenever a business is not "pervasively regulated," then authorization of warrantless reclamation inspections must be based on a finding that surface coal mining is a closely regulated industry. Indeed, in In re Surface Mining Regulation Litigation the Court upheld warrantless inspections of surface mining permit areas on the ground that the long history of regulation of the coal industry justified an exception to the warrant requirement.

Nonetheless, there is difficulty in applying the regulated industry exception since the abandoned mine provisions affect individual landowners rather than specific industry operations. In general, owners of orphaned mine land have no reasonable expectation of government interference, other than perhaps a general knowledge of the extent of control over present day surface mining operations. While it can be argued that since such owners either leased the mineral rights, purchased the disturbed land or even conducted the mining operations themselves, they have entered a "business" where some government interference should be expected, it is questionable whether these owners qualify as proprietors who have consented ahead of time to the interference. Regula-

31 Id. at 314.
32 Id.
34 In 1975, the California Supreme Court declared that every land investor must know that environmental controls and zoning ordinances which affect property are features of modern everyday life and consequently might be imposed at any time. HPH, Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 521, 542 P.2d 237, 246 (1975), cert. denied, 425 U.S. 904 (1976).
tion of surface mining is of a much more recent vintage than that of underground mining, and prior mining activities were probably carried on in full compliance with existing laws, absent government regulation. Furthermore, the character of the interference is far more substantial than owners could have reasonably anticipated when they entered the business or acquired the land. The threat of a lien and the property’s resulting loss of value as collateral is a serious one. Since the Act is silent on the prospect of continued entries for purposes of monitoring or correcting faulty project work, owners may also have legitimate concerns about the extent of government interference with their property. Another fear is that in cases where faulty reclamation work results in even more hazardous conditions, owners will be left unprotected since the federal government is prohibited from entering into agreements to indemnify landowners receiving assistance. These “self-protection” interests of property owners are entitled to the fourth amendment guarantee.

The Government in Marshall also argued that the OSHA searches were reasonable in spite of the general rule against warrantless inspections since the inspections were essential to the enforcement scheme of the Act. According to the Secretary, the inspections were necessary to “preserve the advantages of surprise” in locating those safety violations which could be quickly altered or disguised. In rejecting this argument, the Court opined that the effectiveness of the statutory scheme would not be unduly burdened by requiring search warrants where entry was refused, noting additionally that in the majority of cases businessmen could be expected to consent to the inspections. The Court, however,

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37 Although in Biswell the history of government supervision of the sale of firearms was relatively short in comparison to that of liquor control, business proprietors nonetheless had a reasonable expectation of interference since they annually received copies of ordinances designating their obligations and defining the inspection authority of police and Treasury agents. 406 U.S. at 316.

38 31 U.S.C. § 665(a) (1956), cited in 43 Fed. Reg. 49,932, 49,936 (1978). This statute prevents officers or employees of the United States from making or authorizing expenditures or obligations under any appropriation or fund in excess of the fund amount. “[N]or shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.” Id. See also California-Pacific Utilities Co. v. United States, 194 Ct. Cl. 703 (1971).

39 387 U.S. at 531.

40 436 U.S. at 316.

41 Id. This reasoning may not be as applicable to the reclamation inspections,
did state that its opinion was restricted to the "facts and law concerned with OSHA" and that it would "not retreat from a holding appropriate to that statute because of its real or imagined effects on other, different administrative schemes." If the enforcement needs of a particular statute make warrantless searches imperative, and if the statute provides adequate privacy guarantees, then a warrantless search may be constitutional. Thus, the Court seems to say that even though a regulated industry exception is not applicable in a given situation, an administrative search might still be reasonable.

While it is unclear what the Court means by "privacy guarantees," the Surface Mining Act does provide ample guarantees of reasonableness to property owners. The regulations require advance written notice of entry accompanied by an explanation of the reasons why the inspection is believed necessary. In addition, where landowners cannot be located, there are public notice and posting requirements. Considering the nature of the conditions to be inspected, the advance notice arguably provides a reasonable guarantee of privacy. The second condition for reasonableness, however, is nonexistent under the Surface Mining Act since the enforcement needs of the statute clearly do not call for warrantless searches. As the Court observed in Camara v. Municipal Court, routine area inspections for conditions which are difficult to conceal are not burdened by the requirement of search warrants since

However, since owners of land faced with the possibility of large liens may be less inclined to cooperate with inspection officials.

