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SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Mining Committee Newsletter

Vol. 2, No. 1 **June 2003**

MESSAGE FROM THE CHAIR

Katie Sweeney
National Mining Association
Washington, D.C.

As you can see from this Newsletter, regulatory and legal developments regarding mining law administration abound. There is so much activity in this area that it is hard to discern any themes, but if one looks more closely, one theme becomes clear: mining is under siege in the United States. The articles in the Newsletter hit upon this theme in discussions of mining as a nuisance and unsuitability criteria. While they are not all covered in this Newsletter, other anti-mining initiatives exist from efforts to prevent mining operations on site-specific bases to ballot initiative efforts to foreclose mining on state-wide bases.

It is no wonder that more mining companies are investing abroad as opposed to in the United States, which contributes to the United States' increased dependence on imports to supply strategic and critical minerals. In fact, according to the United States Geological Survey (USGS), the United States' reliance on mineral imports has increased sevenfold in the last decade. No matter what one's views are on mining, it is time to take a step back to examine the consequences of decreased mining in the United States. And there are significant consequences: economic, social and environmental. Minerals are vital for the well-being of U.S. economy, security and way-of-life. The United States needs to develop a National Minerals Policy to encourage investment in and development of U.S. resources and production, while assuring environmental protection.

I hope you find the articles in this season's Newsletter to be informative and helpful to your mining law practice. If you have a viewpoint to share on this issue's content, or suggestions for future articles, I invite you to contact me (ksweeney@nma.org), or our Newsletter vice-chair, Kirsten Nathanson (knathanson@crowell.com).

ABA Section of Environment, Energy, and Resources

11th Section Fall Meeting

October 8-12, 2003
Washington, DC

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Mining Committee Newsletter
Vol. 2, No. 1, June 2003
Kirsten L. Nathanson, Editor

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 750 N. Lake Shore Drive,Chicago, IL 60611.

NEWSFLASH FROM THE VICE-CHAIR: FEDERAL COURT REJECTS EPA REPORTING REQUIREMENT FOR METAL MINING WASTE ROCK

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While the message from our chair is true, that federal and state regulation of mining is more pervasive than ever, a recent federal court decision has placed some limits on one aspect of that regulation. On April 2, 2003, Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia issued an opinion in *Barrick Goldstrike Mines Inc. v. Whitman*, — F. Supp. 2d —, 2003 WL 1919310 (D.D.C. Apr. 2, 2003) upholding Barrick's challenge to two aspects of EPA's reporting requirements for the metal mining industry under the "Toxic Release Inventory" (TRI) program. First, Judge Jackson agreed with Barrick that trace elements of toxic chemicals found in mining waste rock should be eligible for the TRI program's *de minimis* exemption, and rejected EPA's interpretation that required reporting of all toxic chemicals in waste rock, no matter how minute the concentration. Second, the court rejected EPA's interpretation that Barrick "processed" (and therefore had to report) naturally-occurring impurities in the gold bars it produced.

As many of you know, the TRI program springs from Section 313 of the Emergency Planning and Community Right to Know Act of 1986 (EPCRA), 42 U.S.C. § 11023, and requires certain facilities that manufacture, process or otherwise use certain toxic chemicals to report the "releases" of those toxic chemicals from their facilities on an annual basis. EPA added the metal mining industry to the TRI program in 1997. 62 Fed. Reg. 23834 (May 1, 1997). The TRI program

regulations contain a *de minimis* exemption, which excludes trace amounts of toxic chemicals from inclusion in TRI reporting. 40 C.F.R. § 372.38(a).

In its TRI program guidance to the metal mining industry, EPA stated that toxic chemicals in waste rock and tailings were not eligible for the *de minimis* exemption, and that metal mining facilities would have to report all amounts of EPCRA toxic chemicals found in those substances. The impact of this interpretation on the metal mining industry was dramatic, as waste rock accounted for 85-99 percent of the toxic chemical releases reported by the industry during the years when Barrick's challenge was pending. The resulting reported numbers from the metal mining industry made it appear to be the nation's largest toxic polluter – ahead of the manufacturing and utilities industries – according to EPA.

Judge Jackson's decision to exclude waste rock and trace dore impurities from the TRI program is therefore going to have a substantial minimizing effect on the toxic chemical releases reported by the metal mining industry, if EPA applies Judge Jackson's decision on an industry-wide basis. While the opinion on its face applies to Barrick's TRI reporting only, the holdings were based on the plain language of the *de minimis* regulation and EPA's invalid interpretation of the EPCRA term "processing." Therefore the decision could easily be applied to all metal mining TRI reporting.

EPA chose not to appeal the decision and has posted guidance relating to the new reporting requirements at www.epa.gov/tri.

Richard E. Schwartz and Kirsten L. Nathanson of Crowell & Moring LLP represented Barrick Goldstrike Mines Inc. throughout the district court proceedings.

THE SAFE EXPLOSIVES ACT: HOMELAND SECURITY COMES TO THE MINING INDUSTRY

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This past Nov. 25, when President Bush signed the Homeland Security Act of 2002, Pub. Law No. 107-296, mining companies, along with other explosives users, suddenly found themselves thrust into the front lines of the Nation's effort to protect its citizens from terrorists, both foreign and domestic. Dramatically expanding federal regulation of every user of explosives, tucked away in that massive legislation are provisions popularly known as "The Safe Explosives Act," or "SEA." Subtitle C, Title XI of The Homeland Security Act.

In brief, the SEA mandates, for the first time, that *all* users of explosive materials must have a federal permit or license. 18 U.S.C. § 842(a)(3), (4), and (b), as amended by SEA. The SEA also expands the categories of persons who are prohibited from possessing explosives. 18 U.S.C. § 842(d)(6), (7), (8), and (9) and (i)(5), (6), (7), and (8), as amended by SEA. And the SEA requires that persons "authorized to possess explosive materials" and persons "responsible" for the use and management of explosive materials must be identified by their employers to the federal Bureau of Alcohol, Tobacco, and Firearms and Explosives (ATF), so that the ATF can carry out a background check and clearance of each individual to ensure that they are not persons prohibited from possessing explosive materials. 18 U.S.C. § 843(b) and (h), as amended by SEA. Theoretically, at least, this nationwide permiting and licensing scheme and its accompanying new background check and clearance system will operate as a screen to

prevent explosive materials from falling into the hands of terrorists. While praiseworthy in its purpose, what is perhaps most certain is that the requirements of the SEA will impose complex and costly new burdens upon mining companies and other explosives users.

As the heaviest user of explosives, by far, the mining industry can expect to be under special scrutiny from the ATF. In this regard, it is important to be mindful that knowing or willful violations of the SEA are classified as federal felonies and may result in fines, imprisonment or both. In addition, violations of the SEA may result in revocation of user permits or manufacturing licenses.

Prohibited Persons

Becoming effective in two phases, SEA imposes short statutory deadlines on regulated parties, as well as on the ATF. Initially, on Jan. 24, 2003, the categories of persons prohibited from possessing explosives were expanded to include:
(1) aliens (with certain exceptions);
(2) persons dishonorably discharged from the armed forces of the United States; and
(3) persons who have renounced their U.S. citizenship. 18 U.S.C. § 842(d)(6), (7), (8), and (9), and (i)(5), (6), (7), and (8), as amended by SEA. These newly prohibited categories of persons expanded already existing federal law prohibiting certain persons from using explosives. Pre-SEA prohibitions included persons who: (1) are under indictment for, or have been convicted of, a felony; (2) are fugitives from justice; (3) are unlawful users of, or are addicted to, any controlled substance (as defined in the federal Controlled Substances Act); or (4) have been adjudicated as mentally defective or committed to a mental institution. *See, e.g.,* 18 U.S.C. § 842(i).

Thus, if a person employed by a mining company falls within any one of the categories of persons described above, and is in possession of explosive materials, then that person is committing a federal felony. It is important, therefore, that mining companies develop internal checks to make certain that their employees who use or supervise the use of explosives are not persons prohibited from possessing explosives. But care must be taken to assure that these checks do not, themselves, run afoul of labor and employment law requirements. These prohibitions apply right now to all mining companies, even in the case of those companies who have never had to obtain a federal permit or license previously, as well as to pre-SEA permit or license holders.

Aliens

The most troublesome of the expanded categories of persons who cannot possess explosives is “aliens.” Defined by SEA (as derived from the Immigration and Nationality Act definition of “alien” at 8 U.S.C. § 1101(a)(3)) as “any person who is not a citizen or national of the United States,” the purpose of this prohibition is obvious. 18 U.S.C. § 841(r), as amended by SEA. Numerous aliens are employed in the mining industry, however, and many of these individuals are involved directly or indirectly with the use of explosives. Fortunately, SEA includes exceptions to the general alien prohibition. The exceptions include aliens who are “lawfully admitted for permanent residence,” an exception which includes most (but not all) “green card” holders. 18 U.S.C.§ 842(d)(7)(A) and (i)(5)(A), as amended by SEA. The exceptions also include those aliens who are “lawful non-immigrants” and who also meet the SEA definition of “responsible persons,” as discussed below. 18 U.S.C. § 842(d)(7)(B) and (i)(5)(B) as amended by SEA. To avoid SEA’s criminal and other penalties, employers who assign “aliens” to duties involving explosives should be careful to make sure

they fall within one of the exceptions to the general prohibition.

Permits or Licenses

Identifying employees who use or supervise the use of explosives and making sure they do not fall under one of these prohibited persons categories is just the beginning of SEA compliance. By May 24, 2003, ATF permits or licenses will be required of all explosives users, including those intrastate users who did not need an ATF permit or license pre-SEA. 18 U.S.C. § 842(a)(3), (4) and (b), as amended by SEA. If explosives are manufactured on site for on-site use, an ATF license is required. Otherwise an ATF user permit is necessary. In addition, as mining companies apply for new permits or licenses or renewals of existing permits or licenses, they will have to submit to ATF: (1) identifying information for all employees "authorized to possess explosive materials"; and (2) identifying information, plus fingerprints and photographs for each "responsible person." 18 U.S.C. 843(a), as amended by SEA. In turn, ATF will conduct background checks to ensure that all employees and persons so identified are not "prohibited persons." 18 U.S.C. § 843(h), as amended by SEA. Thus, it will become the responsibility of each mining company to determine who must be identified to ATF for background checks and clearances.

Employee-Possessors

Identifying a person "authorized to possess explosive materials" hinges on the meaning of "possession." It is clear that "possession" under SEA includes "actual" as well as "constructive" possession. ATF, which uses the shorthand term "employee-possessor" for "persons authorized to possess explosive materials," says that "actual" possession exists when a person is in immediate possession or control of explosive materials, *e.g.*, an employee who physically handles explosive materials, or an employee, such as a blaster, who uses explosive materials. *See, e.g.,* ATF Form 5400.28, "Employee Possessor Questionnaire." That is straightforward enough, but complications arise in trying to determine the meaning of "constructive" possession. "Constructive" possession, according to the ATF, exists when an employee lacks direct physical control over explosive materials, but *knowingly has the power and intention to exercise dominion and control over the explosive materials either directly or indirectly through others. Id.* While it is beyond the scope of this article to delve into the many nuances of the term "possession," it is readily apparent that the term "employee-possessor" may cover a substantial number of employees. Indeed, so many mining industry employees (not to mention other users of explosives) are potentially covered as employee-possessors, that ATF may not be able to timely conduct the necessary background checks.

