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PROHIBITION OF SURFACE MINING IN WEST VIRGINIA

Patrick Charles McGinley*

I. INTRODUCTION

The West Virginia Surface Mining and Reclamation Act¹ provides the mechanism for prohibiting surface mining of coal² in certain areas of the state where it may cause harm to important public interests. The following discussion does not purport to be an analysis of the entire act for that task has already been admirably performed.³ Rather, this article will examine section eleven of the act which establishes the authority of the West Virginia Department of Natural Resources to prohibit surface mining in certain situations and grants to citizens the right to oversee, to a limited degree, the administrative duty created therein.

Attention will also be given to the suggestion that any prohibition of surface mining pursuant to section eleven of the Act would be constitutionally infirm absent payment of compensation to owners of affected coal rights.⁴

Subsequent to its enactment in 1971 there have been relatively few instances of utilization of section eleven's prohibition mechanism, and there are no reported cases that have actually been litigated in and decided by the circuit courts.⁵ The most likely

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² The Surface Mining and Reclamation Act is not limited to mining of coal but for the purposes of this article use of the term “surface mining” will refer to surface mining of coal. See W. Va. Code Ann. § 20-6-2(L) (1973 Replacement Volume).
³ See Cardi, Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act, 75 W. Va. L. Rev. 319 (1973) [hereinafter cited as Cardi].
⁴ See discussion note 56 infra.
⁵ In Anderson and Anderson Contractors, Inc. v. Latimer, Civil No. 11,567 (Cir. Ct. Kanawha Co., filed Sept. 13, 1972) and Ramo Mining Co. v. Latimer, Civil
explanation for this paucity of litigation is the uncertainty about the precise scope of the prohibition power and the consequences which may flow therefrom. The purpose of this article is to probe and clarify some of the areas of uncertainty.

II. THE STATUTORY SCHEME: AN ANALYSIS

A. The Administrative Mechanism

Underlying the enactment of the West Virginia Surface Mining Reclamation Act was a finding by the West Virginia Legislature that, although surface mining is a relatively safe method of mining which provides needed employment for the state's citizens, unregulated surface mining also causes conditions which have a severe and adverse effect on the public interest. The Act vests the state's Department of Natural Resources with jurisdiction over all aspects of surface mining and gives the Department's Director the authority to administer and enforce its provisions. To assist the Director in carrying out his duties under the Act, the Legislature created a Division of Reclamation in the Department.

No. 11,729 (Cir. Ct. Kanawha Co., filed June 5, 1972) coal operators are seeking a declaratory judgment that several provisions of the Act are unconstitutional. Although these actions were filed in 1972, no decision has yet been rendered.

6 See e.g., "THE ENFORCEMENT OF STRIP MINING LAWS IN THREE APPALACHIAN STATES: KENTUCKY, WEST VIRGINIA, AND PENNSYLVANIA, 55" (Center For Science in the Public Interest Series VIII, (1975)), [hereinafter referred to as ENFORCEMENT OF STRIP MINING LAWS].

7 The Legislature found that surface mining may cause inter alia; soil erosion; landslides; noxious materials; stream pollution; accumulation of stagnant water; increases in the likelihood of floods and slides; destruction of land for recreational and agricultural purposes; destruction of aesthetic values; counteraction of efforts for the conservation of soil, water and other natural resources. See W. Va. Code Ann. §§ 20-6-1, -11 (1973 Replacement Volume). It has been well documented that the surface mining of coal creates a wide range of effects detrimental to public and private interests. See, e.g., STANFORD RESEARCH INSTITUTE, A STUDY OF SURFACE COAL MINING IN WEST VIRGINIA (1972) [hereinafter cited as SANFORD REPORT]; J. BOCARDY & W. SPAULDING, JR., EFFECTS OF SURFACE MINING ON FISH AND WILDLIFE IN APPALACHIA (1968); Reitze, Old King Coal and the Merry Rapists of Appalachia, 22 CASE W. RES. L. REV. 650 (1971); Cardi, Strip Mining and the 1971 West Virginia Surface Mining and Reclamation Act, 75 W. VA. L. REV. 319, 325-38 (1973).


The Act also created a Reclamation Commission within the Department of Natural Resources with the authority *inter alia* to promulgate rules and regulations to implement the provisions of the statute.\(^8\) A five member Reclamation Board of Review was also created to consider appealed rules, regulations, or orders of the Reclamation Commission or the Director.\(^9\)

B. **Statutory Limitations on Surface Mining Operations**

1. **Director's Duty and Authority to Prohibit Surface Mining in Certain Areas**

Although the Act gives passing recognition to the desirability of allowing surface mining of coal within the state, the Legislature placed several limitations on an operator's theretofore almost unrestricted capacity to conduct surface mining operations anywhere in the state without regard to their impact on the public interest. Section eleven of the Act provides:

The legislature finds that there are certain areas in the State of West Virginia which are impossible to reclaim either by natural growth or by technological activity and that if surface mining is conducted in these certain areas such operations may naturally cause stream pollution, landslides, the accumulation of stagnant water, flooding, the destruction of land for agricultural purposes, the destruction of aesthetic values, the destruction of recreational areas and the future use of the area and surrounding areas, thereby destroying or impairing the health and property rights of others, and in general creating hazards dangerous to life and property so as to constitute an imminent and inordinate peril to the welfare of the State, and that such areas shall not be mined by the surface-mining process.

Therefore, authority is hereby vested in the director to delete certain areas from all surface-mining operations.

No application for a permit shall be approved by the director if there is found on the basis of the information set forth in the application or from information available to the director

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\(^8\) **W. Va. Code Ann.** § 20-6-6 (1973 Replacement Volume). The Reclamation Commission is composed of four members: the Director of Natural Resources, the Chief of the Division of Reclamation, the Chief of the Water Resources Division and the Director of the Department of Mines.

and made available to the applicant that the requirements of this article or rules and regulations hereafter adopted will not be observed or that there is not probable cause to believe that the proposed method of operation, backfilling, grading or reclamation of the affected area can be carried out consistent with the purpose of this article.

If the director finds that the overburden on any part of the area of land described in the application for a permit is such that experience in the State of West Virginia with a similar type of operation upon land with similar overburden shows that one or more of the following conditions cannot feasibly be prevented: (1) Substantial deposition of sediment in stream beds, (2) landslides or (3) acid-water pollution, the director may delete such part of the land described in the application upon which such overburden exists.

If the director finds that the operation will constitute a hazard to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake or other public property, then he shall delete such areas from the permit application before it can be approved.

The director shall not give approval to surface mine any area which is within one hundred feet of any public road, stream, lake or other public property, and shall not approve the application for a permit where the surface-mining operation will adversely affect a state, national or interstate park unless adequate screening and other measures approved by the commission are to be utilized and the permit application so provides: Provided, that the one-hundred-foot restriction aforesaid shall not include ways used for ingress and egress to and from the minerals as herein defined and the transportation of the removed minerals, nor shall it apply to the dredging and removal of minerals from the streams or watercourses of this State.