If the owner of the land to be entered under this section will not provide consent to entry, the Office, State, or Indian tribe shall give notice in writing to the owner of its intent to enter for purposes of study and exploration to determine the existence of adverse effects of past coal mining practices which may be harmful to the public health, safety, or general welfare. The notice shall be by mail, return receipt requested, to the owner, if known, and shall include a statement of the reasons why entry is believed necessary. If the current mailing address of the owner is not known, or the owner is not readily available, the notice shall be posted in one or more places on the property to be entered where it is readily visible to the public and advertised once in a newspaper of general circulation in the locality in which the land is located. Notice shall be given at least 30 days before entry.

43 Fed. Reg. 49,932, 49,944 (1978) (to be codified in 30 C.F.R. § 877.12(b)).

436 U.S. at 322.

Id. at 321.

The regulations provide:

the regulations provide:
there is no compelling urgency to inspect at a particular time or day.\textsuperscript{46}

A third exception to the warrant requirement, carved out by the Supreme Court in 1924,\textsuperscript{47} could also prove significant in authorizing warrantless inspections of abandoned mine sites. Under the "open field" doctrine, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields."\textsuperscript{48} Although the doctrine has been more frequently applied to criminal searches,\textsuperscript{49} it has nonetheless proven valuable in inspections analogous to those contemplated under the Surface Mining Act. In Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.,\textsuperscript{50} a Colorado health inspector entered respondent's outdoor premises without respondent's knowledge or consent and conducted an opacity test of the smoke being emitted from respondent's chimneys. Respondent challenged the validity of the entry under the fourth amendment, but the Court held:

He was not inspecting stacks, boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. . . . The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded.\textsuperscript{51}

\textsuperscript{46} Id. at 539.

The Marshall court also felt that the procedure set out in the regulations for OSHA for those instances where entry was refused created an inference that a delay in obtaining entry would not deter OSHA's effectiveness. These regulations, contained in 29 C.F.R. § 1903.4 (1971), provide that in cases where entry is refused, the inspector must report to his or her superior, "who shall then promptly take appropriate action, including compulsory process, if necessary."\textsuperscript{Id.}

Similarly, the regulations for entries under the Surface Mining Act require that in cases where consent to enter cannot be obtained, detailed written notice to the owner is required in advance of entry. See note 44 supra. This provision indicates that delay is no serious threat to the Act. "If the safeguard endangers the efficient administration of the legislation, it should never have been adopted, particularly when the Act does not require it." Marshall v. Barlow's, Inc., 436 U.S. at 319.

\textsuperscript{47} Hester v. United States, 256 U.S. 57 (1924).

\textsuperscript{48} Id. at 59.

\textsuperscript{49} Id. In Hester, two Internal Revenue agents concealed themselves and observed Hester pass some moonshine whiskey. Upon being discovered, Hester and his companion fled and discarded their bottles. The agents confiscated the broken bottles from the field area in the vicinity of Hester's house, and the court allowed the evidence to be used, holding it was obtained in a valid search and seizure.

\textsuperscript{50} 416 U.S. 861 (1974).

\textsuperscript{51} Id. at 864-65.
In *In re Surface Mining Regulation Litigation*, the Government argued that warrantless inspections of surface mine permit areas were valid under the open field rule since "mining operations occur in 'wide open areas,' [and] the operators have no significant privacy interests that necessitate the protection of a warrant requirement." The court, however, declined to rule on the applicability of the exception; indeed such a determination was not necessary since the court found that a regulated industry exception applied to operating surface mines. Use of the open field doctrine in the case of abandoned mines, however, would eliminate the difficulties of applying an industry standard to individual landowners. While the court in *In re Surface Mining Regulation Litigation* felt that it would be "inappropriate and improper for the court to consider in a generalized factual setting the issues of how 'open' mining operations are and the privacy interests and expectations of the operators," certainly inspection of those "wide open areas" after they have been abandoned is an invasion of privacy which is merely "abstract and theoretical."