The legislative history of the SEA addresses the identification of employees authorized to possess explosive materials in significant detail. Congress has stated that it intends and expects the ATF to work closely with regulated industries to develop guidance as to which employees are considered to be in "possession of explosive materials" in the course of their employment. For example, according to the legislative history, applicants are not required to list every single employee of the business but only those who are expected to possess explosive materials as part of their duties. Further, in working with industry to develop "standards," Congress stated that the ATF should be guided by the case law interpreting the term "possession" under the Gun Control Act of 1968, as amended. 18 U.S.C. §§ 921 *et seq*. Under that Act, according to the legislative history, it is well established that possession may be demonstrated through either actual or

constructive possession. Thus, in instances where direct physical contact is lacking a person may, nonetheless, have constructive possession where he *knowingly has the power and the intention at a given time to exercise dominion and control over the explosives, either directly or through others. See* H.R. Rep.. No. 107-658, at 12-13 (2002); 148 Cong. Rec. S11393 (daily ed. Nov. 19, 2002) (statement of Sen. Kohl).

Responsible Person

The term "responsible person" is defined by the SEA to mean "an individual who has the power to direct the management and policies of the applicant pertaining to explosive materials." 18 U.S.C. § 841(s), as amended by SEA. In the case of corporations, what is particularly troublesome about this definition is that the ATF maintains that it covers *corporate directors, officers, and stockholders* who have the power to direct the management and policies of the corporation pertaining to explosive materials. *See, e.g.,* ATF Form 5400.13/5400.16, "Application for Explosives License or Permit." The breadth of this interpretation is likely to lead to differences of opinion between the regulated industry and the ATF, especially since "responsible persons" often will be senior corporate officials or others who may balk at being identified to ATF, much less being fingerprinted and photographed.

Independent Contractors

Many mining companies use independent contractors to carry out blasting operations. Independent contractors using explosives at such operations must have their own ATF license or permit and must otherwise be in compliance with SEA. Mining companies should make sure that such independent contractors have their own ATF licenses or permits. But it appears that mining companies need not, themselves, obtain an ATF license or permit as long as all aspects of the use of explosives at the operation are under the direct control of the independent contractor.

Conclusions

As is apparent from the above summary, the new SEA requirements are complicated and burdensome. In the near future, expect the ATF to be overwhelmed with demands for background checks and clearances. And expect confusion. ATF has published "interim final" regulations for implementation of the SEA, but the regulations are oftentimes more complex and confusing than SEA itself. 68 *Fed. Reg.* 13768 (Thurs. Mar. 20, 2003). In addition, ATF is developing informal solutions as it grapples with SEA's short statutory deadlines – and those informal policies may differ from ATF region to region. ATF officials promise that the Agency will work cooperatively with those regulated entities exercising good faith efforts to comply with SEA. But if "cooperation" fails, and a mining company's or other user's permit or license application or request for renewal is denied, the rejected applicant has a right to an ATF hearing. 18 U.S.C. § 843(e)(2). Furthermore, final ATF decisions on permit or license denials or revocations are reviewable, within 60 days after their receipt, in an appropriate United States Court of Appeals. *Id.*

The war on terrorism is being fought on many fronts. Compliance with SEA puts the mining industry on one of those fronts. To avoid becoming a victim of that war, the penalties associated with the SEA noncompliance make it imperative that mining companies carefully monitor their compliance activities and stay abreast of ATF's SEA implementation efforts.

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AN OVERVIEW OF THE BUREAU OF LAND MANAGEMENT'S RULEMAKING EFFORTS FOR THE 43 CFR 3809 SURFACE MANAGEMENT REGULATIONS FOR HARDROCK MINING

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Reno, Neveda

Overview of the 43 CFR 3809 Rulemaking

The Department of the Interior, Bureau of Land Management (BLM) has been engaged in an ongoing six-year long rulemaking process to amend the 43 CFR 3809 surface management rules for hardrock mines on BLM-administered lands. This highly politicized rulemaking started in 1997 when then secretary of the Interior, Bruce Babbitt, announced he intended to use the 3809 rules as a surrogate for Congressional action to amend the Mining Law. Since then, Congress has exerted a strong influence over the 3809 rulemaking process by appropriating funds for a National Research Council (NRC) study of hardrock mining on federal lands and enacting legislation stating the revised 3809 rules cannot be inconsistent with the findings of the NRC Report. The findings from the NRC's study were published in October 1999 in a report entitled: "Hardrock Mining on Federal Lands," National Research Council/National Academy of Sciences.

On Nov. 21, 2000, the Clinton administration published final 3809 rules at 65 Fed. Reg. 69998 that became effective on Jan. 20, 2001, the last day of the Clinton administration. Hereinafter referred to as "the Babbitt 3809 regulations," these rules were immediately challenged by two industry plaintiffs, the state of Nevada, and several environmental public interest organizations.

In March 2001, Secretary of the Interior Gale Norton proposed to suspend the Babbitt 3809 regulations, in whole or in part, and reopened the rulemaking. The Bush administration published final 3809 rules on Oct. 30, 2001 at 66 Fed. Reg. 54834 (hereinafter called "the Norton 3809 regulations"). The Norton 3809 regulations retain many of the elements of the Babbitt 3809 regulations and reinstate a few elements of the original 3809 rules enacted in 1980. In an Oct. 25, 2001 letter to Congress, Secretary Norton described the changes to the 3809 rules as modifications needed to minimize legal uncertainties, to eliminate unnecessary and burdensome restrictions on mining operations that comply with environmental regulations, and to address the regulatory gaps identified in the NRC Report.

This article summarizes how the key 3809 issues evolved during the rulemaking process, and describes the main differences between the Babbitt and Norton 3809 regulations. The close relationship between the 3809 rulemaking and the Congressional debate about amending the Mining Law is briefly discussed.

Evolution of Key 3809 Issues During the Rulemaking

Unnecessary or Undue Degradation. The debate over the definition of unnecessary or undue degradation is emblematic of the controversy that surrounded the 3809 rulemaking. Preventing unnecessary or undue degradation, which is a statutory mandate under the Federal Land Policy and Management Act of 1976 (FLPMA), is the principal focus of the 3809 regulations. The mining industry argued the original 1980 definition of unnecessary or undue degradation at § 3809.0-5 was effective in protecting the environment because it created a site specific, dynamic and comprehensive standard that required compliance "with all applicable environmental protection statutes and regulations." In contrast, the Clinton

administration and other mining critics contended a new, prescriptive standard was needed to provide BLM with additional discretionary authority to deny an applicant's Plan of Operations or Notice of Intent for mining and mineral exploration activities on BLM-managed public lands.

In 1999, Secretary Babbitt announced proposed 3809 rules that defined unnecessary or undue degradation in terms of compliance with a long list of prescriptive, one-size-fits-all environmental performance standards defined at § 3809.420. In 2000, Secretary Babbitt added a new criterion, the "Significant Irreparable Harm" (SIH) standard at § 3809.0-5(4) to the final 3809 rules. SIH authorized BLM to deny a Plan of Operations or Notice of Intent that would "result in substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated." The last-minute addition of SIH, which industry supporters dubbed "the Mine Veto Provision," was one of the most hotly debated aspects of the Babbitt 3809 rules.

As discussed below, the Norton 3809 rules eliminated Babbitt's SIH provision from the definition of unnecessary or undue degradation. Secretary Norton's final rules also clarify the definition of unnecessary or undue degradation by mandating compliance with general and specific performance standards in § 3809.420.

Substantial Irreparable Harm. The unexpected addition of the SIH provision to the definition of unnecessary or undue degradation at § 3809.5 and § 3809.415(d) in Secretary Babbitt's final rules created an enormous controversy and precipitated legal challenges. SIH was briefly described in Alternative 4, "The Maximum Protection Alternative" in BLM's February 1999 Draft Environmental Impact Statement (EIS). However, SIH was not included in BLM's Proposed Action or Preferred Alternative, nor was it part of the 1999 proposed rules.

From industry's perspective, SIH provided anti-mining groups with a powerful tool with which to supplant the National Environmental Policy Act (NEPA) process and to obstruct proposed mining projects. Industry challenged the legality of SIH. The lawsuits charged FLPMA does not authorize SIH and that adding SIH to the final rules, without giving the public an opportunity to comment, violated NEPA and the Administrative Procedures Act. The mining industry also argued the SIH provision was inconsistent with the findings in the NRC Report, and thus violated Congressional mandates that the final rules had to be consistent with this report. In a related decision, Department of the Interior Solicitor, William Myers, issued an Opinion on Oct. 23, 2001 (M-37007) that served as part of the legal foundation for deleting SIH from the Norton rules. The Solicitor's Opinion concluded that "relevant legal authorities required removal of the SIH criterion from the definition of unnecessary or undue degradation in § 3809.5 of the 2000 regulations." (Solicitor's Opinion M-37007, page 15).

Environmental Performance Standards. The 3809 performance standards establish sideboards for determining the adequacy of environmental protection and compliance with the unnecessary or undue degradation standard.

The Babbitt 3809 regulations included detailed, prescriptive performance standards. Mining interests challenged those performance standards, and justified their opposition by referencing the NRC Report's finding that regulations should be based on a site-specific evaluation process rather than on inflexible, technically prescriptive, one-size-fits-all standards, (NRC Report, page 5).

The Norton 3809 regulations respond to the NRC's recommendation by combining the 1980 and the Babbitt environmental performance standards: "Based on the NRC Report conclusion that the existing regulations were generally effective, BLM determined...we should not have adopted an entire new set of environmental performance standards, and that we should reinstate the performance standards from the 1980 rule." (66 Fed. Reg. 66, 54840). In addition to reinstating the 1980 performance standards, however, the Norton final rules retain the general performance standards in the Babbitt regulations at § 3809.420(a) (1)-(5) "because they provide an overview of how an operator should conduct operations under an approved plan of operations...." (66 Fed. Reg. 54840). The Norton rule also retains the acid rock drainage and cyanide leaching performance standards in § 3809.420 (c)(11) and § 3809.420 (c)(12) of the Babbitt rules.

Financial Assurance Requirements. From the beginning of the rulemaking dialogue, nearly everyone agreed BLM should require a reclamation bond for all surface disturbing activities. The need to expand reclamation bonding requirements was a key finding in the NRC Report. Both the Babbitt and Norton final regulations require a reclamation bond that covers 100 percent of the anticipated costs of reclamation for all surface-disturbing activities that go beyond casual use. The new 3809 rules also eliminate the prospective use of corporate guarantees as an acceptable form of financial assurance. On April 12, 2002, BLM reopened the 3809 comment period for 30 days. This latest rulemaking included a specific request for comments on the availability of financial guarantees and other appropriate financial instruments to ensure proper reclamation.

Definition of Operator. The Babbitt 3809 regulations significantly expanded the definition of operator at § 3809.5 from "..a person conducting or proposing to conduct operations" to "..any person who manages, directs, or conducts operations under this subpart, including a parent entity or an affiliate who materially participates in such management, direction or conduct." The Norton 3809 regulations reinstate the original operator definition, "operator means any person who is conducting or proposing to conduct operations," and remove the references to parent entities and affiliates. In explaining this change, BLM determined the expanded definition in the Babbitt rules would authorize BLM to breach the corporate veil that is generally established under state corporate laws to protect parent entities and affiliates. Instead, BLM decided to rely on established state common law principles to hold the appropriate entity liable.

Joint and Several Liability. The Babbitt rules named mining claimants and operators jointly and severally liable for reclamation and other obligations that accrued while they held their interests. The Norton rules delete any references to joint and several liability, noting this was unfair because it failed to recognize that claimants or operators may hold varying portions of ownership and cleanup responsibility. BLM also expressed the concern that imposing joint and several liability may exceed BLM's authority. The Norton rules clarify mining operators, including claimants, are responsible for the full cost of reclaiming obligations that accrue while they hold their interests. This change effectively reinstates this aspect of the 1980 rule in order to remain consistent with common law practices and to avoid creating a new regulatory standard of joint and several liability.