Whenever the director finds that ongoing surface-mining operations are causing or are likely to cause any of the conditions set forth in the first paragraph of this section, he may order immediate cessation of such operations and he shall take such other action or make such changes in the permit as he may deem necessary to avoid said described conditions.

The failure of the director to discharge the mandatory duty imposed on him by this section shall be subject to a writ of mandamus, in any court of competent jurisdiction by any private citizen affected thereby.\(^\text{12}\)

The precise scope of the duty and authority of the Director under section eleven is not free from ambiguity and has yet to be

tested in the courts. The Director of the Department of Natural Resources in fact has apparently chosen to read the provision as granting him only a narrow authority to prohibit surface mining in certain locales. 13

Those who support a narrow interpretation suggest that the first paragraph of section eleven is merely a general policy statement and that the authority of the Director to "delete certain areas from all surface-mining operations" extends only to those specific situations outlined in the five paragraphs which follow immediately thereafter. This interpretation has, however, been challenged by at least one commentator who argues persuasively that such a limited interpretation of section eleven is clearly erroneous. 14 The logic behind a narrow interpretation is tenuous at best and seems to fly in the face of the clear legislative intent to protect the environment in those areas of the state "which are impossible to reclaim." 15 The Legislature found as a fact that in those areas environmental harm may result, inter alia, in water pollution, landslides, flooding, and the destruction of aesthetic values, recreation and future uses of surrounding areas. The possibility of the creation of such harm, said the Legislature, constitutes "an imminent and inordinate peril to the welfare of the state." Thus, the Legislature, in the exercise of its power to regulate for the common good, has found that in some areas of the state surface mining must be prohibited. 16

In ascertaining the scope of his duty and authority under section eleven the Director must, therefore, begin with the assumption that there are locations in the State of West Virginia where it is unacceptable to permit surface mining of coal. The first question that arises from this premise involves the identification of such areas. The simple response would be that section eleven indicates that surface mining must be proscribed in areas incapable of reclamation. Such an answer begs the question, for the Act does not set forth a definition, as such, of "reclamation." It is apparent, however, in reading section eleven that the words "areas . . . which are impossible to reclaim" are modified by the list of conditions which immediately follows that phrase; that is to say, areas impossible to reclaim are those areas where surface mining may cause

13 Cardi, supra note 3, at 364, 368.
14 Id. at 351.
16 Id.
hazards and harms such as stream pollution, landslides, flooding and destruction of various desirable land uses.\textsuperscript{17}

It has been suggested that beyond the point of generally defining "areas impossible to reclaim" the Act provides the Director with few guidelines delineating the boundaries of his duty and authority under section eleven, the premise being that only the Director can specifically identify those regions. Therefore, it is asserted that section eleven gives the Director extremely broad discretion in determining if and when\textsuperscript{18} it is appropriate for him to exercise the power of prohibition contained in paragraph two thereof and that the Director's failure to take prohibitive action is virtually nonreviewable in the courts. Of such discretion it has been said: "The [result] is that the particular environmental, political, social, and economic views of the Director play an overwhelming role in determining what the law is during any particular period of time."\textsuperscript{19} If this were indeed the case, section eleven would be subject to serious constitutional challenge as an unlawful delegation of legislative power, for it is well settled that a legislative delegation of regulatory power must provide an administrative agency with a definite standard sufficient to guide the agency in the exercise of its discretionary enforcement powers.\textsuperscript{20}

It can hardly be conceded, however, that this is the only possible interpretation of the Director's powers under section eleven. On the contrary, it would seem that, when viewed as a whole, the Act's delegation of power to the Director, although inartfully worded, grants him discretion which is so limited that it would assuredly withstand constitutional scrutiny.

The standards set forth in section eleven, (may cause water pollution, landslides, etc.) provide a sufficient guide for agency action.\textsuperscript{21} It is not really the absence of adequate legislative stan-

\textsuperscript{17} See text accompanying notes 34 to 44 infra.

\textsuperscript{18} It has been suggested that section eleven does not give the Director power to designate regional areas of prohibition prior to application for permits to surface mine within those areas. See discussion in Cardi, supra note 3, at 364-365.

\textsuperscript{19} Cardi, supra note 3, at 369.


\textsuperscript{21} For examples of statutes representing the exercise of the state's police power to prohibit an activity for which there is more than normal justification for allowance, because of only possibility of harm, see W. Va. Code Ann. § 16-9-4 (1972 Replacement Vol.) (prohibition of sale or gift of cigarette, cigarette paper, pipe or
standards that gives rise to the suggestion that the Director's action may be based on such subjective and improper grounds as his personal social views, partisan political considerations, or theory of environmental priorities. Rather, it is the placement of power to implement paragraph one of section eleven in the hands of one person—the Director—that gives rise to the suggestion of impropriety. While it is, indeed, possible that the Director may abuse his discretion, such action would not result from inadequate legislative standards in section eleven. On the contrary, there is no guarantee that any public official will faithfully execute even the clearest of duties imposed upon him by the Legislature.

There may be nothing inately offensive or unlawful about giving the Director sole power to decide when and where to prohibit surface mining under the Act. One must wonder, however, if granting such power to the Director was the intention of the Legislature. If the administrative structure created by the Act is viewed as a whole, a different conclusion is suggested.

2. Duty and Authority of Reclamation Commission Under Section Eleven

One must not lose sight of the fact that the West Virginia Surface Mining and Reclamation Act rests on one major premise—that surface mining is desirable only in those areas where "proper reclamation" can be expected to negate the possibility of harm to the public interest. The Act sets forth a procedure by which this

tobacco to person under 18 years of age); W. Va. Code Ann. § 17-19-1 (1974 Replacement Vol.) (prohibition of signs, advertisements, etc. in or upon right of way of highway); W. Va. Code Ann. § 17-22-3 (1974 Replacement Vol.) (prohibiting outdoor advertising and signs within 600 feet of right of way); and W. Va. Code Ann. § 17-23-4 (1974 Replacement Vol.) (prohibiting licensing of salvage yards within 1000 feet of edge of right of way of state road). There are some who suggest that some activities subject to serious penal sanction, such as use of marijuana, raises little possibility of harm to anyone, but such arguments have met little acceptance in the courts. Breecher, *Marijuana: The Health Question/Legal Question*, 4 Contemp. Drug 115 (1975); Gerber, *Cannabis: A Critical Review*, 13 W. Ont. L. Rev. 79 (1974); Note, 24 Cath. U.L. Rev. 648 (1975). The above are only token examples of such legislation directed toward protecting the public from the possibility of harm.