If it is determined, however, that the regulated industry exception, a demonstrated need for spot inspections, or the open field doctrine are each insufficient grounds upon which to sustain warrantless entries for reclamation inspections, a search warrant requirement fits easily within the existing provisions of the Act and regulations. While the Act authorizes inspections without warrants, it does not forbid the Secretary from proceeding to inspect by warrant where entry is refused. There is nothing in either the Act or the regulations to prevent the advance notice from including a search warrant. Indeed, in view of the precautions established for dealing reasonably with landowners and the character of the private interests at stake, the requirement of a search warrant for those owners who demand one is consistent with the Act's overall policy. A warrant "would provide assurances that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria."

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53 456 F. Supp. at 1318.
54 456 F. Supp. 1301.
55 456 F. Supp. at 1318.
56 416 U.S. at 865.
58 Id. at 323. Justice Stevens analyzed these functions of the warrant in his
The Liens Provision

The most unique constitutional question under the Surface Mining Act is whether the imposition of liens on reclaimed land constitutes a taking of property without just compensation. Generally, similar improvement schemes have been recognized as constitutionally valid exercises of the police power. For example, state laws authorizing agencies to inspect and treat infected vegetation
dissent and concluded that the slight additional benefit was "insufficient to identify a constitutional violation or to justify overriding Congress' judgment that the power to conduct warrantless inspections is essential." Id. at 332. With regard to the assurance that the inspection is in fact routine, he pointed out the statistical basis of employee numbers in certain industries used in determining which businesses to search. As to assurance that the inspection is by an authorized agent, the statute itself conditions the right to enter upon presentation of official identification credentials. Third, the warrant is not necessary to inform employers of the lawful limits of the inspection since the statute also expressly provides which specific areas are to be inspected. Thus, Justice Stevens concluded that the purposes of an administrative warrant are adequately achieved under the statutory OSHA scheme. The same can be argued with respect to inspections under the Surface Mining Act.

The requirement of a warrant to prevent harassment inspections is unnecessary in view of the provisions in the regulations directing the implementation of state reclamation plans. By requiring area surveys and maps in the description of the state's activities, the regulations assure impartial inspections and "reasonable" standards for conducting searches of particular land:

(f) A general description of the reclamation activities to be conducted under the State Reclamation Plan, including as a minimum—

(1) A general description of the known or suspected eligible land and water within the State which require reclamation, including a map showing their general location at a scale of 1:250,000 or larger;

(2) A general description of the problems occurring on the eligible land and water identified on the map and how the plan proposes to deal with each; . . .

(4) A table summarizing the quantities (e.g. acres, miles) of land and water affected by the problems identified. . . .

43 Fed. Reg. 49,932, 49,948 (1978) (to be codified in 30 C.F.R. § 884.13). Assurance that the inspections are authorized is provided through the advance notice and explanatory requirements. See Regulations, supra note 44. Furthermore, the regulations also limit the search to location of "the existence of adverse effects of past coal mining practices and the feasibility of restoration, reclamation, abatement, control, or prevention of such adverse effects." 43 Fed. Reg. 49,932, 49,944 (1978) (to be codified in 30 C.F.R. § 877.12(a)). Thus the inspection warrant arguably "adds little in the way of protection to that already provided under the existing enforcement scheme." 436 U.S. at 334. In such cases, a warrant is essentially a formality, and in view of the high cost of enforcing a health and safety scheme, the court "should not, in the guise of construing the fourth amendment, require formalities which merely place an additional strain on already overtaxed federal resources." Id.
or noxious weeds on private property and to charge the expense to the owners have been upheld since such conditions represent a grave potential danger to other growers as well as to ultimate consumers.\(^\text{59}\) In upholding the constitutionality of a statute authorizing agents of the Kansas Entomological Board to destroy San Jose scale and other insect pests, the Kansas Supreme Court in 1911 stated that the legislation was designed to protect the public and was thus a proper exercise of the police power.\(^\text{60}\) As such, it was not unconstitutional even though it authorized the expense of abating such a nuisance to be charged against the property owner. "[T]he lien given by the statute upon the premises for the expense of abating such nuisance thereon is not for a delinquent tax, but for an indebtedness due the state."\(^\text{61}\) While the overall scheme of such legislation may be constitutional, however, the decisions emphasize that the burden borne by the owner must be reasonable.\(^\text{62}\) The imposition of a reclamation lien can be a deprivation of property's vital aspects. Indeed the value of property is seriously impaired by a lien, and the result may be an unreasonable burden on the owner. A further difficulty is presented by a potential conflict between the language of the Act and the procedures set forth in the regulations for imposing liens. In order to judge the reasonableness of the lien and the provisions for imposing it, both must be viewed in relation to the public benefit and congressional intent in enacting the legislation.\(^\text{63}\)