Civil Penalties. The Babbitt 3809 regulations authorized enforcement orders to suspend or revoke noncompliant Plans of Operation and problematic Notices of Intent, and allowed BLM to issue a $5,000 per day discretionary

civil penalty for violations. The Norton rules withdrew the civil penalties provision because BLM determined its legal authority to impose civil penalties was uncertain at best. Secretary Norton's October 2001 letter to Congress specifically asks legislators to amend the mining law to authorize administrative penalties.

The Relationship Between the 3809 Rulemaking and the Debate About Amending the Mining Law

The final 3809 rules strengthen the environmental regulations for hardrock mining, thereby addressing many of the environmental issues raised in past legislative debates about amending the Mining Law. Thus, significant progress has been made towards achieving Secretary Babbitt's goal to amend the Mining Law through the 3809 rulemaking process. However, three key Mining Law policy issues remain unresolved: 1) whether patenting should be preserved, modified, or abolished; 2) payment of a federal royalty; and 3) establishing a fund to clean up abandoned mines. In her Oct. 25, 2001 letter, Secretary Norton asks Congress to amend the Mining Law by enacting changes to address these issues, to authorize administrative penalties, and to expand the States' role in managing the mining program.

There remain significant policy disputes and political challenges in developing Mining Law legislation that both the House and the Senate will pass and the president will sign. The political dynamics may be so difficult and complex, that the only way to amend the Mining Law in the near future is through piecemeal administrative changes like the 3809 rulemaking.

MINING AND TAKINGS LAW – TWO ARTICLES ON UNSUITABILITY AND NUISANCES

MACHIPONGO LAND & COAL CO. AND *R.T.G., INC.*: WHEN IS AN AREA UNSUITABLE FOR MINING A REGULATORY TAKING AND WHEN IS IT NOT?

Joel R. Burcat
Julia M. Glencer

The law of regulatory takings remains in constant flux. Determinations by the United States Supreme Court seem to point the way in which the high Court will proceed, only to be contradicted a short while later by the same Court. The states, perhaps confused by the United States Supreme Court's inability to forge a definitive statement of the law, when reviewing cases with almost identical factual patterns, are now going in opposite directions, despite application of identical Federal Constitutional principles.

Two recent decisions of the high courts in Pennsylvania and Ohio exemplify this unfortunate pattern. These states share more than a geographic border; they boast a similar past in relation to the prevalence and importance of coal mining. Pennsylvania and Ohio also share a similar legal framework – one that recognizes and protects the coal estate as a separate and valuable interest in land. The two states recently parted ways, however, when their high courts reached polar opposite conclusions in factually similar cases where an aggrieved landowner alleged a regulatory taking of property interests in coal. In both cases, the affected landowner challenged a regulation designating certain portions of their property unsuitable for mining as an unconstitutional regulatory taking. In *Machipongo Land and Coal Company Inc. v. Commonwealth Department of Environmental*

Protection, 569 Pa. 3, 799 A.2d 751 (2002), *cert denied* 123 S. Ct. 486 (2002), the Supreme Court of Pennsylvania refused to define the vertical component of the "relevant parcel" – a key concept in the law of regulatory takings – to include only the coal estate. In *State ex. Rel. R.T.G., Inc. v. The State of Ohio*, 98 Oh.3d 1, 780 N.E.2d 998 (2002), *reconsideration denied* 98 Oh.3d 1401, 781 N.E.2d 220 (2003), the Supreme Court of Ohio reached the opposite conclusion.

I. *Machipongo*

A. Background

The *Machipongo* litigation involved two landowners. One, the Machipongo Land and Coal Company, Inc., held approximately 1,000 acres of land in Clearfield County, Pennsylvania. The land was purchased in the early 1900's by the grandfather of Machipongo's current vice-president, and held for the purpose of coal mining. 799 A.2d at 756-757. The second landowner, the Victor E. Erickson Trust and Joseph Naughton (collectively, Erickson/Naughton), owned approximately 1,150 acres in Clearfield County. The land was held jointly, with Naughton holding a 1/5 interest and Victor E. Erickson (who ultimately placed his interest in a trust) holding the other 4/5ths interest. *Id.* at 757.

In 1989, the Brisban Recreation Board and Locust Grove Sportsmen Club filed a petition with the Pennsylvania Department of Environmental Resources (DER) seeking to have the Goss Run Watershed (Watershed), located in Clearfield County declared unsuitable for mining under the authority of Section 4.5(b) of the Surface Mining Conservation and Reclamation Act. *Id.* at 756. The original petition covered 1,830 acres, and included land owned by Machipongo and Erickson/Naughton (collectively "Coal Owners"). The purpose of the petition was to create a recreation area and stocked trout fishery for nearby residents. Coal mining, it was alleged, would adversely impact the quality of the water in Goss Run, which fed into the Brisban Dam.

After the Department completed its study, it recommended to the Pennsylvania Environmental Quality Board that certain areas of the Watershed be declared UFM. *Id.* at 758. The recommendation did not cover all of the areas identified in the petition but rather, excluded the area of two surface mines already in operation. Two other mines were also located within the vicinity of the area covered by the Department's recommendation. The ensuing regulation, issued by the Environmental Quality Board, covered 555 acres and took effect on May 23, 1992. The regulation was eventually set forth in 25 PA. CODE §86.130(b)(14).

B. Procedural History

After the regulation took effect, Coal Owners filed a petition for review in the Commonwealth Court of Pennsylvania, claiming that the UFM designation worked a regulatory taking of their property. For eight years, the parties engaged in procedural skirmishing related to the Department's repeated attempts to have the case dismissed. *See Machipongo Land & Coal Co. v. Commonwealth, Department of Environmental Resources,* 155 Pa. Cmwlth. 72, 624 A.2d 742 (1993) (*Machipongo I*) (referring the claim to the Pennsylvania Environmental Hearing Board under the administrative agency doctrine of primary jurisdiction); *rev'd in part*, 538 Pa. 361, 648 A.2d 767 (1994) (*Machipongo II*) (directing the case to the Court of Common Pleas, Clearfield County), *modified*, 544 Pa. 271, 676 A.2d 199 (1996) (*Machipongo III*) (remanding to the Commonwealth Court for further proceedings), *on remand*, 719 A.2d 19 (Pa. Cmwlth. 1998) (*Machipongo IV*) (denying the

Commonwealth's motion for summary judgment and setting forth the issues for trial). Finally, a trial was held before a single judge of the Commonwealth Court in January 2000.

1. Crafting a Test – Commonwealth Court's Summary Judgment Decision

In a prior decision (subsequently used by the court and the parties as a road map for trial), which denied the Commonwealth's motion for summary judgment, a panel of the three judges of the Commonwealth Court devised a test to determine the relevant parcel to be used in conducting the takings analysis. 719 A.2d 19 (Pa. Cmwlth. 1998).

The Commonwealth Court first addressed how it would identify the horizontal aspect of the property to be analyzed. Coal Owners argued that the court should consider only the land they owned inside the UFM designation. The Commonwealth argued that that all of Coal Owners' land – land both inside and outside the UFM designation – should be considered and that only this approach was consistent with *Penn Central*'s parcel as a whole rule. The Commonwealth Court considered each of the parties' proposed tests plus a third it distilled from case law, which considered a multitude of factors. *Id*. at 26-28. The multi-factored approach would have considered: "whether the landowner had investment-backed expectations, whether any land that could be part of the denominator was sold or developed prior to the regulation's enactment or enforcement, the dates of acquisition, the extent to which the parcel had been treated as a single unit, and the extent to which the protected land enhances the value of the remaining land." *Id*. at 27. The court ultimately crafted its own modified related land approach – unique in the law of takings:

> [T]he property interest by regulation approach is the best one to determine the denominator, but with some important modifications . . . while the regulated land would first be considered under this approach, to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions:
>
> - whether the regulated land had value prior to the regulation;
> - whether the regulated land has a separate use from the non-regulated contiguous parcel(s) – *i.e.*, whether it may be profitably used if it is the only parcel; and
> - if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.
>
> If the regulated land had no value prior to the regulation because it had no viable use, it could not serve as the denominator . . . if the regulated land had an economically viable use separate and apart from any other contiguous land that was owned and became valueless after the regulation, it would become the denominator . . . This approach is best because it fosters predictability, focuses on the effect of the governmental regulation on the property and not on the circumstances of the property owner, and results in fairness because it treats all property owners the same. 719 A.2d at 28 (footnotes omitted).

The Commonwealth Court next addressed the vertical aspect of the property to be considered. The Commonwealth argued that Coal Owners' coal rights in the property were

but one strand of a bundle of rights owned. As the court acknowledged, "[i]f we were to do so, there would be no taking because Coal Owners do not dispute that they have surface rights that can be used and they would not be deprived of all economically beneficial use of their land." *Id* at 28. Coal Owners argued, however, that only the coal estate, which was recognized in Pennsylvania law as a separate estate in land, should be considered. The Commonwealth Court agreed to use only the coal estate, because, as it explained:

> [i]n most other states, coal estates are not treated as separate estates from surface estates. However, Pennsylvania is unique from other states in that it has long recognized three separate estates in land – surface, coal/mineral and the right of support. All three estates may be owned separately and taxed separately … [o]wners of coal estates that do not own the surface rights have the right to remove the coal by using portions of the surface as reasonably necessary to remove the coal. *Because separate estates create separate interests*, the appropriate denominator by which to determine whether Coal Owners have lost all viable economic use of their land is *solely the coal estate* in the UFM designated area. *Id*. at 28-29 (internal citations omitted, emphasis added).

Importantly, in light of the Pennsylvania Supreme Court's later treatment of the vertical aspect of the takings analysis, the Commonwealth Court cited the United States Supreme Court's decision in *Keystone*, noting that the high court had, in that case, tied the support estate to either the surface or the mineral rights. The Commonwealth Court noted, however, "we need not address here whether the Supreme Court's interpretation of Pennsylvania law in this area is accurate." *Id*. at 29 n.24.

> The Commonwealth Court then set forth the takings test in easy to understand terms:
>
> In this case, using the regulated land standard to determine whether there is a taking would result in the following fraction:
>
> $$\frac{\text{the interest in the land taken (numerator)}}{\text{the regulated land (denominator)}}$$
>
> If the result of the fraction is 1, then a taking has occurred; conversely, if the fraction is anything less than 1, no compensatory taking has occurred [.] *Id.* at 29.

Having established the property interests it would consider in applying the takings analysis, the Commonwealth Court then identified the remaining issues of fact to be determined at trial:

> To make that [takings fraction] calculation, it must be determined if the coal estate had value prior to the UFM designation, whether it had a separate use from the non-regulated contiguous land Coal Owners owned, and whether all of its economic benefit was gone as a result of the regulation. If, after that determination is made, the result of the fraction is less than 1, then a taking has not occurred. In this case, *specific evidence would have to be adduced* as to whether the coal can be extracted by subsurface mining; whether the land in the regulated area cannot be surface mined without using the contiguous parcel; and whether the grade of coal is insufficient in amount or

> quality to economically mine. With that evidence, the denominator can be fixed and we can then determine whether the regulation has resulted in an unconstitutional taking[.] *Id.* at 29.