22 W. Va. Code Ann. § 20-6-1 (1973 Replacement Volumes), provides in pertinent part:

The legislature finds that, although surface mining provides much needed employment and has produced good safety records, unregulated
goal may realistically be attained. That procedure includes the creation of a Reclamation Commission in the Department of Natural Resources. The Reclamation Commission is given the authority to promulgate reasonable rules and regulations to implement the Act. To assist it in devising such rules and regulations the Commission has the power to hold public hearings and to subpoena documents and witnesses, as well as the power to appoint advisory committees to aid in the development of programs and policies.23

Following passage of the Act in 1971, the Reclamation Commission, not the Director, promulgated rules and regulations pursuant to its mandate to do so "for the effective administration of the act."24 The promulgation of such rules and regulations is necessary not so much to limit the agency's discretion but to formalize it so as to give notice concerning respective rights and duties to all who might be affected by the Act and to provide rules by which the Department may gauge its own conduct to insure fairness for all concerned. The absence of rules and regulations clearly setting forth departmental policy is likely to make efficient administration of the statute difficult and subject the Department to frequent litigation by those who claim discriminatory or otherwise unfair enforcement of the Act.

Having created the Reclamation Commission with such broad rule making powers, it is logical to assume that the Legislature intended the Commission to use such powers to develop detailed criteria for identifying those areas of the state where surface min-

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surface mining causes soil erosion, pyritic shales and materials, landslides, noxious materials, stream pollution and accumulation of stagnant water, increases the likelihood of floods and slides, destroys the value of some lands for agricultural purposes and some lands for recreational purposes, destroys aesthetic values, counteracts efforts for the conservation of soil, water and other natural resources, and destroys or impairs the health, safety, welfare and property rights of the citizens of West Virginia, where proper reclamation is not practiced.

The legislature also finds that there are wide variations regarding location and terrain conditions surrounding and arising out of the surface mining of minerals, primarily in topographical and geological conditions, and by reason thereof, it is necessary to provide the most effective, beneficial and equitable solution to the problems involved.


24 Cardi, supra note 3, at 341-42.
ing creates a possibility of danger to the public interest and thus must be barred.\textsuperscript{26} It is most plausible that the Legislature, having in section eleven generally described those conditions indicative of reclamation impossibility, left it to the Commission’s expertise and not the Director’s to decide the exact parameters of the areas where surface mining must be prohibited. Consistent with this interpretation, the Director’s authority is literally what section eleven says: “to delete certain areas from all surface-mining operations”\textsuperscript{27}—the administrative tasks of enforcing the standards set forth in section eleven and in the Commission’s rules and regulations.

Such an interpretation of the Act answers the argument that, by giving the Director, alone, power to “delete,” the statute contradicts the West Virginia Administrative Procedures Act.\textsuperscript{27} The Administrative Procedures Act provides that every “regulation, standard, or statement of policy or interpretation of general application and future effect . . . affecting private rights” is a rule.\textsuperscript{28} Such interpretation also recognizes the clear intent of the Legislature that the Commission\textsuperscript{29} not the Director, shall promulgate rules in accordance with the Administrative Procedures Act’s requirements of public notice and opportunity for the public to be heard.\textsuperscript{30} Moreover, any rule or regulation of the Commission may be appealed to the Reclamation Board of Review and thence to the courts.\textsuperscript{31}

The preceding interpretation of the extent of the Director’s discretion in light of the legislative purpose underlying the Act not only saves it from any possible constitutional infirmity but is the most rational reading of the statute.

\textsuperscript{26} It would also follow that the Commission could, by rule, prohibit surface mining from identified areas which fit the prescribed criteria. Such action would, of course, be taken prior to specific permit applications. It would have the great benefit of giving fair notice to those interested in exploiting the designated area’s coal reserves that coal could not be extracted therefrom. Any rule or regulation setting forth regional surface mining prohibition would be subject to review at the instance of persons adversely affected. W. VA. CODE ANN. § 20-6-11 (1973 Replacement Volume).

\textsuperscript{27} Cardi, \textit{supra} note 3, at 365.

\textsuperscript{28} W. VA. CODE ANN. § 29A-1-1(c) (1971 Replacement Volume).

\textsuperscript{29} W. VA. CODE ANN. § 20-6-6(a) (1973 Replacement Volume).

\textsuperscript{30} W. VA. CODE ANN. §§ 29A-3-1 to -7 (1971 Replacement Volume).

\textsuperscript{31} W. VA. CODE ANN. § 20-6-38, -29 (1973 Replacement Volume).
3. The Statutorily Imposed Standard for Determining When Prohibition is Required

It is most important to note that, subsequent to the passage of the Surface Mining and Reclamation Act, the Legislature enacted a surface mining moratorium law which prohibited surface mining in the counties of the state where it had not previously been undertaken.32 Thus, the Legislature has mandated the wholesale prohibition of surface mining in twenty-two counties encompassing a large percentage of the total land area of West Virginia.

If the Surface Mining and Reclamation Act is read in light of the subsequent passage of the moratorium law, the legislative intent to place severe restrictions on surface mining activity within the State becomes manifest. The Legislature has concluded that in twenty-two counties surface mining is per se inimical to the public interest.

The limitation of the surface mining moratorium to twenty-two counties was probably the result of a legislative recognition of political reality; a statewide prohibition of surface mining would, on balance, have too harsh an impact on those communities where such operations had become a significant factor in the local economy. However, from the Legislature’s decision to enact such a large scale monatorium, and from the Surface Mining and Reclamation Act’s complementary recognition of the myriad injuries surface mining may cause,33 one is led unavoidably to the conclusion that the state’s solons looked with great skepticism on the probability that surface mining can be conducted without serious harm to the public interest. Therefore, it would be reasonable to assume that through paragraph one of section eleven the Legislature intended the Department of Natural Resources to carefully circumscribe the extent to which surface mining may be conducted in the state.

With this in mind it can be reasonably argued that paragraph one of section eleven requires that surface mining be prohibited, not in cases where it will necessarily cause harm, but rather in the much broader range of situations where harm to the public interest may result. Paragraph one states in pertinent part:

[T]here are certain areas . . . which are impossible to reclaim [and] . . . if surface mining is conducted in these certain areas

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such operations may naturally cause . . . hazards, and so . . . such areas shall not be mined by the surface-mining process.\footnote{31}[emphasis added]

Although one might contend that the words “impossible to reclaim” is the standard for determining when surface mining must be prohibited, a close reading of section eleven strongly suggests a different interpretation. The section indicates in unequivocal language that surface mining in areas that are impossible to reclaim “may” (rather than “will”) cause hazards. It follows that some areas that are impossible to reclaim may not cause hazards. Thus section eleven does not distinguish between those areas where the effects of impossibility of reclamation are certain and those areas where such effects are speculative. If there exists a possibility that a hazard or harm to the public interest may result from surface mining then the area “shall not be mined by the surface mining process.” It can be argued with much cogency that section eleven is an example of lawmakers’ unwillingness to gamble with public interests. Such a decision would seem well within the province of the Legislature. There is no rule of law which restricts legislative power to situations where it is certain that a dangerous instrumentality will bring about the harm of which it is capable.