Where there is an increase in the fair market value of the land after reclamation, the regulations require the Secretary to place a lien on the property.\(^\text{64}\) The amount of the lien is not to exceed the


\(^{60}\) Balch v. Glenn, 85 Kan. 735, 119 P. 67 (1911).

\(^{61}\) Id. at 752, 119 P. at 77-78.

\(^{62}\) "Doubtless the legislature considered, what is most obvious, that no serious hardship is likely to result to the owner of property through the enforcement of its provisions." Id. at 746, 119 P. at 71.

\(^{63}\) See note 18 supra.

\(^{64}\) "The Regional Director, State, or Indian tribe which performs the reclamation work shall place a lien against land reclaimed if the reclamation results in an increase in the fair market value based on the appraisals obtained under § 882.12." 43 Fed. Reg. 49,932, 49,947 (1978) (to be codified in 30 C.F.R. § 882.13[2]). Section 882.12 provides for notarized appraisals of the land's value before and after reclamation work. 43 Fed. Reg. 49,932, 49,947 (1978) (to be codified in 30 C.F.R. § 882.12).
increase in the fair market value of the land and is to be fully or partially satisfied at the time of a transfer of ownership of the property by sale or in exchange for other consideration. In addition to the Act’s exemption for owners who acquired title prior to May 2, 1977, and who did not consent to, participate in or exercise control over the mining operations, the regulations provide that the lien requirement may be waived in three instances: (1) where the costs of filing, including the indirect costs to the Office or the state, exceed the increased market value; (2) where the reclamation primarily benefits the health, safety, or environmental values of the greater community; or (3) where the work is necessitated by some unforeseen occurrence. Aside from these exceptions, the regulations mandate nondiscretionary liens to recover costs from property owners.

Nowhere, however, does the Act itself provide for such far reaching imposition of liens. Instead, the Act states that the monies expended for the work and the benefits are “chargeable” against the land and that the Secretary “may file a statement”

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65 “The lien shall not exceed the amount determined by the appraisal to be the increase in the market value of the land as a result of the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices,” 30 U.S.C.A. § 1238(a) (West Supp. 1978).

66 “A lien placed on private property shall be satisfied, to the extent of the value of the consideration received, at the time of the transfer of ownership. Any unsatisfied portion shall remain as a lien on the property and shall be satisfied in accordance with this paragraph.” 43 Fed. Reg. 49,932, 49,947 (1978) (to be codified in 30 C.F.R. § 882.14(a)). The original proposed regulations required all liens to be satisfied within five years. 43 Fed. Reg. 17,918, 17,929 (1978) (to be codified in 30 C.F.R. § 848.14). This requirement was changed to the current provision in order to avoid hardship and feelings of ill will on the part of landowners, as well as to encourage participation in the program. 43 Fed. Reg. 49,932, 49,938 (1978).


68 43 Fed. Reg. 49,932, 49,947 (1978) (to be codified in 30 C.F.R. § 882.13(a)).