In another critical pre-trial ruling, the Commonwealth Court prohibited the Commonwealth from "introduc[ing] evidence [at trial] on the issue of whether Coal Owners' proposed mining activities constitute a public nuisance, except to the extent that Coal Owners would be denied a permit to mine coal under the Surface Mining Act or the regulations promulgated thereunder." As the court explained, "[a]t common law, Coal Owners could not have been prevented from mining the coal reserves on their property. Even though this is now a regulated activity that requires coal owners to alleviate the deleterious effects, as the Commonwealth and Coal Owners have stipulated, '[t]he right to mine the coal is a property [right] that inheres in [Coal Owners] title subject to obtaining a permit from the Department.'" *Machipongo*, slip op. at 8 (unpublished opinion, Oct. 28, 1999). Thus, since mining is not a nuisance per se under Pennsylvania law, evidence regarding nuisance would be limited at trial.

2. The Trial

At trial, Coal Owners presented their takings claims in the form of three proposals: the Erickson/Naughton surface mine, the Machipongo surface mine and the Machipongo deep mine. The three proposals were designed to access the coal reserves in accordance with the laws and regulations of Pennsylvania, and to limit the adverse environmental effects of mining on the Goss Run Watershed. Coal Owners presented evidence that significant coal reserves underlay the areas of the proposed mines, and that these proposed mines could be readily, easily and profitably mined.

In August 2000, the Commonwealth Court issued an adjudication which invalidated the UFM designation as applied to the Erickson/ Naughton surface reserves and the Machipongo underground reserves, finding both reserves to be substantial, valuable and economically mineable. The decision (*Machipongo VI*) was unreported. *Machipongo VI*, slip op. at 23-24. The court refused to invalidate the designation as to the Machipongo surface reserves, finding them insufficient in quantity to sustain mining. *Id.* at 24. The order suggested that any damages for the temporary taking could be recovered "through the normal eminent domain process.", *Id*. at 38. The taking was characterized as "temporary" because the court's order had struck down the regulation thereby imposing an end point on the taking.

The Commonwealth appealed and Coal Owners cross-appealed to the Pennsylvania Supreme Court.

C. The Pennsylvania Supreme Court Decision

The Supreme Court of Pennsylvania (hereinafter "*Machipongo* Court") first summarized the two tests used to assess regulatory takings claims – *i.e.*, the categorical takings analysis of *Lucas* and the partial takings analysis of *Penn Central*. It noted that, under either test, identifying the relevant parcel was the critical threshold issue. 799 A.2d at 765.

The *Machipongo* Court acknowledged that the case before it involved two severance issues: 1) the horizontal, the physical division of property – "is the relevant parcel all the land in a given geographic area that one owns or some smaller portion of that acreage," and 2) the vertical division of property – "can the parcel be divided among air rights, surface rights, and mineral rights."

1. The Vertical

The *Machipongo* Court set forth the linchpin of its analysis of the vertical context in the first paragraph of its discussion on "Vertical Conceptualization of Property":

> The U.S. Supreme Court has expressly rejected Pennsylvania's division of estates within a single parcel of land for the purposes of takings analysis. Specifically, the [*Keystone*] Court stated:
>
> > Pennsylvania property law is Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate. Petitioners therefore argue that even if comparable legislation in another State would not constitute a taking, the Subsidence Act has that consequence because it entirely destroys the value of their unique support estate. *It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.*

Id. at 766 (quoting *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 500 (1987) (emphasis in the original).

The *Machipongo* Court then cited *Penn Central* and its parcel as a whole language, viewing the case as a another example in which the United States Supreme Court refused to separate out of the bundle of rights a singular strand – there, the air rights.

The *Machipongo* Court acknowledged that footnote 7 in *Lucas* and language in *Palazzolo* revealed that some Justices have "misgivings about whether to apply that [the parcel as a whole] test in all situations," but nonetheless, the *Machipongo* Court believed that the United States Supreme Court had recently reaffirmed the validity of the parcel as a whole rule in *Tahoe-Sierra*, and that it remained controlling. *Id*. at 767-768. It summarized its rationale for rejecting the Commonwealth Court's conception of the vertical as solely the coal estate in the UFM designated area:

> As we have noted above, the U.S. Supreme Court has not instructed conclusively how the denominator problem should be resolved. However, that Court has refused to allow: vertical severance of the mineral estate in Keystone; vertical segmentation of the air and surface rights in Penn Central; or temporal division of property in Tahoe-Sierra. Thus, in this case, the relevant parcel cannot be vertically segmented and must be defined to include both the surface and the mineral rights. *Id.* at 768.

2. The Horizontal

In defining the horizontal context of the relevant parcel, the *Machipongo* Court rejected the approach offered by the parties and by the Commonwealth Court. It disparaged the Commonwealth Court's approach (*i.e.*, only the coal estates within the UFM designated area) as under-inclusive and the Commonwealth's approach (*i.e.*, all of Coal Owners' property in Clearfield County) as over-inclusive. 799 A.2d at 768. Instead, the *Machipongo* Court adopted what it called a "flexible approach, designed to account for factual nuances," largely derived from takings decisions of the Federal Circuit. A non-exclusive list of factors was suggested, including:

> unity and contiguity of ownership, the dates of acquisition, the extent to which the proposed parcel has

> been treated as a single unit, the extent to which the regulated holding benefits the unregulated holdings, the timing of transfers, if any, in light of the developing regulatory environment, the owner's investment-backed expectations and, the landowner's plans for development.

Id. (citing *Loveladies Harbor, Inc*. *v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994); *Florida Rock Industries v. United States*, 791 F.2d 893, 901 (Fed. Cir. 1986)); *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 879 (D.C. Cir. 1999)).

The *Machipongo* Court determined, however, that because the record did not contain information pertaining to some these factors, a remand was in order to allow the Commonwealth Court to determine, in the first instance, the appropriate horizontal conceptualization of the property. *Id.* at 769.

3. Application of the Takings Tests

Having set forth the governing principles of severance, the *Machipongo* Court then analyzed the case in terms of the two takings tests. It first addressed the *Lucas* – categorical takings test, noting that "[t]o conduct a *Lucas* analysis, we need to determine whether the subject regulation 'deprives a landowner of all economically beneficial' use of his or her property." *Id.* Notwithstanding the remand for the Commonwealth Court to define the horizontal component of the relevant parcel, the *Machipongo* Court determined that it could apply the *Lucas* test to the Machipongo property. Specifically, in rejecting the claim, it reasoned:

> [Coal Owners] conceptualize this case as a *Lucas* categorical taking. They claim that because they own coal estates in the UFM area and are not permitted to mine that coal, all of their interest in the land has been taken. … As we have stated, though, the relevant parcel must be defined to include both the surface and mineral rights of the parties. …Machipongo owns 373 acres in fee simple within the UFM area and 1000 acres outside of the UFM area. Machipongo owns surface rights as well as mineral rights… Machipongo admits that it benefits from its surface rights by selling timber and entering into leases for gas development …[i]n 1994, …Machipongo received $60,000 for 35.93 acres of its property…if Machipongo sold the remaining 373 acres of undeveloped land within the UFM area …it would earn, in 1994 dollars, at least $622,878. Clearly, the regulation does not deny Machipongo 'all economically beneficial' use of its property. Accordingly, we find that the regulation, as it relates to Machipongo, passes the *Lucas* test. *Id*. at 769-770 (internal record citations and case citations omitted).

For the Erickson/Naughton property, the *Machipongo* Court was unable to conduct the *Lucas* analysis due to an ambiguity in the record as to whether both surface rights and coal rights or just coal rights were held. The Court noted that "[t]his would appear to distinguish them from the Machipongo property owners." 799 A.2d at 770. The case was remanded for the Commonwealth Court to conduct the Lucas test on the Erickson/ Naughton property once the interests held and the horizontal extent of the property were defined. *Id.*

Because "the regulation, as to Machipongo (and possibly to Erickson/Naughton) survives

Lucas, a traditional takings analysis [*i.e.*, a *Penn Central* – partial takings analysis] must be performed." *Id.* As the Commonwealth Court had defined the case in terms of *Lucas*, focused on the coal estates, and limited the inquiry at trial to economic mineability, the Machipongo Court found the record was devoid of information pertaining to the three *Penn Central* factors. *Id.* at 771. Thus, a remand was in order to permit the Commonwealth Court to conduct the analysis in the first instance.

Ultimately, the *Machipongo* Court remanded the case back to Commonwealth Court for a determination on four issues, which would lead to a determination on whether or not there had been a taking:

> [The case is remanded to:] (1) horizontally define the relevant property; (2) conduct the *Lucas* analysis with regard to the property of the Naughton/Erickson Property Owners; (3) conduct the *Penn Central* analysis with regard to the property of both Property Owners; and, if necessary, (4) determine whether the proposed use would constitute a nuisance or would otherwise violate state property law. *Id.* at 775.

D. The Aftermath

Coal Owners filed a petition for a writ of certiorari with the United States Supreme Court. In seeking discretionary review, they contended, *inter alia*, that the Supreme Court of Pennsylvania erred in its conceptualization of the vertical and horizontal components of the takings denominator. Specifically, regarding the vertical component, Coal Owners argued that the state court had misinterpreted the United States Supreme Court opinion in *DeBenedictis* and ignored its own precedent recognizing and protecting separate estates in property. As for the horizontal component, Coal Owners argued that the test adopted, which differentiates between property owners according to the amount of land held, was inherently unfair. The petition repeatedly stressed the need for the United States Supreme Court to finally clarify the law. The petition was denied on Nov. 4, 2002. *Machipongo Land & Coal Co. v. Pennsylvania, et al*., 123 S.Ct. 486 (2002).

Pursuant to the *Machipongo* Court's remand, Coal Owners and the Commonwealth continue to litigate the case, more than ten years after the petition for review was first filed.

II. *R.T.G.*

A. Background

In the 1980's, R.T.G., a coal mining company, began investigating whether it could viably conduct surface mining on land located in Valley Township, Ohio. After test-drilling revealed the presence of high quality coal, R.T.G. acquired approximately 500 acres of property *in* the area. *R.T.G*. 780 N.E.2d at 1001. R.T.G. held the property in two ways: approximately 200 acres were held in fee (meaning that R.T.G. owned both the surface and the coal rights); in the other 300 acres, R.T.G. owned or leased only the coal rights. *Id*. The Ohio Supreme Court noted that because the record was unclear regarding the exact amount of property held in each category and whether it was inside or outside the regulated area, the acreages cited in the opinion were estimates. *Id*. n.1.

R.T.G. subsequently sought a permit from the state of Ohio to mine 21.8 acres of its property. *Id.* at 1002. Because the land was located close to a well field providing water to the nearby Village of Pleasant City, the Ohio Department of Natural Resources, Division of Reclamation required R.T.G. to determine,

through the installation and testing of monitoring wells, whether mining would interfere with the water supply. On May 20, 1986, after a pump test clarified that the monitoring wells were in a different acquifer than the village's wells, the state issued a mining permit. *Id*. R.T.G. then spent a substantial sum preparing the land for mining. *Id.* Specifically, R.T.G. spent $100,000 to build a sedimentation pond, establish drainage controls, remove and segregate topsoil, and construct roads and a ramp to facilitate excavation. *Id.* On June 5, 1987, the permit area was revised to include an additional 77.2 acres adjacent to the original permit area. In revising the permit, the state agency found that ground water monitoring had not indicated any changes in the quality or quantity of the water in the Village wells.

In September 1988, the United States Environmental Protection Agency designated the aquifer supplying water to the Village as a "sole-source aquifer." Soon after, the Village petitioned the state agency to designate 833 acres of land in Valley Township unsuitable for mining. In support of its petition, the Village alleged that mining would adversely affect the aquifer. The Department of Reclamation, agreeing that mining could ultimately reduce the long-term productivity of the Village wells, designated approximately 275 acres UFM. *R.T.G*., 780 N.E.2d at 1002. A portion of R.T.G.'s land was included in this designation, prompting the company to appeal the designation to the Ohio Reclamation Board of Review. The Village, dissatisfied that not all of the land was designated, also appealed. In June 1994, the Board designated all 833 acres UFM, thereby preventing R.T.G. from mining most of its property. *Id.* In the meantime, R.T.G.'s mining permit was revised to permit mining on an additional 8.4 acres. *Id*.