On the contrary the source of many legislative proscriptions is legislative recognition that a particular activity is potentially dangerous or harmful to the public.\footnote{35} In a somewhat analogous situation in Candlestick Properties, Inc. v. San Francisco Bay C. & D. Commission,\footnote{36} the California legislature enacted a statute which permitted a state agency to prohibit the placing of fill in San Francisco Bay because “the haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area . . . .”\footnote{37} The California court of appeals upheld the statute as a valid exercise of the state’s police power notwithstanding the fact that prohibition of fill was allowed in the absence of a showing that the fill activity would itself cause harm to the bay.\footnote{38}

\footnotesize
\begin{itemize}
\item \footnote{31}{Id.}
\item \footnote{35}{See note 21 supra.}
\item \footnote{36}{11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Ct. App. First Dist., Div. Three 1970).}
\item \footnote{37}{11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (Ct. App. First Dist., Div. Three 1970).}
\item \footnote{38}{11 Cal. App. 3d at 572-73, 89 Cal. Rptr. at 905-06.}
\end{itemize}
In such instances it is the potential for harm to the public rather than certainty of result that provides the impetus for exercise of legislative power. It cannot seriously be contended that such legislative determinations are invalid. The Legislature's decision not to take chances where the possibility of harm from surface mining exists is merely another instance of legitimate exercise of the police power.

In essence, then, paragraph one constitutes a legislative finding of fact that in certain areas surface mining may cause hazards. The use of the words "may cause" and "hazard" indicate that the less rigorous standard of possibility rather than probability of harm is the test that must be applied by the Reclamation Commission in determining the areas where surface mining should be curtailed. Where the possibility of such hazards exist the Legislature has concluded that the welfare of the State is adversely affected and surface mining must be prohibited.

Moreover, it should be emphasized that the Legislature has not indicated that "environmental" harm is the only factor to be weighed by the Reclamation Commission and Director in determining the presence of a hazard to the public interest. Section eleven also injects into the equation a consideration of the potential adverse economic impact surface mining may have on the economy of a given area; consequently section eleven requires the Commission to consider whether surface mining may destroy aesthetic values, recreational areas and future desirable land uses. Such considerations represent what must certainly be a legislative awareness of the great long range economic benefits tourism and recreation can bring to a state which officially advertises itself as "wild and wonderful," as well as awareness of the commonly held belief that the presence of surface mining in an area creates an inhospitable climate for a tourist-recreation industry.

As a practical matter, application of the "possibility of harm" test required by paragraph one of section eleven may require the

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39 The state of West Virginia publishes a periodical entitled WEST VIRGINIA MAGAZINE one purpose of which is to promote tourism. "Wild, Wonderful, West Virginia" is a slogan often utilized therein to facilitate this purpose. The state's motor vehicle registration plates also are inscribed with this motto.

40 Whether surface mining always has an adverse effect on the environment is fairly debatable. There are many who argue with much force that an area properly reclaimed may be more valuable and may be put to greater and more beneficial use after surface mining and reclamation than before.
Reclamation Commission to canvass the various regions of the state in order to determine where surface mining can be conducted without significantly harming either the local environment or economy. This is so because it appears that the thrust of paragraph one of section eleven reflects an intention to protect interests broader than merely those of landowners whose properties are situated adjacent to a proposed surface mine tract.42

Regional consideration by the Commission prior to specific application for permission to mine would create a uniform approach to determination of the potential impact of surface mining in the area. The likelihood that all relevant factors would be considered would increase with utilization of such review.43 This procedure certainly would tend to vindicate the broad public interest which section eleven seeks to protect. Moreover, it would be only fair that the owners of coal rights be put on notice as soon as possible of the State’s intention to inhibit the value of such property interest.44

An example of a situation where surface mining most certainly should be barred under the section eleven “possibility of harm” test would be an area which possesses scenic characteristics and

42 In section eleven the Legislature mentions possibility of harm caused by stream pollution; destruction of aesthetic values; and destruction of recreational areas and the future use of the area and surrounding areas. The use of such terms arguably suggests a broad regional concern about the potential impact of surface mining activities. For a discussion of the pro and con of “area-wide deletion” see Cardi, supra note 3, at 364-366.

43 Even if the Commission adopted regulations indicating regional surface mining prohibitions based on a state-wide study, the Director would retain the power to deny permit applications if the circumstances of a given case required such action. Denial would be appropriate where the Director finds that the proposed operation will not meet the requirements of reclamation regulations promulgated by the Commission.

Thus, even if some relevant facts relating to surface mining impact were not brought to the attention of the Commission they might still be revealed in the course of departmental review of specific applications. This double check procedure enhances and is consistent with the legislative intent to limit surface mining in those areas where there is a possibility of harm to the public interest.

44 The promulgation of regional prohibition regulations would be subject to review. Such an appeal can be made at any time after promulgation thereof. W. Va. Code Ann. § 20-6-28 (1973 Replacement Volume). Also, if the Director denied a permit on the basis of regional prohibition regulations the applicant would have the right to appeal within thirty days thereof. Id. If, however, a challenge to the regulations failed in the first instance it is likely that an aggrieved permit applicant would be collaterally estopped from re-litigating the same issues upon denial of a permit.
an environmental ambiance which is presently or has the future potential to attract tourists in numbers which may significantly benefit the local economy. A remote sparsely populated mountain region where indigenous large and small game hunting and/or trout fishing are available for recreational exploitation would fit such a description. So too, would an area where recreational activities such as boating, golfing, fishing or skiing have attracted or give promise of attracting vacation enthusiasts with their attendant potential for pumping dollars into the local economy. In each instance surface mining should be prohibited in the area.

In light of the above it is difficult to comprehend how section eleven can reasonably be interpreted to require anything but a painstakingly comprehensive ongoing environmental and economic impact study of all regions of the state by the Department of Natural Resources and the reduction of the findings therefrom to detailed regulations prescribing criteria upon which to base section eleven prohibitions of surface mining in certain areas.

One might argue that such a study, (based, as it must be, on the premise that surface mining should be prohibited where there is a possibility of harm to the public interest) would result in quite severe limitations upon surface mining activity within the state. This suggestion may, indeed, be accurate. However, keeping in mind the clear language of paragraph one and the legislative moratorium on surface mining in twenty-two counties, such a conclusion would seem to be not only reasonable but inescapable.