The third exception applies to special circumstances:
For instance, if subsidence occurs on land recently purchased and the purchaser had no knowledge of the underground mine workings which were the cause of the subsidence, placing a lien on that property may result in the landowner paying twice. In fact, the value of his land may not increase over the amount he paid for the land only a short time before the property subsided. However, compared to the value of the land in a subsided condition, the reclaimed portion may be worth substantially more. In such a case, it is doubtful that a genuine windfall profit would result.


69 The pertinent section provides in part:
The moneys expended for such work and the benefits accruing to any
of moneys expended for reclamation work. This is quite different from a requirement that all costs "shall" be charged, and is indicative of a congressional intent that in certain instances it may be desirable to impose a lien, while in others it may not. In drafting the Act, Congress undoubtedly intended that liens be used only to prevent windfall profits. By requiring landowners to bear a large portion of the reclamation burden, however, the regulations may lose sight of this objective.

The Act’s purpose is to benefit the public through reclamation and to make the mining industry chargeable through the reclamation fund responsible for the task of reclamation. The Act clearly indicates that the industry and not the individual landowner is to be primarily responsible for reclamation. Section 1231(b), for example, provides a list of fund sources, and the fees collected from coal operators are listed first. On the other hand, money received from liens is never specifically mentioned, but is rather included in a final "catchall" phrase. This section seems to indicate that while such moneys are to be collected where windfall profits are likely to otherwise result, they are not meant to be a primary source of funding. This intention is further illustrated by the legislative history:

such premises so entered upon shall be chargeable against such land and shall mitigate or offset any claim in or any action brought by any owner of any interest in such premises for any alleged damages by virtue of such entry.


Id. § 1238 [emphasis added]. This section reads:

Within six months after the completion of projects to restore, reclaim, abate, control, or prevent adverse effects of past coal mining practices on privately owned land, the Secretary or the State, pursuant to an approved State program, shall itemize the moneys so expended and may file a statement thereof in the office of the county in which the land lies.

While the use of the word "shall" does appear later in § 1238, it is not a directive to the Secretary requiring him to file a lien. "Such statement shall constitute a lien upon the said land." 30 U.S.C.A. § 1238 (West Supp. 1978). Where the Secretary has already, in his discretion, decided to file the statement, the statement "shall" become a lien on the land.

The sources of the fund are to include:

(1) the reclamation fees levied under section 1232 of this title . . .;
(2) any user charge imposed on or for land reclaimed pursuant to this subchapter, after expenditures for maintenance have been deducted;
(3) donations by persons, corporations, associations, and foundations for the purposes of this subchapter; and
(4) recovered moneys as provided for in this subchapter.

Id. § 1231(h).
The burden of paying for reclamation is rightfully assessed against the coal industry. The bill adopts the principle that the coal industry, and by extension the consumers of coal, must bear the responsibility for supporting special rehabilitation programs to recover and reclaim areas which have been severely impacted in the past by coal mining operations.\textsuperscript{22}

The danger of unreasonable burdens and unjustified deprivations of constitutionally protected property rights is likely to be greater where liens are uniformly imposed on the owners of reclaimed property. If the legislative purpose is to be accomplished, the procedures set forth in the regulations must reflect the Act's basic policy\textsuperscript{23} and produce results which are both reasonable and consistent with congressional intent.

Wise use of the exceptions to the lien requirement provides a meaningful method for satisfying the purpose of the Act by imposing liens only in those cases where public funds might be used for private gain. Landowners should not be permitted to use the program to reclaim lands in order to significantly improve their own uses of the property or to receive windfall profits upon resale. In West Virginia, for example, much of the inadequately reclaimed land is owned by large landholding companies which actually conducted the mining operations.\textsuperscript{24} Congressional intent would be satisfied in such cases by imposing a lien so these corporations would be charged for the increase in the value of their holdings and so they would not otherwise benefit materially from reclamation paid for solely by the fund.\textsuperscript{25}


\textsuperscript{23} See, e.g., NLRB v. John S. Barnes Corp., 178 F.2d 156 (7th Cir. 1949).