B. Procedural History

R.T.G. immediately filed a legal action in state court, alleging a regulatory taking of its land. Specifically, the company sought a writ of mandamus to compel the state to appropriate and pay for the coal it could no longer mine. The complaint was initially dismissed by the trial court, but on appeal, the Tenth District Court of Appeals reversed and remanded the matter for a hearing. R.T.G. then dismissed its initial complaint, and asked the Tenth District Court of Appeals to issue a writ of mandamus compelling the state to initiate appropriation proceedings. *Id.* at 1002-1003.

The matter was referred to a magistrate, before whom the state filed a motion for judgment on the pleadings. *Id.* at 1003. As a precursor to conducting the takings analysis, the magistrate divided R.T.G.'s land into two parcels – one, consisting of tracts owned in fee within the UFM designated area, and the other, land in which R.T.G. owned or leased only coal rights within the UFM designated area. *Id.* at 1003. The magistrate then applied a different takings test to each parcel. For the land owned in fee, the magistrate applied the partial takings test of *Penn Central* and determined that even though the UFM designation deprived R.T.G. of its ability to mine the coal, no taking had occurred because the surface estate still retained some value. *Id.* To the land in which R.T.G. owned or leased only coal rights, the magistrate applied the *Lucas* categorical takings test and determined that R.T.G. had been completely deprived of the value of its coal rights. Despite the latter finding, because the magistrate also determined that coal mining would constitute a nuisance, no compensation for the taking of R.T.G.'s coal rights was awarded. *Id.*

The Tenth District Court adopted the magistrate's decision in its entirely except for the nuisance finding. Ruling that mining was not a nuisance, the appellate court issued a writ of mandamus compelling the state to appropriate the land in which only coal rights

were taken, *id*. at 1003-1004. The state appealed. R.T.G. cross-appealed that portion of the judgment requiring the state to begin appropriation proceedings. *Id*. at 1004. R.T.G. also filed a separate appeal of the order denying its request for attorneys fees and costs.

C. The Ohio Supreme Court Decision

The Ohio Supreme Court [hereafter "*R.T.G*. Court"] first differentiated between the partial and the categorical takings tests. *Id*. at 1007. Then, echoing *Palazzolo*, it acknowledged that determining the relevant parcel was a "persistent and difficult issue," and a critical one "because it usually determines the applicable takings test:" Thus,

> [t]he more broadly the relevant parcel is defined, the less likely that a regulation will result in a complete economic deprivation and that the Penn Cent[ral] test will apply; conversely, the more narrowly the relevant parcel is defined, the more likely that a regulation will result in a complete economic deprivation and that the Lucas test will apply. *Id.*

The *R.T.G*. Court then proceeded to consider how appropriately to define the relevant parcel in the case before it.

1. The Vertical

The *R.T.G.* Court first addressed the vertical component of the relevant parcel. R.T.G. argued, and the *R.T.G*. Court agreed, that the relevant parcel in the vertical context should be defined to *exclude* rights retained in the surface estate. 570 N.E.2d at 1007. The *R.T.G.* Court traced the evolution of the *Penn Central* "parcel as a whole" concept, noting that some of the United States Supreme Court Justices had expressed misgivings about it and had decried the uncertainty it had created. *Id.* at 1008. It then quoted footnote 7 of *Lucas* – to wit, that "the solution to the difficult issue of determining the denominator 'may lie in how the owner's reasonable expectations have been shaped by the State's law of property …'". *Id*. (quoting *Lucas*, 505 U.S. at 1017 n.7). Acknowledging that the *Lucas* language was *dicta*, the *R.T.G*. Court nonetheless explained that "property rights are defined by state law." From there, it analyzed Ohio property law on the coal estate:

> We find that the criticism in *Lucas* regarding how to define the relevant parcel for the takings analysis particularly relevant to coal rights in Ohio. Unlike other individual rights within the bundle of rights that make up a complete property estate, *mineral rights are recognized by Ohio law as separate property rights*. Therefore, because the ownership of the coal is 'both severable and of value in its own right, it is appropriate consider the effect of regulation on that particular property interest.' Accordingly, in determining the relevant parcel in the takings analysis pursuant to the Takings Clause of the Ohio Constitution, Section 19, Article 1, coal rights are severable and may be considered as a separate property interest if the property owner's intent was to purchase the property solely for the purpose of mining the coal. *Id*. at 1008 (emphasis added).

It was undisputed that R.T.G. held *all* of the property at issue – "whether in fee or through coal leases or purchases" – for the *sole* purpose of mining. *Id*. at 1008-1009. As the *R.T.G*. Court aptly stated, drawing on the pithy conclusion of *Whitney Benefits*: "The surface rights served as nothing more than an impediment to acquiring the coal. Thus, the

right to mine the coal 'is what, and only what, this suit is about.'" *Id*. at 1009 (quoting 926 F.2d at 1174). In analyzing the regulatory takings claim, the Court pledged to consider only the coal rights in the vertical context.

2. The Horizontal

R.T.G. asked that only the property located within the UFM designation be considered in fixing the denominator. The state, citing the parcel as a whole rule, urged consideration of all 500 acres of R.T.G's property. Again, the state's conception of the rule was rejected.

The *R.T.G*. Court explained that of the 500 acres at issue, approximately 100 acres were located outside the UFM designated area. R.T.G. admitted that coal existed in this land, but claimed that, if it was prevented from mining the coal *inside* the UFM designated area, it would not mine the minimal area *outside* the UFM area, for "economy of scale" reasons. 570 N.E.2d at 1009. On this record, the *R.T.G*. Court held, "[b]ecause there is no evidence that the coal outside the regulated area can be economically mined independent of the reserves in the regulated area, … the relevant parcel in the horizontal context is limited …to R.T.G.'s coal that is located within the UFM designated area." *Id.*

3. Application of the Tests

Putting its analysis together, the *R.T.G.* Court held that "the relevant parcel in this case is the remaining coal located within the UFM designated area." *Id.* With the denominator so defined, the Court easily concluded that a taking had occurred:

> 'What makes the right to mine coal valuable is that it can be exercised with profit.' The UFM designation makes it impossible for R.T.G. to mine coal, thereby depriving R.T.G. from exercising its coal rights for profit. Thus, imposition of the UFM designation deprived R.T.G.'s coal rights of all economic value. Accordingly, applying *Lucas*, we hold that the UFM designation resulted in a categorical taking of R.T.G.'s coal rights. *Id*. (quoting *Mahon*, 260 U.S. at 414).

And, because the *R.T.G*. Court adopted the lower court's conclusion that mining did not constitute a nuisance, the taking was determined to be a compensable one. Thus, in the subsequent appropriations proceedings, "the value of R.T.G.'s coal within the UFM designated area will be the sole issue to be determined." *Id*. at 1011.

The Ohio Supreme Court subsequently denied a petition for reconsideration, with two dissenting from that decision in an unreported memorandum. (Moyer, C.J., and Cook, J., dissenting from the denial of reconsideration). The State of Ohio allowed the deadline for a petition for certiorari to pass, so the *R.T.G.* determination is final.

III. Conclusion

The Courts seem incapable of agreeing on when government action relating to severe restrictions on mining is a taking. Depending upon which jurisdiction you are in, sometimes it is and sometimes it is not. The results of *Machipongo* and *R.T.G.* exemplify two different approaches to takings. This continuing difficult issue may yet be resolved by the United States Supreme Court. Stay tuned.

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IS MINING A NUISANCE AFTER *LUCAS*?

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Introduction

Takings law has long recognized that landowners do not have unlimited property rights. Governmental exercise of police power to protect public health, safety, and welfare was traditionally seen as an implied limitation on an owner's title. *See Mugler v. State of Kansas,* 123 U.S. 623, 665 (1887). Common law nuisance was one area where the exercise of police power was justified as protecting public health and safety while not altering customary tort law limitations upon landowners. *Id.* at 669; *accord, e.g., Keystone Bituminous Coal Ass'n v. deBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 1245-46 & n.22 (1987) (citing cases).

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), reviewed its precedent on "noxious use logic." *Lucas* developed an expanded rule of decision regarding land uses proscribed under "background principles of state law" and therefore not qualifying as protected property rights. While the traditional nuisance exception survived *Lucas,* its specification has arguably expanded due to environmental regulation. Currently, the *Lucas* nuisance exception functions as a threshold defense in takings law although determination of this issue is not necessarily dispositive.

The mining industry has been subject of substantial litigation involving the nuisance exception, including both the traditional formulation as well as *Lucas'* restatement. This article provides an abbreviated review of the case law and compares mining operations that lose or retain protection according to the nuisance exception. A complete treatment is beyond the purview of this newsletter. Readers are hopefully apprised of issues and authorities addressing the problem for their further reference.

References treating the nuisance exception in takings law include: R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN at 112-131, 198-199 (1987); J. Laitos, LAW OF PROPERTY RIGHTS PROTECTION—LIMITATIONS ON GOVERNMENTAL POWERS § 11.07 (2003); R. Glicksman, *Making a Nuisance of Takings Law,* 3 WASH. U. J. L. & POLICY 149 (2000); and, G. Sugameli, *Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define if There Is a Protected Property Interest*, in T. Roberts, ed., TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, Ch. 7 (2002).

Mining Pursuant to the Nuisance Exception

Two Supreme Court decisions concerning underground coal mining illustrate evolution of the nuisance exception. In 1922, Justice Holmes decided the seminal case *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). *Mahon* first established a rule of constitutional limitation on government regulation without compensation. *Mahon* struck down a 1921 Pennsylvania statute that protected private surface estate against

underground coal mining. A half century later, the Supreme Court sustained a 1966 Pennsylvania statute that required underground coal mining to leave support for the surface estate. *Keystone, supra.*

Mahon addressed Pennsylvania's 1921 Kohler Act. This legislation prohibited mining that caused subsidence under certain structures and authorized an injunction against such activity. The property in question consisted of severed surface and subsurface estates and the coal company had acquired the previously severed "support estate" recognized in Pennsylvania property law. The legislation did not include a statement of public purposes nor any findings that public health, safety or welfare was advanced through the property regulation.

On this record, Justice Holmes determined "a source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common to the public." *Mahon,* 260 U.S. at 413. Furthermore, Holmes found, the legislation "is not justified as a protection of personal safety" and the public interest shown by the statute was limited. *Id.* Regarding the regulatory effects of the Kohler Act, Holmes stated "[i]t purports to abolish what is recognized in Pennsylvania as an estate in land – a very valuable estate," *id.* at 414, and rendered coal mining in certain areas commercially impracticable. *Id.* at 414-15.

By comparison, the legislation reviewed in *Keystone* included declaration of public purposes. These were to provide for conservation of surface land areas affected by coal mining other than the surface method, to aid in preservation of surface water drainage and public water supplies, to enhance property value for taxation purposes, and to aid in protection of public safety, among other purposes. *Keystone,* 107 S.Ct. at 1242. *Keystone* found these public purposes legitimate and further determined the regulatory provisions of the statute to effectuate the stated purposes. *Id.* at 1243 n.16.