C. Mandamus As A Remedy Under Section Eleven

One should not assume from the above discussion that unbounded discretion is placed in the hands of the Commission and that there is no possibility to review departmental action which permits surface mining in an area where prohibition seems to be required by the section eleven mandate. There is a means provided by the act to challenge such administrative action. It is found in paragraph eight of section eleven:

The failure of the director to discharge the mandatory duty imposed on him by this section shall be subject to a writ of mandamus, in any court of competent jurisdiction by any private citizen affected thereby.\(^\text{45}\)

\(^{45}\) W. VA. CODE ANN. § 20-6-11 (1973 Replacement Volume).
The language "any private citizen affected thereby," would seem to be a broad grant of standing to sue to any citizen who is affected in any way by the director's failure to act. Thus the director's grant of a permit may be challenged by a private citizen who, although not a party to the permit process, is in some way affected. Such a grant of standing does little more than allow a potential litigant to pass through the courthouse door. The question remains: what is the scope of the mandamus remedy so beneficently granted to West Virginia citizens? Traditional concepts of mandamus require that the writ will issue only if three factors coexist:

1. A clear legal right to the relief sought;
2. the absence of another adequate remedy at law; and
3. a clear legal duty on the part of the respondents to do the thing which the petitioner seeks to compel.7

The private litigant seeking to challenge the grant of a surface mining permit can satisfy the first two elements of the test. Part one is essentially, in the context of section eleven, a standing requirement which is satisfied if the petitioner can show that he is affected by the director's action. That is to say, section eleven probably permits any angler who fishes in a stream adjacent to a proposed surface mining area to sue in mandamus.8

The litigant can also easily satisfy the second part of the test, for there would seem to be no other remedy available at law to redress the type of indirect injury to private citizens for which section eleven grants standing. Obviously a tort suit for completely speculative monetary damages would not be an adequate remedy

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7 One must assume that the Legislature intended a more relaxed standard than the more usual "person aggrieved" requirement. As a matter of fact in section twenty-eight of the Act the Legislature more narrowly limits the grant of standing to appeal rules, regulations or orders of the Reclamation Commission to persons "claiming to be aggrieved or adversely affected." The implication is that the Legislature recognized the significant although indirect interest all citizens have in the preservation of environmental amenities. It is perhaps also a recognition that private citizen oversight of administrative action will cause the agency to show optimum sensitivity to factors involving possibility of harm to the public interest. See generally, K. Davis, 3 ADMINISTRATIVE LAW TREATISE § 22.01 et seq. (1958) for a general discussion of standing to challenge administrative action. See also, Cardi, supra note 3, at 362, n. 167.

for taking from the fisher a stream’s ability to sustain fish and aquatic life.

It is part three, the “clear legal duty” requirement of the mandamus test, that creates considerable difficulty for the potential litigant. Judicial concern with “clear legal duty” in the context of mandamus evinces the courts sensitivity to the fundamental concept of separations of powers.69 The West Virginia Constitution prohibits one branch of government from exercising power belonging to one of the others.50

Courts have been especially cautious of separation of power implications in cases where they are urged to delve into facts or perform functions which seem to be outside their realm of competence or authority.61 From this kernel has grown the limited scope of review doctrine in administrative law; courts must give deference to an agency action and will not substitute their opinions for the agency’s in the absence of fraud, manifest abuse of discretion, or error of law.52

Keeping in mind the separation of powers restraints imposed upon the judiciary, the question for consideration would seem to be: In what circumstances does section eleven create a clear legal duty in the Director to deny a surface mining permit? Having superficially studied the text of section eleven, one might reasonably argue that it creates no such clear legal duty in the director. For example, the possibility that stream pollution may occur would appear to be the type of technical determination which is peculiarly in the province of agency expertise. For a court to substitute its notions of when stream pollution may occur for the judgment of the Department would seem to be precisely the type of situation which the traditional mandamus test seeks to avoid.


It would appear then, that section eleven’s mandamus remedy is illusory. Such an interpretation, however, leads to the very unpalatable conclusion that the creation of such an illusionary remedy was nothing more than a crass political maneuver on the part of the Legislature to deceive the public into thinking that surface mining would be permitted in West Virginia only when it would not significantly damage public interests. This interpretation is both unacceptable and unnecessary. While section eleven will not receive awards for expert draftsmanship, its emphasis is clear. Strip mining should be excluded from areas where it may cause harm to the local environment or economy. As discussed above, in order to comply with section eleven’s mandate, it is incumbent upon the Reclamation Commission to perform a comprehensive environmental and economic impact study and set forth by regulation criteria for identifying those areas where strip mining must be prohibited. In light of this it is submitted that it is the clear duty of the director under section eleven to deny surface mining permits where the possibility of harm to the public, as defined by the law and regulations, exists. While section eleven mandamus may not be used as a vehicle to seek judicial second guessing of the director’s decisions, it should be available to challenge the grant of a strip mining permit when the area in the vicinity of the property sought to be mined has not been subjected to the rigorous scrutiny of a comprehensive impact study such as that required by section eleven. A prima facie case of violation of the Director’s section eleven duty would be made out if he issues a permit even though the reclamation commission had not undertaken such an impact study or issued regulations based thereon.

Thus the mandamus remedy, to which the Director is subject, requires a judicial determination of whether the Department has created procedures by which the public interest may be adequately protected from surface mining hazards. Certainly it is within the competence of the judiciary to determine whether the Department has formulated a detailed strategy for implementing the legislative mandate that surface mining be barred where it presents the possibility of harm to the public interest. If the Commission has failed to adopt comprehensive regulations seeking such an end, the

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23 It should be noted that the singular “duty” rather than “duties” is used in section eleven to define the situation where mandamus will lie against the Director. The implication is that all of the requirements of section eleven are to be considered part and parcel of one larger “duty.”
Director in granting a permit cannot be said to have given due consideration to the possibility of harm to the public interest. It is clearly the Director's duty to deny a surface mining permit where such consideration is absent, and thus mandamus should lie to compel the Director to comply with this duty.

If the Commission has adopted “prohibition” or “deletion” regulations to guide the Director, mandamus should issue where the Director's grant of a permit was inconsistent with such regulations.54

It is also possible, although the burden of proof would be greater, that a successful mandamus action may be instituted to compel the director to revoke a permit even though the director has adhered to the regulations. As mentioned above, such a case would arguably call for the exercise of some discretion on the part of the Director in determining when, for example, stream pollution might result from surface mining. If, however, the Director had decided that there was little chance of stream pollution, his grant of a permit should still be subject to mandamus when it can be shown by a petitioner through clear and convincing evidence that pollution might occur. It could logically be argued that such an action would not run afoul of the “clear legal duty” concept. While the director's determination of the possibility of water pollution calls for a decision based on administrative expertise and is, to a point, discretionary, the failure to deny a permit where substantial evidence exists to show pollution may occur would amount to an arbitrary act and constitute an abuse of discretion.