\textsuperscript{24} A study done in 1973 revealed that the top twenty-five landholding corporations in West Virginia own some 44% of the state's total land. The seven largest holders are out of state companies holding a combined total of 1,371,065 acres. Pocahontas Land Corp. ......................................... 341,496 acres Consolidation Coal Co. .................................. 329,801 acres C&O/B&O R.R. ............................................. 212,163 acres Georgia-Pacific ......................................... 195,845 acres Eastern Assoc'd. Coal .......................................... 103,775 acres Island Creek Coal Co. ..................................... 103,405 acres Bethlehem Steel ................................................ 84,580 acres

\textsuperscript{25} Although charging an owner who originally mined the land and left it in an unreclaimed state would satisfy congressional intent that such owners take responsibility for the conditions on their property and not benefit materially by having
Since there is no indication in the Act or regulations as to exactly what constitutes either an indirect cost of filing or a benefit to the health, safety or environmental values of the greater community, these concepts can be used to waive liens where the result would otherwise be an unreasonable burden on the landowner. While increased market value is a consideration in determining whether or not to impose a lien, it is not the only consideration contemplated by Congress since the Secretary is granted discretion in all cases. Thus, if a small landowner stands in jeopardy of losing his land or the privileges attached to it due to extensive prior liens on the property, the danger of windfall profit would seem to be slight in comparison to the risk that the owner might lose the land altogether. The problems of subsequent state acquisition and the burden to the state in becoming an unwilling owner of the property could be viewed as an indirect cost of filing, and the lien requirement could be waived.

In addition to abating hazardous environmental and health conditions, reclamation measures may provide aesthetic and even economic benefits to the overall health of a community. The regulations, as originally proposed, contained a provision whereby an owner who dedicated his land to a valid public use for a certain period of time could be exempted from the lien requirement. The permanent rules eliminated this alternative, asserting that it frustrated the congressional intent that a landowner not be allowed the use of any device which would amortize the cost of reclamation to be charged against him. Nonetheless, the provision of the final rules which allows liens to be waived for off-site benefits and benefits to the public at large provides a vehicle for achieving the same result.

Thus, in order to limit the potential for constitutional chal-
Challenges to the Act and resulting impediments to its effective enforcement, the exceptions to the lien requirement must be construed broadly. Otherwise the threat of mandatory liens may cause some corporations and landholding companies, as well as private owners who may not qualify under a strict application of the exceptions, to seek legal remedies or force condemnation proceedings. While ultimately landowners' burdens may be found "reasonable" in such cases, the litigation process frustrates the effective implementation of the Act's provisions. For smaller landowners especially, the possibility also exists that courts may find some burdens unreasonable and hence unconstitutional. To avoid these possibilities, the Office explains that "the facts and circumstances surrounding each such case . . . must be examined to determine whether a lien is appropriate to protect the public from windfall profits inuring to the benefit of private landowners." Reclamation of abandoned mine sites under the Surface Mining Act is to result in windfall profits inuring to the benefit of private landowners.

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81 It might also be argued that the mandatory lien requirement denies affected owners of their fifth amendment guarantee of due process before deprivation of property rights. There is no provision in the Surface Mining Act, nor in the regulations, enabling an owner to protest or dispute the reclamation lien before it is imposed. Instead, the regulations provide that within 60 days after a lien is filed, the landowner may petition under local law to determine the increase in market value of the land as a result of the reclamation work. 43 Fed. Reg. 49,932, 49,947 (1978) (to be codified in 30 C.F.R. § 882.13(c)). This increased value is the amount of the lien, and any party aggrieved by the decision may appeal in the manner provided by local law. Id.

In 1907 in the decision of Londoner v. Denver, 210 U.S. 373 (1907), the Supreme Court reviewed a similar lien proceeding and held that: "Due process requires that at some stage of proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personally, by publication, or by a law fixing time and place of hearing." Id. at 385-86.