Keystone did not turn on public purposes supporting the legislation. Rather, the Court analyzed the purposes within the rubric of character of governmental action. This topic became one of three factors reviewed in the Court's takings analysis following the 1978 decision in *Penn Central Railroad v. City of New York,* 438 U.S. 103 (1978). *Keystone* indicates the nature of the 1966 legislation abated a public nuisance by reference to its precedent on the matter, including *Mugler*. *Keystone, supra,* at 1243-44. *Keystone* also commented that time can change circumstances once considered private concerns to a public interest. *Id.* at 1243. Aside from nuisance classification, *Keystone* can be further distinguished from *Mahon* because the 1966 legislation was found not to render coal mining unprofitable. *Id.* at 1246.

Between *Mahon* and *Keystone,* the Court nominally addressed the nuisance exception in review of a quarry operation. In *Goldbatt v. Town of Hempstead,* 369 U.S. 590 (1962), the court sustained a local ordinance that prohibited sand and gravel extraction within two feet of the watertable. *Goldblatt* is pre *Penn Central* and the record is sparse regarding the impacts of the quarry operation on the public interest and affected community. *Id.* at 591, 595. The ordinance was justified as a safety regulation and the Court sustained the regulation as a valid police power measure, quoting *Mugler. Id.* at 593-95.

Goldblatt noted without discussion that police power regulation need not be limited to a common law nuisance. *Id.* at 593. In this respect *Goldblatt* resonates with Justice Holmes' statement "the legislature may change the common law as to nuisances . . .

although by so doing it affects the use or value of property." *See Commonwealth v. Parks,* 20 N.E. 174, 174 (Mass. 1892). This maxim is further illustrated in *Goldblatt* because the property in question had been quarrying since 1927 while the regulatory activity culminated in a 1959 ordinance prohibiting excavation into the watertable.

If mining activity in the latter part of the nineteenth century is reflective of the common law, then a variety of operations working different deposit types did not qualify as nuisances. In Lindley's treatise on mining, the author surveyed the law in both the public land and eastern states on drainage of mines, pollution impacts, lateral and subadjacent support, and nuisance associated with mining operations. *See* III C. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands,* Title IX, §§ 814, 818-22, 838-41 (3d ed. 1914). Lindley generally found mining to be compatible with the common law unless particular operations violated the maxim *sic utero tuo ut alienum non laedus* ("Use your own property in such a manner as not to injure that of another").

Regarding surface support, Lindley stated that the owner of surface estate had a right of support unless there was a severance of title to the minerals and the right of surface support had been expressly waived or released. The surface owner only had a right to support of the natural surface and not support of structures. Lindley noted legislation abrogating the common law, however there had been no challenges at the time of his treatise. He questioned the constitutionality of such statutes in a manner anticipating *Mahon.* Lindley, *supra,* §§ 814, 818-22.

Regarding pollution from mining operations in riparian jurisdictions, Lindley surveyed the decisions and found no general rule. A reasonable use of water depended upon the circumstances, and this was a question of fact to be determined in each case. *Id.* § 240 at 2063 (citing cases from several jurisdictions).

According to Lindley, the common law adapted in almost all American jurisdictions was that mining could be abated as a public nuisance "[i]f the use of the stream by the miner or upper appropriator is fraught with such detrimental consequences to the waters thereof." *Id.* § 241, at 2074 (citing cases). The weight of the authority also recognized that a nuisance could be enjoined by private persons claiming special injury. *Id.* §§ 241-42.

As with the question of reasonable use of waters, Lindley stated that enjoinable nuisances associated with mining operations turned on the circumstances. Factors to be considered in the equitable proceeding were the permanence of the injury, the consequences flowing from the injury, the economic impact the parties respectively of relief being granted or denied, and the collective interests of the community in the competing water uses. *Id.* § 242. This discussion focused on tailings, solids, and debris as the injury rather than pollution or other fouling of water quality. *See id.*

Examining only the issue of water use in mining, Lindley's analysis of the common law accords with the *Restatement (Second) Torts* §§ 821A- 832 (1977) on the subject of nuisance. Section 832 of the *Restatement* states a conditional rule in regard to water pollution:

> An invasion of one's interest in the use and enjoyment of land or water resulting from another's pollution of surface waters, ground waters or water in watercourses and lakes *may constitute a nuisance* under the rules stated in §§ 821A- 831 of this Chapter (emphasis added).

Lucas Restatement of the Nuisance Exception

In *Lucas, supra,* at 1020-26, the South Carolina Coastal Council sought to protect coastal dunes through a police power prohibition on residential construction. Writing for the Court, *id.* at 1026, Justice Scalia determined the traditional harm prevention rationale was no longer tenable where property was being sacrificed for conservation and there was no showing of nuisance. *Lucas* therefore discarded "noxious use" logic as the principal justification for police power regulation:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not possible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings" – which require compensation – from regulatory deprivations that do not require compensation.

Lucas, supra, at 1026.

Justice Scalia then constructed a separate justification for limitations on property use. According to Scalia, "a logically antecedent inquiry into the nature of the owner's estate" is necessary to ascertain whether a total use prohibition burdened the title acquired. *Id.* at 1027. At this juncture, *Lucas* identified "background principles of the State's law of property and nuisance" as legitimate restrictions on property use. Even where regulatory action is found to eliminate all beneficial use, *Lucas* held the action will be sustained against a takings challenge where the land use was "proscribe[d] . . . under relevant property and nuisance principles." *Id.* at 1029-30.

Justice Scalia then set forth guidance for a "total taking inquiry." *Lucas, supra,* at 1030-31. The Court drew upon the *Restatement (Second) Torts, supra,* at §§ 821- 830 in regard to factors appropriate to the nuisance analysis. The Court noted that prior use is relevant in ascertaining property protection, and that common law principles rarely supported prohibition of the essential use of land. *Lucas, supra,* at 1030-31. With this guidance, Justice Scalia questioned whether construction of a residence on the coastal dunes of South Carolina amounted to a nuisance under that state's law.

Post *Lucas* Decisions Holding Mining to Be a Nuisance

A number of decisions have justified regulation or denial of mining operations on grounds of *Lucas'* restatement of the nuisance exception. *See Appolo Fuels, Inc. v. U. S.* 54 Fed.Cl. 717 (2002); *Rith Energy v. United States,* 44 Fed. Cl. 108, 114-15 (1999) (*Rith I*), *order denying reconsideration,* 44 Fed. Cl. 366 (1999), *aff'd,* 247 F.3d 1355 (Fed. Cir. 2001), *rehr'g en banc denied,* 270 F.3d 1347 (Fed. Cir. 2001); *M & J Coal Co. v. United States,* 30 Fed.Cl. 360 (1994), *aff'd,* 47 F.3d 1148 (Fed.Cir. 1995); *State v. The Mill,* 887 P.2d 993 (Colo. 1994); *Aztec Minerals Corporation v. Romer,* 940 P.2d 1025 (Colo. App. 1996). *See also Atlas Corp. v. U.S.*, 895 F.2d 745 (Fed. Cir. 1900) (pre *Lucas* decision).

Three of these decisions arose under the Surface Mining Control and Reclamation Act (SMCRA). The nuisance activities were identified as threats to public health and safety and were deemed enjoinable. *See Appolo Fuels, supra,* at 720, 735 (municipal water supply and water quality would be adversely affected and water treatment costs would

increase; operations would constitute a "condition of pollution" under Tennessee law and qualified as public nuisance); *Rith I*, *supra*, at 114-15 (toxic materials handling plan was insufficient to prevent acid mine drainage into aquifer; Tennessee water pollution law also applied to find a public nuisance); *M & J Coal, supra*, at 1151-52 (surface subsidence occurred over a four-year period with damage to municipal water tank foundation, state highway, and risk of electrical and gas utility line rupture; cease & desist order issue pursuant to SMCRA § 521(a)(2) analogous to nuisance injunction).

Three additional cases addressed waste contamination consequential of mining operations or disposal of contaminated tailings pursuant to environmental remediation statutes. In these cases, the regulatory authorities required remediation actions and the owners unsuccessfully challenged the requirements as a taking. The decisions consistently ruled that waste generation activities posed health hazards and fell within the traditional "noxious use" regulation or were akin to common law nuisances.

See Atlas Corp., supra, at 757-58 (uranium tailings were radioactive and required stabilization under federal statute; operator's reclamation and stabilization of uranium tailings was not compensable taking according to *Keystone* and *Mugler* because regulation protected public health and safety); *The Mill*, *supra*, at 1001-02 (purchaser of uranium tailings site was prevented from leasing site for commercial use pending reclamation and stabilization; loss of commercial property use not compensable because radioactive wastes were a health hazard and were enjoinable nuisance under Colorado law); *Aztec Minerals*, *supra*, at 1031-32 (cyanide solution from mining operation leached into ground waters and discharged into local stream; environmental remediation requirements were not a compensable taking because contamination was a threat to public health and safety under CERCLA; generation of hazardous wastes was an enjoinable nuisance under Colorado law).

Post *Lucas* Decisions Holding Mining Not to Be a Nuisance

A partial compilation of additional court decisions indicates that mining or pollution discharges will not necessarily constitute an abatable nuisance, and hence, the *Lucas* nuisance exception will not insulate against takings liability. *See Tahoe Sierra Preservation Council, Inc. v. Tahoe Sierra Regional Planning Agency*, 34 F.Supp.2d 1226, 1251-55 (D.Nev. 1999), *aff'd in part, rev'd in part,* 216 F.3d 764 (9th Cir. 2000), *rehr'g en banc denied,* 228 F.3d 998 (9th Cir. 20000, *aff'd,* 535 U.S. 302 (2002); *Florida Rock Industries, Inc. v. United States,* 8 Cl.Ct. 160 (1985) (*Florida Rock I*), *rev'd and remanded,* 791 F.2d 793 (Fed. Cir. 1986), *on remand,* 21 Cl.Ct. 161 (1990), *vacated and remanded,* 18 F.3d 1560 (Fed. Cir. 1994), *on remand,* 45 Fed.Cl. 21 (1999); *Laguna Gatuna, Inc. v. United States,* 50 Fed.Cl. 336 (2001); *see also Whitney Benefits, Inc. v. U.S.*, 18 Cl.Ct. 394, 406 (1989), *aff'd.,* 926 F.2d 1169, 1177 (Fed. Cir. 1991) (pre *Lucas*).

Florida Rock is usually characterized as a wetlands case because the property was regulated under the Clean Water Act (CWA) § 404 dredge and fill requirements. However, the proposed activity was limestone mining beneath the vegetative cover and saturated waters that comprise wetlands. Although the mining operation constituted a "discharge" and generated "pollutants" within the meaning of the CWA, the reviewing courts determined wetlands removal without more did not pollute surface or ground waters. The courts rejected the Corps' defense that wetlands destruction was a nuisance under Florida law and noted that the mining activity had been historically undertaken in the area without incident.

Florida Rock I was auspicious in ruling that the mere presence of pollution should not insulate the government from takings liability under traditional nuisance doctrine:

> Defendant suggests that *Mugler* continues to have force in the circumstances of this case because the proposed use of the property would cause pollution. Defendant argues that there is no right to use one's property so as to harm others and government may therefore prohibit such uses without compensation.
>
> . . . . [S]imple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the fifth amendment. . . . Government may not circumvent the takings clause by defining an activity as pollution and rendering noxious by fiat. Pollution, as that term is normally understood, involves serious adverse physical effects upon the health, welfare or property of others. To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes such harm.

Florida Rock I, *supra*, at 171.

Laguna Gatuna was a successful takings case although the government did not assert the nuisance defense. The owner had leases and permits for produced brine water disposal from oil and gas wells in the Permian Basin. The EPA noticed birdkills at the dry lake bed in New Mexico where the produced waters were disposed. EPA asserted jurisdiction under the CWA, issued a cease and desist order, and basically shut the operation down. While the takings case was pending, the *SWANCC* decision issued, and EPA withdrew its authority. *See Solid Waste Management Agency of Northern Cook County v. U.S. Army Corps Engineers*, 531 U.S. 159 (2001). EPA decided the discharges were isolated waters beyond CWA jurisdiction. Because the agency exercised its regulatory authority over the operation, the court determined a taking had occurred. *Laguna Gatuna* is interesting because the federal government made no attempt to classify the brine disposal as pollution or a nuisance under state law when wildlife losses were observed.