Other than mandamus under section eleven, there is no available vehicle by which citizens generally may seek review of this type of arbitrary agency action. It is reasonable to assume that, in keeping with the tendency of West Virginia courts to advance and enlarge its scope, the Legislature intended the writ to be used in just this type of situation to combat agency abuses of discretion. This is not to say that proof of arbitrary action or abuse of discretion is simple and that there is a great likelihood that a petitioner would prevail; however it is suggested that it was the intention of the Legislature that citizens should at least have a right to be heard in such situations. This is not a novel idea. On the contrary, the interpretation afforded the section eleven mandamus provision herein is in keeping with traditional mandamus concepts which

54 See text at note 26 supra.
allow the writ to issue when administrative action is arbitrary, capricious or based on a misapprehension of law.55

D. Summary of the Statutory Procedures

In sum, the West Virginia Surface Mining and Reclamation Act provides that there are areas in the state where no surface mining should be permitted because of the possibility that harm to the public interest may result. The Department of Natural Resources Reclamation Commission is given the authority to specifically delineate by rule those areas where conditions outlined by the Legislature may result from surface mining. The Director is required to delete such areas from all surface mining operations. The failure of the Commission to promulgate regulations setting forth detailed criteria upon which to base a decision to delete, or the Director's failure to deny a surface mining permit in areas where the legislatively enumerated conditions may result is subject to mandamus attack by any citizen affected thereby.

As thus constituted, this statutory scheme indicates a laudatory effort on behalf of the West Virginia Legislature to insert considerations of the public interest into the administrative decision making process. With its provision for public hearings, grant to the public of standing to review both the Commission's regulations and the Director's decisions to sue,56 and the Act's extensive protection of procedural and substantive rights of coal operators, it strikes a rational and necessary balance between very important competing interests.

III. SURFACE MINING PROHIBITIONS: COMPENSABLE TAKINGS OR NON-COMPENSABLE EXERCISE OF POLICE POWER?

A. An Overview

The constitutionality of section eleven of the West Virginia Surface Mining and Reclamation Act has been challenged because it does not provide that compensation be given to those persons


56 See, e.g. W. VA. CODE ANN. §§ 20-6-26 to -29 (1973 Replacement Volume).
whose ownership of coal rights may be adversely affected by surface mining limitations. This issue arises out of the fifth amendment provision stating, "nor shall private property be taken for public use, without just compensation," and from the West Virginia Constitution which adopts the fifth amendment language broadened by the use of the words "property damaged or taken." The following discussion is not intended to be an exhaustive treatment of the myriad conflicting "taking" theories and authority. Rather, the consideration given to the issue is founded upon the notion that while there may be many situations where the existence of a compensable taking is fairly debatable, the state's regulation of surface mining in the context of the West Virginia Act is not compensable even if it clearly rises to the level of a prohibition.

The requirement of compensation has not been interpreted literally by the courts, but instead has been viewed as a mandate for the courts to impose fairness in property conflicts between competing public and private interests; protecting individual property interests from arbitrary or capricious exercise of governmental

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37 A declaratory judgment action is presently pending in the circuit court of Kanawha County, West Virginia, which raises a broad challenge to the validity of the Act as a whole and on the enforcement aspects of section eleven in particular. Anderson and Anderson Contractors, Inc. v. Latimer, Civil No. 11,567 and No. 11,729 (Cir. Ct. Kanawha Co., Filed Sept. 13, 1972). Apparently the current director of the Department of Natural Resources feels that the constitutionality of section eleven is questionable and has given such rationale for his failure to exercise the full authority granted him by section eleven. See, Enforcement of Strip Mining Laws, supra note 6, at 65. The propriety of the Director's action in failing to enforce a statute because its constitutionality has been challenged is questionable, but will not be addressed in this article.

38 U.S. Const., amend. V. This prohibition has been held applicable to the states by the due process clause of the fourteenth amendment. Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897); United States ex rel. T.V.A. v. Powelson, 319 U.S. 266, 279 (1943).

power as well as guarding the general public welfare from private encroachment.\footnote{For a recent example of this approach see Goldblatt v. Hempstead, 369 U.S. 590 (1962) in which the "taking" issue seems to turn on the "reasonableness" of government action.}

Courts and commentators have long labored to devise a framework of analysis through which such conflicts might be fairly resolved but have been singularly unsuccessful. One commentator who has struggled to make some sense out of the various themes and reasoning which runs through "taking" cases has found that "the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results."\footnote{Sax, Taking and the Police Power, 74 YALE L.J. 36, 37 (1964) [hereinafter cited as Sax].} Numerous theories have been advanced by distinguished scholars promoting various approaches which they suggest will bring some clarity and rationality to analysis of taking issues.\footnote{See F. Bosselman, D. Callies & J. Banta, The Taking Issue (Council on Environmental Quality 1973); Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (1972); Costonis, Development Rights Transfer: An Exploratory Essay, 83 YALE L.J. 75 (1973); Dunham, Griggs v. Allegheny County in Perspective: 30 Years of Supreme Court Expropriation Law, 1962 SUP. CT. REV. 63; Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. CHI. L. REV. 681 (1973); Harris, Environmental Regulations, Zoning and Withheld Municipal Services: Takings of Property by Multi-government Action, 25 U. FLA. L. REV. 695 (1973); Kusler, Open Space Zoning: Valid Regulation or Invalid Taking, 57 MINN. L. REV. 1 (1972); Large, This Land is Whose Land? Changing Concepts of Land as Property, 1973 WIS. L. REV. 1039; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967); Netherton, Implementation of Land Use Policy: Police Power v. Eminent Domain, 3 LAND & WATER L. REV. 33 (1968); Plater, The Takings Issue in a Natural Setting: Floodlines and the Police Power, 52 TEX. L. REV. 201 (1974); Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971); Sax, Takings and the Police Power, 74 YALE L.J. 36 (1964); Comment, Eminent Domain—Conservation, 6 NATURAL RESOURCES J. 8 (1966); Comment, The Taking Issue: Patentable Obstacle to National Resource Management Legislation, 54 Ore. L. REV. 64 (1974); Note, An Economic Analysis of Land Use Conflicts, 21 STAN. L. REV. 293 (1969); Note, Development Rights Transfer in New York City, 82 YALE L.J. 338 (1972).} It seems, however, that each and every theory thus advanced is subject to major criticism because, while it may prove useful in resolving some taking conflicts, it is of limited utility in dealing with others.\footnote{For a general criticism of the major taking theories see Berger, A Policy Analysis of the Taking Problem, 49 N.Y.U.L. REV. 165 (1974). Perhaps the real problem with the various taking theories is their proponent's failure to grasp the}
The most recent statement of the Supreme Court of the United States on the subject of taking came in Goldblatt v. Hempstead. In Goldblatt a municipal ordinance directed toward sand and gravel mining prohibited excavations below the water table and imposed an affirmative duty on mine operators to refill any excavations that had already reached below that level. As a practical matter the ordinance promised to have the affect of severely curtailing or eliminating Goldblatt's sand and gravel operation. Goldblatt appealed alleging, inter alia, the ordinance was not a business regulation but rather was completely prohibitory and confiscated his property without just compensation.