In cases of administrative agency decisions which deprive an owner of property, the minimal procedural constitutional safeguards must include (1) adequate notice detailing the reasons for such deprivation, and (2) effective opportunity to defend by confronting any adverse witnesses and by presenting the owner's own agents and oral evidence. See Goldberg v. Kelly, 397 U.S. 254 (1970). None of these opportunities are currently provided for prior to lien assessment. It can, however, be argued that the opportunity for a hearing within 60 days indicates that the lien is actually not "irrevocably" fixed. Moreover, courts have more recently upheld deprivations of property without a prior hearing where a prompt post-deprivation hearing is afforded. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 10-14 (1978). Nonetheless, the problem could be corrected by a case-by-case examination accompanied by opportunity for a hearing, which would correct the due process defect as well as provide assurance to property owners that their particular situation is of the type which Congress intended to include within the lien requirement.

in a substantial public benefit, and careful application of the lien provisions ensures the reasonableness of owners’ burdens and the constitutional validity of the legislation.

THE ABANDONED MINE RECLAMATION PROGRAM IN WEST VIRGINIA

The abandoned mine reclamation program in West Virginia has not encountered constitutional obstacles although it contains many similarities to the federal plan. The program is currently funded through a special tax paid by operators applying for mining permits. This tax is then paid into a reclamation fund. By statute, the Department of Natural Resources is given authority similar to that granted the Secretary under the federal Act to enter private property and make inspections of adverse conditions. Reclamation specialists, working in conjunction with soil conservationists, make decisions and recommendations for reclamation projects according to feasibility. The Department is authorized to acquire land by means of donation, agreement, lease, purchase, easement or right-of-way. While payments to the Department made pursuant to agreements with landowners are accepted, owners are not required to pay the state any costs. This policy probably reflects the idea that the public benefit accruing from the reclamation far outweighs any possible advantages to owners from increased land values. Furthermore, the industry is already paying the costs of reclamation through the state fund. Under this system, there are no problems with obtaining consent to enter or reclaim, and objections by landowners are virtually nonexistent. Between 1964 and 1976 it is estimated that the industry has paid nearly ten million dollars into the fund for the reclamation of over 2500 acres

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* The fund is established by statute:

   In addition to the fees required by the provisions of section eight of this article, every applicant for a permit to surface mine coal shall, before such permit may be issued, pay to the director a special reclamation tax of sixty dollars for each acre of land to be disturbed in the mining operation, with the exception of exempted roadways, storage areas and processing plants.

   W. VA. CODE § 20-6-17 (1978 Replacement Vol.).

* Id.

* W. VA. CODE § 20-6C-7a(1) (1978 Replacement Vol.).

* Id. § 20-6C-7a(4).

* Id. § 20-6C-7a(5).

* The original fee was 30 dollars per acre, but was raised in 1971 after determination that the original amount had “proved inadequate to carry out the ambitious program to its full potential.” Dollars, Dozers & the DNR, GREEN LANDS (West Virginia Surface Mining and Reclamation Association) 44 (Winter 1977-78).
of disturbed land.\textsuperscript{83}

The federal Act, however, will cause certain operational changes in the West Virginia system.\textsuperscript{80} First of all, the method for determining reclamation project priorities will be changed from the current standard of feasibility to one of progressive dangers. As the West Virginia program now operates, there is no established system for project determination; decisions concerning what land is to be reclaimed are left to the discretion of the Department. The federal Act, however, provides that fund money shall be used to reflect priorities in the order of (1) extreme dangers to the public health, safety, welfare and property; (2) dangers to the public health, safety, welfare and property; and (3) restoration of degraded land and water resources.\textsuperscript{81} Federal funds are not to be used

\textsuperscript{83} Surface Mining Control and Reclamation Act of 1977; Hearings Before the Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources, United States Senate, No. 95-32, 95th Cong., 1st Sess. 521 (1977) [hereinafter cited as 1977 Senate Hearings].

\textsuperscript{80} Since federal funding depends upon federal approval of state reclamation plans, 30 U.S.C.A. § 1235(c) (West Supp. 1978), some states have expressed concern about funding for the implementation and development stages of state programs. Inventories of abandoned mine sites, for example, will require significant expenditures. The regulations have, however, expressly provided funding for:

1. cooperative projects to compile information required for the preparation of State and Indian reclamation plans. . . . This work shall be done only with those moneys allocated or available for allocation to a State or Indian tribe and at the request of the Governor of a State or the Indian tribe.