Whitney Benefits, *supra*, rejected the nuisance exception. Though the litigation occurred prior to *Lucas*, the government argued the nuisance exception according to *Keystone* and earlier cases*. Id.* The record in *Whitney Benefits* did not indicate any discharges threatening the public health or safety. *See id.* The regulation confronting the operator was a prohibition of mining alluvial valley floors by the surface method. *See Whitney Benefits, supra*, 926 F.2d at 1169 (citing 30 U.S.C. § 1260 (b)(5)(A)). The reviewing courts determined Congress strived to balance the public interest in agriculture on alluvial valley floors with the need for energy production from coal mining. The courts could not infer from SMCRA's statement of purposes that mining was a nuisance especially since certain operations were grand fathered according to a "valid existing rights" provision. The owner eventually obtained a 61 million dollar damage award (before interest) for permanent taking of mineral property.

Tahoe Sierra is not a mining case but post *Lucas*. *Tahoe Sierra* concerned a management plan directed at preservation of Lake Tahoe, including aesthetic value of clear water. The management plan controlled surface runoff of organic material attributable to land development. The government defended the takings challenge *inter alia* on grounds of the nuisance exception. *Tahoe Sierra*,, *supra*, 34 F.Supp. 2d at 1251. The trial

court found that construction on the regulated lots would generate the targeted runoff, and that such activity constituted "pollution" under state pollution control statutes. *Id.* at 1254.

The trial court carefully reviewed California's statutory scheme for pollution control, including injunctions for nuisance pollution activity, along with California's common law of public nuisance. *Id.* at 1252-54. The trial court determined that surface runoff associated with residential construction and resulting eutrophication of Lake Tahoe did not qualify as a common law nuisance. *Id.* at 1253-54. Whereas the trial court held a *Lucas* taking had occurred, The Ninth Circuit and the Supreme Court reversed and held the regional planning agency was not liable for temporary moratoria on building development.

Comments on the *Lucas* Nuisance Exception

The following comments are offered regarding the *Lucas* nuisance exception:

1) Mining operations that cannot be permitted in compliance with either state or federal requirements for pollution control, landscape stability, or remediation of contaminants – and which pose a threat to public health or safety – will not survive a takings challenge. Such operations will be classified as nuisance under *Lucas*' nuisance exception. Notwithstanding these difficulties, mining has never been considered a nuisance *per se.* Lindley's treatise demonstrates the common law accepted mining in the nineteenth century and that mining was free from the extensive governmental interference of today.

2) The law of nuisance is evolutionary. *Lucas* acknowledges that permissible uses of land may change with times, citing *Restatement (Second) Torts* § 827, comment *g.* *Lucas*, *supra*, at 1031. This principle is illustrated by *Goldblatt* where the quarrying operation over a thirty plus year period became harmful to the town's interests in groundwater preservation. The corollary proposition is that property rights limited by "background principles of the State's law of . . . nuisance" also change. *See id.* at 1026. The normative approach to property is controversial, fills the academic journals, and is beyond the scope here. *Lucas* suggests a conservative position with the statement "[t]he State, by *ipse dixit,* may not transform private property into public property without compensation." *Id.* at 1031.

3) The *Lucas* nuisance exception is not dispositive of takings cases. The analysis arises under character of governmental action or investment backed expectations prongs of the *Penn Central* analysis. Typically, the courts make other findings either supporting no takings liability or in determining takings liability. Most importantly, following Justice O'Conner's concurrence in *Palazollo v. Rhode Island*, 121 S.Ct. 2448, 2465 (2001), the "notice exception" may provide an effective defense to takings liability regardless of whether the property use amounts to a common law nuisance.

4) The nuisance exception in *Lucas* was evaluated for a total prohibition on beneficial use of property. However, post *Lucas* courts have expanded the exception to apply to any takings case wherein the nature of the property use colorably violates the traditional "noxious use" prohibition. Thus, the nuisance exception has been applied in *Penn Central* type cases where a diminution in value is asserted rather than a total deprivation of beneficial use.

5) Compliance with regulatory standards is a factor for determining public nuisance according to *Restatement (Second) Torts* § 821B, comment *f.* Typically, the takings decisions approach the nuisance problem from the standpoint of non-compliance with statutory regulation. *E.g.*, *Appolo Fuels*,

supra; *Rith Energy*, *supra*; *M & J Coal*, *supra.* However, statutory non-compliance should not be dispositive of a nuisance determination. In this regard, *Lucas'* guidance for evaluating the nuisance exception included common law equities and balancing considerations set forth in the *Restatement (Second) Torts.* The post *Lucas* decisions applying the nuisance exception consistently disregard this guidance. As a rationalization, the record in the decisions finding a nuisance may be reconciled with the common law equities and balancing requirements.

6) A defensible argument can be made the *Lucas* nuisance exception should be limited to property uses that pose genuine threats to public health or safety, or otherwise strictly construed as common law nuisances. The nuisance exception should not extend to regulatory violations or permitting denials directed at resources conservation and protection. After all, this was the context in which Justice Scalia discarded "noxious use logic." *Tahoe Sierra, Florida Rock* and *Whitney Benefits* support such limitation. Future proceedings in *Palazollo* may test the issue.

CLEAN WATER ACT UPDATE: § 404 DEVELOPMENTS

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The new year has already seen several significant developments regarding Clean Water Act (CWA) § 404 compliance issues impacting mining operations.

***SWANCC* Fallout**

On Jan. 15, 2003, EPA and the U.S. Army Corps of Engineers (Corps) issued an advance notice of proposed rulemaking (ANPR), 68 Fed. Reg. 1991, requesting public input regarding the proper scope of CWA jurisdiction in the wake of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC*, the Supreme Court held that the Corps lacked § 404 jurisdiction over an isolated, intrastate, non-navigable water – an abandoned gravel pit. The Corps had asserted jurisdiction to protect migratory bird habitat under the auspices of the so-called "Migratory Bird Rule," but the court rejected this rationale, thereby calling into question the validity of agency jurisdiction under other CWA programs as well, namely NPDES (§ 402), oil spill (§ 301), water quality standards (§ 303), and the water quality certification (§ 401) programs.

The ANPR includes a joint guidance memorandum, which states that neither the EPA nor the Corps will assert jurisdiction over isolated, intrastate, non-navigable waters, where the sole basis is any of the Migratory Bird Rule factors (use of the water as habitat for protected migratory birds or endangered or threatened species, and use of the water to irrigate crops sold in interstate commerce). For jurisdictional scenarios based on the other interstate commerce grounds listed in 33 CFR § 328.2(a)(1)(i-iii), the guidance instructs field staff to seek prior formal approval from Corps Headquarters. CWA applicability to wetlands and ephemeral streams and washes are among the controversial issues that should be resolved by the anticipated rule. The comment period on the notice closed April 16, 2003. *See* 68 Fed. Reg. 9613.

Legislation has been introduced in Congress to counteract *SWANCC*. The Clean Water Authority Restoration Act of 2003, introduced Feb. 27, would establish a statutory definition of "waters of the United States" based on the Corps' broad regulatory definition, *see* 33 C.F.R. Part 328; eliminate "navigable" from the

CWA; and include a section of "findings" to explain the Constitutional basis for Congress to assert its authority to the extent expressed by the amendments. *See* H.R. 962.

Mining Waste

Legislation has also been introduced in Congress to amend the definition of "fill material," discharges of which require a § 404 permit from the Corps. The Clean Water Protection Act of 2003, H.R. 738, would nullify the joint EPA/Corps rule issued last year which defines fill material as material which has the *effect* of raising the bottom elevation of a water or converting wet areas to dry land. The unified definition is consistent with EPA's prior position, whereas the Corps' regulatory language had focused on the *purpose* of the discharge. This subtlety fostered a controversy over whether discharges of waste material, such as overburden from mining operations, qualified as fill material subject to authorization by the Corps under § 404, or whether they could only be authorized by an EPA NPDES permit under § 402. Under the division of authority worked out between the Corps and EPA and adhered to over the last 25 years, the Corps handled permits for mining overburden with EPA consultation.

An environmental citizens' group scored a short-lived victory on this issue last year, when a federal district court in Kentucky concluded the Corps lacked authority to issue a permit for a coal mining operation to discharge overburden into stream beds. *See Kentuckians for the Commonwealth, Inc. v. Riverburgh*, 206 F. Supp. 2d 782 (S.D. W.Va. 2002). On Jan. 29, 2003, the Fourth Circuit Court of Appeals reversed, thereby upholding the Corps' authority to regulate and issue permits for such discharges. 317 F.3d 425 (4th Cir. 2003). The court found a "long-standing and consistent division of authority between the Corps and EPA with regard to issuance of permits under CWA § 402 and CWA § 404," with the Corps "authorized to regulate discharges of fill, even from waste, unless the fill amounted to effluent that could be subjected to effluent limitations." *Id.* at 445. The proposed legislation would effectively reverse the Fourth Circuit, EPA and the Corps and require all waste discharges including mining overburden, to be covered by an EPA-issued NPDES permit.

Stay tuned, as the new year could get even more interesting for 404 permittees.

LEGISLATION TO PROTECT SACRED NATIVE AMERICAN FEDERAL LANDS WOULD JEOPARDIZE MINING AND OTHER LAND-DEVELOPMENT ACTIVITIES

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Introduction

Native American traditional cultural values have been considered and protected in federal land management decisions by the Executive Branch and the Congress for many years. However, legislation introduced in 2002 in the 107th Congress, H.R. 5155, to protect vaguely defined "sacred sites" would have radically changed the manner in which Native American values are addressed, and would have done so in a way that would thwart the principles of multiple use which have governed federal land management policy for decades. Similar legislation was adopted by California's General Assembly last year (SB 1828), but vetoed by California governor Gray Davis in September 2002. Yet, new legislation in California was enacted on April 7, 2003 (SB 22) designed to block a proposed gold mine on federal lands near a Native American "sacred site" by requiring compliance with new infeasible mine backfilling requirements.

These legislative efforts are virtually certain to arise again in the near future. This article focuses upon the federal bill H.R. 5155 from the 107th Congress, which may yet resurface in the 108th Congress. There are serious federal preemption issues involving California legislation as applied to federal lands which are beyond the scope of this article.

First, the proposed federal legislation would create new administrative and legal mechanisms for Native American groups and their allies to impede virtually all development activities on federal lands, including mining, oil and gas production, geothermal energy projects, wind farms, and wireless telecommunications, to name just a few. Permitting these activities on federal lands is already a protracted and burdensome process. This proposed legislation would add major new obstacles to a wide range of activities that are authorized and encouraged by other federal laws and policies. Among its novel features was a judicial review provision that authorized not only injunctive relief, but also *money damages* against federal agencies and agency officials.

Second, the proposed federal legislation would have allowed Native American groups to declare that any geographical area or feature is "sacred" by virtue of its alleged cultural or religious significance based on evidence which could include nothing more than oral history. Such claims would be highly subjective and virtually unverifiable. Indeed, the Interior Department under Secretary Bruce Babbitt in 2000 recognized the subjective and unverifiable nature of these allegations in the "3809" hardrock mining rulemaking which sought to establish an administrative "mine veto" power.