In upholding the Town of Hempstead's ordinance the Court suggested general guidelines for determining whether particular governmental activity constitutes a compensable taking. The Court noted that "every regulation necessarily speaks as a prohibition" and that if the ordinance constituted a valid exercise of the town's police powers, the fact that it deprived the property of its most beneficial use did not render it unconstitutional. The Court emphasized, however, that governmental regulation may become "so onerous as to constitute a taking which constitutionally requires compensation." Notwithstanding various attempts to create one, the Court recognized that "there is no set formula to determine where regulation ends and taking begins."

The Court indicated that while a comparison of values before and after imposition of government regulation is relevant, it is not conclusive. In fact in one case, the Court noted, a diminution of

lesson implicit from their failure—because of the myriad factual possibilities attendant taking problems, no one mode of analysis will fit all situations.


45 In Goldblatt it was argued that the ordinance completely destroyed the economic value of the land. Brief for Appellant at 18.

46 369 U.S. at 592. In support of this proposition the Court cited Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hadacheck v. Sebastian 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); and Mugler v. Kansas, 123 U.S. 623 (1887). The Court also noted that it was not of controlling significance that the "use" prohibited was of the soil itself as opposed to a "use" upon the soil, or that the use was arguably not a common law nuisance. 369 U.S. at 593.


48 369 U.S. at 594. See also, United States v. Caltex, Inc., 344 U.S. 149, 156 (1952).

49 369 U.S. at 594. The "diminutions of value" theory is often applied in taking cases. Diminution of value has been considered most recently in cases involving wetlands statutes, flood plain regulation, gravel mining, and in other contexts.
value from $800,000 to $60,000 was upheld. Because of the inadequacy of the record as to diminution of value in Goldblatt, the Court did not find it necessary to draw a line indicating where regulation ends and taking begins. Instead the Court indulged in "the usual presumption of constitutionality" and upheld the ordinance as a valid exercise of the town's police power. Although police power regulations must be reasonably necessary to accomplish their purpose, the Court emphasized that the burden is on the challenger to show unreasonableableness. Moreover, if this burden was not heavy enough, the Court suggested that if the reasonableness of a particular enactment were debatable courts should defer to the legislature.

While the inadequacy of the record in Goldblatt allowed the Court to finess the taking question, the case does seem to provide some guide for deciding whether given government activity constitutes a compensable taking. This guide will perhaps not suit the fancy of legal academicians who seek to develop "the test" to be applied across the board to every situation where taking may be an issue. Such criticism notwithstanding, Goldblatt does provide a rational framework for the often complex considerations of taking issues. While the commentators seek the consistency which flows from fixed formulae, they seem to ignore the possibility that flexibility may be the essence of fairness in the context of taking. Considerations of competing interests in the public and private sector

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72 Id. at 596, citing Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959) (exercise of police power presumed constitutionally valid); Salsburg v. Maryland, 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the state); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could reasonably be assumed affords support for it).


74 Professor Sax concluded that Goldblatt and other recent cases leave "the impression that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem." Sax, supra note 61 at 46.
may in fact require case by case analysis, for the weight given such interests and the resultant protection afforded them may be subject to frequent reevaluation. What is considered a useful activity yesterday may be deemed of marginal utility today and an imminent peril tomorrrow.

Thus the manufacture of liquor in Kansas was completely prohibited in 1887, but not today; lotteries once looked upon with much disfavor now flourish under state sponsorship, and a brickyard which is an acceptable industrial enterprise may be greatly restricted when a residential community grows up around it.

The lesson of Goldblatt then, may be implicit in the Court's reminder that there is no "set formula" for determining when compensation is required. Rather the Court pragmatically suggests that at least two considerations are relevant. If there is no diminution of value of the property then there is, of course, no compensable taking. If there is some diminution of value a court must then look to the rationale underlying the legislative enactment to ascertain whether it is so onerous as to require compensation. If the regulation involved is determined to be a valid exercise of the state's police power Goldblatt would arguably stand for the proposition that great deference should be granted to the legislative scheme and it should be upheld if consistent with fundamental notions of fairness. Certainly one would have difficulty arguing that a fair regulatory scheme could nevertheless be termed "onerous." Such a view is consistent with the historical antecedents of the fifth amendment. Professor Sax argues that:

"[I]t can be demonstrated that the English and American authorities writing at about the time of the adoption of the fifth amendment also viewed the provision as a bulwark against unfairness, rather than against mere value diminution."

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78 Sax, supra note 61 at 57. Professor Sax relates:

What seemed to concern the early writers was not the fact of loss but the imposition of loss by unjust means. It was the exercise of arbitrary or tyrannical powers that were sought to be controlled.

We have become so indoctrinated with the idea that quantitative value maintenance is a constitutional principle and dictate of "natural equity" that we have conveniently forgotten the extensive non-property background in our law. [T]he Christian [as opposed to the Roman] tradition... devised the legal concept of "just price"... a fundamen-
The West Virginia courts have long espoused the general approach to taking set forth in Goldblatt. In 1915, the West Virginia Supreme Court of Appeals held that governmental interference with beneficial use and ownership of land may constitute a taking if it does not fall within the ambit of general police power of the State.78 If, however, the regulation does constitute a valid exercise of the police power then West Virginia courts are unlikely to require compensation. The Supreme Court of Appeals accepts the premise mentioned above that the concept of police power regulation must be flexible to meet changing situations and developing data:

The police power is difficult to define because it is so extensive, elastic and constantly expanding . . . to meet the new and increasing demands for its exercise for the benefit of society . . . . It embraces the power of the state to preserve and promote the public welfare and it is concerned with whatever affects the peace security, morals, and general welfare of the community . . . . The exercise of the police power cannot be circumscribed within narrow limits nor can it be confined to precedents resting on conditions of the past. As civilization becomes more complex and advances are made, the police power of necessity must develop and extend to meet such conditions.80

B. A Section Eleven Prohibition is not a Compensable Taking

While it is true that in some contexts there may be an almost imperceivable line distinguishing a taking from a non-compensable exercise of the police power, it is equally true that in some situations the facts allow for no doubt as to where such a line must be drawn. Thus no authority need be cited for the proposition that a landowner must be paid if the state condemns his land for highway

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78 Fruth v. Board of Affairs, 75 W. Va. 456, 84 S.E. 105 (1915) (building line regulation ruled improper exercise of power which does not extend to aesthetic grounds). See also, Carter v. City of Bluefield, 132 W. Va. 881, 54 S.E.2d 747 (1949) (denial of commercial use variance in area zoned residential, but actually essentially commercial, ruled a taking.)

construction; nor is there any doubt that compensation would not be required if the state were to order cessation of blasting which is a necessary element of a stone quarry operation located in close proximity to a children’s hospital.  