\textsuperscript{81} Stated in full, the priorities in the Act are:

1. the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices;
2. the protection of public health, safety, and general welfare from adverse effects of coal mining practices;
3. the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity;
4. research and demonstration projects relating to the development of surface mining reclamation and water quality control program methods and techniques;
5. the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by coal mining practices;
6. the development of publicly owned land adversely affected by coal mining practices including land acquired as provided in this subchapter.
LAND RECLAMATION

on the less hazardous areas while more imminently dangerous conditions remain. Additionally, unlike the current program in West Virginia which applies only to orphaned strip mined lands, under the federal Act fund money is to be used for reclaiming and restoring land and water resources adversely affected by all types of coal mining activities.\(^2\)

Both changes will surely improve the state reclamation program by eliminating possible abuses of discretion and favoritism, as well as by providing the opportunity to restore the thousands of acres of land and water ruined by pollution and subsidence related to underground mining. At the same time, however, there will be cost increases in the reclamation operations. While basic bulldozing equipment and simple revegetation operations are often sufficient to reclaim areas under the current state policy, restoration of the more highly dangerous conditions may be complicated and expensive, requiring more expertise and sophisticated technology. Furthermore, a state receives only 50% of the amount it pays into the federal fund, and the balance is allotted at the discretion of the Secretary.\(^3\) State officials estimate that West Virginia will receive the minimum 50% since the state has already reclaimed a substantial amount of orphaned land. In testifying before the Senate Committee on Energy and Natural Resources, Governor Rockefeller related this concern: "If a national surface mine reclamation policy and project related to abandoned mine land is going to be effective, it must recognize and not penalize a state whose efforts have been successful in achieving the purposes of this legislation."\(^4\) There appears to be no reason, though, why the separate

\(^2\) Such correction includes, but is not limited to:

[R]eclamation and restoration of abandoned surface mine areas, abandoned coal processing areas, and abandoned coal refuse disposal areas; sealing and filling abandoned deep mine entries and voids; planting of land adversely affected by past coal mining to prevent erosion and sedimentation; prevention, abatement, treatment, and control of water pollution created by coal mine drainage including restoration of stream beds, and construction and operation of water treatment plants; prevention, abatement, and control of burning coal refuse disposal areas and burning coal in situ; and prevention, abatement, and control of coal mine subsidence. . . .


\(^4\) Id. § 1232(g)(2).

\(^1\) 1977 Senate Hearings, supra note 89, at 522. It is estimated that West Vir-
state fund money could not be used by state officials to continue state projects of lesser priority. There is a reported surplus in the present fund, and at present there are no indications that the industry will protest the fact that it must continue to pay the state tax in addition to the new federal fee.

Thus, the goals of the state and federal legislation are compatible, the only material difference being the methods for dealing with property owners. In West Virginia, conflict has been avoided, but there are possibilities that the lien requirements of the federal Act could change the situation. Aside from potential court battles, the threat of liens in addition to the fund charge may operate to drive operators out of West Virginia to the West where the threat of liens is substantially less due to the absence of great quantities of unreclaimed land. Since so much of West Virginia land is owned and mined by such corporations, the economic results could be devastating. Through the use of the exceptions to reflect the intentions of the Act, however, these fears can be alleviated. In addition, the Act's provision that reclamation projects be completed on a priority basis probably means that for a lengthy period of time such projects will result in substantial health, safety or environmental benefits to the public at large and thus qualify for exemption from the lien requirement. Furthermore, since federal money may be used to correct adverse conditions caused by all types of mining activities, the time period before less hazardous areas are reclaimed is further extended. When and if a potential lien situation does present itself, liens can be imposed in only those circumstances contemplated by the Act.

Betsy Clare Steinfeld

In a recent special surface mining issue of its quarterly publication, the West Virginia Surface Mining and Reclamation Association addressed the prospect of the federal payments and indicated that the federal fee was to be assessed in addition to the state charge: "These additional funds should give West Virginia a major boost in its efforts to eliminate every abandoned mine site." See note 88 supra.