The "mine veto" power was determined to be beyond Interior's legal authority in an Interior Department Solicitor's Opinion issued by William Myers on Oct. 23, 2001, and in subsequently amended rules, but H.R. 5155 would have reopened this divisive issue for potentially all undertakings on federal lands.

Chief Justice Marshall stated long ago in *Marbury v. Madison* (1803) that the "government of the United States has been emphatically termed a government of laws not of men." Yet, if a bill like H.R. 5155 were to be enacted, groups of individual Native Americans would have the authority to allege that vast portions of federal lands are sacred to their religious beliefs, and federal officials would be hard-pressed to find such subjective allegations without merit, especially where the previously proposed legislation provided that "[o]ral history shall be given no less weight than other evidence" and actions for money damages may be brought for alleged violations.

Third, if a new Native American "sacred site" veto power is created, the legislation and the resulting processes would be subject to constitutional challenge as an impermissible establishment of religion by the U.S. government and, alternatively, as an unconstitutional taking of private property without just compensation.

Several laws already in place provide for and reflect careful consideration of Native American values in federal land management. These include the National Historic Preservation Act, the Native American Graves Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act, as well as many other site-specific laws establishing parks and wilderness areas, such as the 1994 California Desert Protection Act (discussed below), and the land-use planning and withdrawal authorities of the Federal Land Policy and Management Act of 1976 (FLPMA).

The Impetus for the Legislation

The controversy over the "Glamis Imperial Project," a proposed gold mine on federal lands near Indian Pass in Imperial County, California, was part of the impetus for H.R. 5155. Yet, the alleged "sacred site" around the Project is a prime example of how such proposed legislation could be used by Native American groups to thwart a wide range of development projects across the western United States.

Background

In the late 1980s, Glamis discovered the valuable gold deposit that is now the Imperial Project in rural southeastern California, and has since spent nearly $15 million in exploration, feasibility analysis and permitting efforts to develop an open-pit gold mine that would produce an average of 130,000 ounces of gold per year and would employ over 100 individuals in high-wage jobs. This site is located in an historic gold-producing district, only seven miles from another operating gold mine and six miles from Glamis's own Picacho gold mine that was operated for over 20 years and successfully closed and reclaimed in 2002.

After further mineral exploration in 1991, Glamis filed its original mining proposal with the Interior Department in 1994, and Native American consultations were conducted as required. Two Interior Department-sponsored cultural resource studies were undertaken to determine the nature, if any, of cultural resources at the site, the first in 1991 and the second in 1995. Not until a *third* cultural resource study was conducted in 1997 did assertions arise that the Imperial Project area was considered "sacred" to the Quechan tribe, which has a reservation over 10 miles to the south. Yet, the same tribal historian participated in all three studies.

In 1999, the tribal historian testified before the Advisory Council on Historic Preservation that the site is part of a broad regional trail system running from Arizona to Los Angeles and south to Mexico, encompassing hundreds of square miles. There was no claim that tribal members ever occupied the project site for any substantial length of time, nor is it a burial site. The alleged sacred site was part of an asserted "Trail of Dreams" encompassing a broad region and many hundreds of square miles in southern California. Both the Tribe's attorney and tribal members reiterated the broad scale of concern in testimony and in letters. For example, the Quechan tribal historian testified that:

> It is a region we are discussing. It just so happens that this area, Indian Pass, is right in the path of one of those regions . . . .[T]his trail follows west to the present town of Los Angeles, then down to San Juan Capistrano, then it goes into Catalina Island and trails into Mexico. To this point we don't know how deep into Mexico we went but . . . in this creation history it tells of the Amazon Parrot. So you can imagine how far they went.

Similarly, the Quechan Tribe's legal counsel stated in a letter to Interior's Bureau of Land Management (BLM) that "Quechan sacred lands include the Indian Pass area and clearly encompass the proposed Imperial Project site, but also extend towards the north up to Blythe, towards the south connecting with Pilot Knob, towards the west and the Cargo Muchachos Mountains and east to the Colorado River and along portions of what is now western Arizona." The area described thus spanned hundreds of square miles comprising a major part of southern California.

Significantly, when BLM prepared its Indian Pass Management Plan in 1987, it noted that "there is no evidence that the area is used today by contemporary Native Americans."

Glamis modified its mining plan and otherwise attempted to accommodate the Quechan concerns with mitigation, but has been told that no level of disturbance at the site is acceptable.

The Imperial Project is located on federal land that was open to mineral entry at the time Glamis acquired its mining claims. The area is within the California Desert Conservation Area and has been the subject of intense land-use planning processes, the establishment of 7.7 million acres of park and wilderness areas pursuant to the California Desert Protection Act in 1994, and the creation of large protected areas outside the Imperial Project site to protect Native American cultural values. Following all of these land designations, the Imperial Project area remained open to mineral development and Glamis proceeded with its substantial investment in development.

However, in 1998, Interior proposed a withdrawal of over 9,000 acres of BLM lands surrounding the Glamis project – a withdrawal that became effective in 2000, but was subject to valid existing rights. Then, on Jan. 17, 2001, during his final week in office, former Interior Secretary Bruce Babbitt announced that he had denied the Imperial Project based on a novel legal opinion rendered by his Solicitor. On Nov. 23, 2001, Interior Secretary Gale Norton rescinded the Babbitt denial based on the legal opinion of her Solicitor, which held that Interior had no discretionary power to veto the mine proposal. On Sept. 27, 2002, Interior released a detailed mineral examination report finding the Glamis mining claims to be valid and located in compliance with law.

The 1994 California Desert Protection Act

Ironically, the Glamis Imperial Project controversy arose in an area where the U.S. government had made a major effort to address Native American cultural concerns. The California Desert Protection Act of 1994 (CDPA) provided permanent protections to vast lands of cultural significance to Native Americans. This Act was the most significant federal public land legislation in the past two decades.

The CDPA established major new National Park lands and wilderness areas. The congressional findings reveal that the purposes for which these lands were protected are quite similar to the general concerns being raised in connection with the landscapes affected by the Glamis Imperial Project. For example, the Congress found in 1994 that the designated "desert wildlands display *unique scenic, historical, archeological*, environmental, ecological, wildlife, *cultural*, scientific, educational and recreational *values* . . . ."

The lands set aside for preservation by the CDPA included over 7.7 million acres, the largest wilderness and park area ever designated by Congress in the lower 48 states, encompassing an area larger than the State of Maryland. Notably, the Imperial Project is not within those designated park lands and wilderness areas. Two wilderness areas were designated near the Imperial Project specifically for Native American cultural purposes. They were the Indian Pass Wilderness, which encompasses over 34,000 acres, and the Picacho Peak Wilderness Area, which encompasses 7,700 acres.

BLM studied the wilderness areas in the CDPA extensively pursuant to the wilderness study review provisions of FLPMA. In addition, those studies were conducted by the BLM in coordination with land-use plans developed by BLM pursuant to the provisions of FLPMA dealing with the California Desert Conservation Area (CDCA). In the 1980 California Desert Conservation Area Plan, prepared pursuant to FLPMA, the BLM heavily focused on Native American cultural values

and stated that "these values will be considered in all CDCA land-use and management decisions." BLM's stated goal was to "[a]chieve full consideration of Native American values in all land-use and management decisions."

In the CDPA, Congress acted on BLM's wilderness recommendations and took special steps to ensure that the designated wilderness areas of importance to Native Americans did not prevent traditional cultural and religious use of those lands. The CDPA contained another significant provision that underscores the unfairness of using sacred site allegations to block the Glamis Imperial Project. Section 103 of the Act stated: "Congress does not intend for the designation of wilderness areas in Section 102 of this title to lead to the creation of protective perimeters or buffer zones around any such wilderness area. The fact that non-wilderness activities or uses can be seen or heard from areas within a wilderness area shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area."

Through the CDPA, the Congress settled in a significant and meaningful manner longstanding disputes between competing public land users and interests. Many millions of acres of public lands were permanently set aside for preservation purposes, including Native American cultural purposes. Other areas, including the Glamis Imperial Project lands, remained classified as multiple-use public lands open to the federal mining laws and other management standards that permitted continued development.

Constitutional Concerns

Enactment of the proposed legislation to protect "sacred sites" raises serious constitutional concerns – first and foremost, because of the First Amendment's prohibition of the establishment of a religion by the government. The express purpose of this type of legislation is to protect alleged Native American religious practices and sites. By declaring that certain religious concerns should supersede mining and other development rights, such legislation would clearly have the effect of endorsing Native American religious beliefs. The Supreme Court has repeatedly held that the Establishment Clause requires that "government may not promote or affiliate itself with any religious doctrine or organizations . . . ." *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989). Actions similar to H.R. 5155 have been found by courts to constitute unconstitutional establishments of religion. For example, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Supreme Court held that Indian tribes could not require the government to prohibit timber harvesting in National Forests in order to protect areas used for religious purposes:

> No disrespect for these [Indian religious] practices is implied when one notes that such beliefs could easily require *de facto* ownership of some rather spacious tracts of public property. *Even without anticipating future cases*, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i.e.*, more than 17,000 acres) of public land.

Similarly, the U.S. Court of Appeals for the Tenth Circuit, in *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), explained that administrative action taken to aid religious

conduct on public lands would violate the Establishment Clause. In *Badoni*, the court held that if either the purpose or primary effect of government action is "the advancement or inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution."

The text of H.R. 5155 made it clear that here there was not "a secular . . . purpose and a primary effect that neither advances nor inhibits religion." Indeed, the proposed legislation's exclusive or primary purpose is to have a positive influence on the religious practices it seeks to protect, and its primary effect is to give priority to the Native American religious beliefs at the expense of property interests of others.

The proposed sacred sites legislation would also raise concerns under the Fifth Amendment, which gives property owners the right to use their property without unreasonable interference, and without substantial diminution of its value, in keeping with their reasonable investment-backed expectations. For example, federal mining claims are constitutionally protected property interests, as are federal mineral leases. Yet, this legislation would take and damage individuals' property rights without the compensation required by the Fifth Amendment. Moreover, the takings liabilities could extend far beyond mining properties and include takings claims based on a wide variety of blocked development projects.

Summary

To sum up, the legislation to protect "sacred sites" would introduce chaos into the project review process across the western United States – a process that is already highly cumbersome and expensive. Further, it would grant unprecedented power to Native American groups over virtually all major development projects on federal lands, and raise serious constitutional issues.

MINING COMMITTEE ONLINE

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MINING COMMITTEE NEWSLETTER

We hope you enjoy this issue of the Mining Committee Newsletter. The Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the Newsletter editor Kirsten Nathanson at 202/624-2887 or knathanson@crowell.com.

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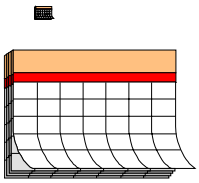
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



ABA Annual Meeting
August 7-13, 2003
San Francisco, California

Conference on Federal Lands and Natural Resources Law
September 17-19, 2003
Seattle, Washington
(Co-sponsored with ALI-ABA, for information call 800/253-6397.)

11th Section Fall Meeting
October 8-12, 2003
Washington, D.C

Third Annual Indian Tribes, Natural Resources and ADR Conference
October 9-10, 2003
Durango, Colorado
(Co-sponsored with the ABA Section of Dispute Resolution, for information call 202/662-1687.)

The Endangered Species Act Turns 30
October 23-24, 2003
Portland, Oregon
(Co-sponsored with Lewis & Clark Law School, for information call 800/222-8213.)

22nd Annual Water Law Conference
February 19-20, 2004
San Diego, California

33rd Annual Conference on Environmental Law
March 11-14, 2004
Keystone, Colorado

For more information, see the Section Web site at http://www.abanet.org/environ or contact the Section at 312/988-5724.