In either instance it would make no difference whether the property value was diminished—to take property for highway construction purposes without paying compensation would be onerous without regard to the extent public welfare would be promoted; the effective prohibition of stone quarrying because of its disturbance of hospital functions on the other hand would not be compensable no matter how great the monetary loss suffered by its owner. In each situation the key to achieving the “correct” result would seem to involve the element of fairness. Applying the test of fairness to a section eleven surface mining prohibition one must necessarily conclude that compensation would not be required.

To constitute a valid exercise of the states’ police power it must be shown that it bears some reasonable relation to the public health, safety morals or general welfare of the area affected. The legislative purpose of the Surface Mining and Reclamation Act is clear—to limit the potentially severe adverse effect of surface mining upon a broad spectrum of public and private interests. The prohibition of surface mining in areas where it may cause harm to the public certainly bears a reasonable relationship to public health, safety, and the general welfare.

Even if the regulatory scope of the Surface Mining and Reclamation Act bears a reasonable relationship to its purpose, Goldblatt suggests that it may still be unreasonable as applied

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81 Such a situation would be somewhat analogous to the provisions in section eleven which bar surface mining within one hundred feet of public property or which will constitute a hazard to a school, church or institutional building etc. Query, whether there is any real difference between these prohibitions and a prohibition of surface mining for the reasons stated in paragraph one of section eleven (stream pollution, flooding, damage to land uses, etc.).


83 See W. VA. CODE ANN. §§ 20-6-1, 11 (1973 Replacement Volume) See note 7 supra.

84 See note 39 supra.
because of its onerous effect on established property interests—thus requiring compensation.\textsuperscript{85}

It is necessary then, to determine, if possible, the parameters of the impact of a section eleven prohibition and the effect it would have on the owner of vested rights in coal.

One might inquire initially as to the value of such a property interest prior to invocation of a section eleven prohibition. One indication of the value of coal rights is the tax assessment or valuation of the property. As a practical matter, a survey of most rural counties would probably reveal that coal is valued at less than ten dollars per acre and divided coal rights or surface coal rights are valued much lower if at all.\textsuperscript{86} While practically speaking such valuation may not always reflect the market value of the property, it is supposed to.\textsuperscript{87} In any case such valuations are accepted and adhered to by owners of coal rights, and thus they should not be heard to challenge the fairness of using such valuations for "taking" analysis purposes.\textsuperscript{88}

If the hypothesis is correct, that tax assessments or valuation of coal rights is relatively low, this fact would indicate that both in fact and in the view of the Legislature, ownership of coal is nothing more than ownership of an expectation interest. The value of such an interest is marginal until it is determined that the quality, mineability and marketability of the coal are such that mining the coal is profitable. It should also be emphasized that the owner of coal rights must certainly be aware of the increasing severity of governmental regulation of surface mining activity to protect the environment. The low valuation of coal rights must certainly also reflect a recognition that governmental regulation may greatly limit the extent to which potential profits from mining of coal will in fact be realized.\textsuperscript{89} If it is concluded that mining will

\textsuperscript{85} 369 U.S. 590, 593-94 (1962); See e.g. HFH, LTD v. Superior Court, 41 Cal. 3d 908, 116 Cal. Rptr. 436 (1974) to the effect that in certain cases even a valid exercise of the police power can involve a taking.

\textsuperscript{86} Another relevant indicator of value would be what the property owner paid for the coal.

\textsuperscript{87} W. Va. CODE ANN. § 11-3-1 (1974 Replacement Volume) provides that real property be assessed at its "true and actual value." \textit{But see }SANFORD REPORT, supra \textsuperscript{note 7}.

\textsuperscript{88} It would be unusual indeed to find the owner of coal rights who would protest a valuation of his interest as being too low.

\textsuperscript{89} \textit{See} Bortz Coal Co. v. Air Pollution Comm'n., 2 Pa. Cmwlth 441, 279 A.2d 388 (1971). In \textit{Bortz} the court found that there existed no feasible way to abate air
be profitable, the value of the coal would yet be minimal until substantial investments are made to realize that potential.\footnote{This discussion underlines the fact that once mining has started there is a greater chance of onerous diminution of value than before development and suggests the importance of action on the part of regulatory agencies before mining activity actually begins.} Thus in situations where surface mining has not actually been initiated, the only effect of a prohibition would be upon expected or potential profits.

Having arrived at perhaps the only logical, non-speculative means of valuing coal rights, one must then determine the effect of a section eleven prohibition thereon. In a situation where a person owns all of the coal under a tract, owns the surface and all or part of the coal, or owns the coal and surface “in fee” the owner may use his property in various productive ways. He may use it to deep mine coal, or to grow and harvest timber. He may use it for agricultural, recreational, residential, or industrial development. With any of these uses his property interest would not be valueless and may not be diminished at all.

Where a person does not own “deep” coal or the surface, but possesses only an interest in “surface” mineable coal, he would still own the coal notwithstanding invocation of a section eleven prohibition. Moreover, technological advancements may eventually allow him to mine the coal either by deep mining methods or new surface mining techniques which will not cause the various harms to the public interest section eleven was designed to prevent. Thus, the owner of such coal rights retains the expectancy he possessed before prohibition—based largely on his gamble on the potential value of the coal if and when development could take place.\footnote{See e.g. Sibson v. State, 111 N.H. 304, 282 A.2d 664 (1971) (prohibition of filling of wetlands sustained); the fact that a property owner had fully recovered his investment on the sale of a portion of his property was considered sufficient to preclude compensation with regard to effect of prohibition on his remaining property. See also, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761, 767-768 (1972). In Just the court distinguished “natural and non-natural uses.” Said the Court: The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land.}
In light of the relatively low valuation of coal rights and the largely speculative nature of a coal owner's expectancy of profit, it would seem fair to conclude that the extent of diminution of value of such rights resulting from a section eleven prohibition would be minimal. Even if diminution of value were substantial the coal owner could be said merely to have gambled and lost. When one has undertaken to speculate on development of interests in estates in land, can he argue that he is constitutionally entitled to protection from loss?

The question remains, is a section eleven prohibition so onerous a regulation as to constitute a taking which constitutionally requires compensation? Keeping in mind Goldblatt's deference to legislative determinations explicit and implicit in police power regulations and its co-extensive requirement of fairness, the answer would clearly be negative. The owner of coal rights possesses a property interest the value of which is speculative in nature and which he knows or should know is subject to governmental regulation including prohibition. Thus, when the government acts to protect multifaceted and broad based public and private interests by prohibiting surface mining of his coal, no onerous burden is placed unfairly on such owner. As the Supreme Court of the United States recently emphasized:

The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people.92

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IV. SUMMARY

The West Virginia Surface Mining and Reclamation Act, although poorly drafted, does in fact provide a useful tool to be used by the Department of Natural Resources in protecting vital public interests. The Act is clearly constitutional notwithstanding pending “taking” challenges. The failure to strictly administer and enforce section eleven limitations subverts the legislative purpose underlying the act and endangers precious resources belonging to all of the people, resources which once lost may never be reclaimed.