The Benchmark of Expectations: Regulatory Takings and Surface Coal Mining

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In November of 2006, the United States Court of Federal Claims issued its decision in Benchmark Resources Corporation v. United States.\(^1\) The ruling was made with little fanfare and hardly a ripple was formed across the pond of legal scholarship. In many ways, this lack of attention is justified. Benchmark, a regulatory takings case, did not produce any novel and untried arguments that might fundamentally shift the takings doctrine in the federal judiciary. Much of the argument focused on a statute of limitations question, itself a product of prior debate over erroneously recorded addresses and letters of notice sent but not received,\(^2\) ultimately resulting in the dismissal of one co-plaintiff for failure to file a complaint within the six years required by the Tucker Act.\(^3\) Furthermore, the decision rendered by the Claims Court was limited to the ripeness of plaintiffs’ claims, avoiding the central regulatory takings challenge and allowing for the possibility for the same challenge to be revisited.\(^4\)

Despite its uneventful character, the Benchmark decision, its possible rehearing, and the potential for similar cases in the future, merit attention. One simple reason is the magnitude of the takings claims issued against the federal government. The sought compensation amount of $846,385,000 has already been described by the Claims Court as “potentially devastating”\(^5\) to the plaintiffs if no compensation is granted, and could likely also be interpreted as a tremendously unfair windfall at taxpayer expense if granted.

Additionally, the facts of Benchmark do not exist in a vacuum. The challenge in Benchmark is a regulatory takings challenge against implementation of the Surface Mining

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\(^1\) Benchmark Resources Corporation v. United States (Benchmark II), 74 Fed. Cl. 458 (2006).
\(^2\) Benchmark Resources Corporation v. United States (Benchmark I), 64 Fed. Cl. 526, 528-29 (2005).
\(^3\) 28 U.S.C. § 2501; Benchmark II, supra note 1 at 478.
\(^4\) Benchmark II, supra note 1 at 475.
\(^5\) Benchmark I, supra note 2 at 530.
Control and Reclamation Act (SMCRA), a federal statute that empowers the Office of Surface Mining (OSM) within the Department of the Interior to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” Although SMCRA regulates a single industry, the potential precedential impact of any ruling in this field could be significant, given size, importance, and influence of that industry.

The case, however, was decided within a precedential context. *Benchmark* involved a regulatory takings challenge. Like cases involving eminent domain, the plaintiff’s argument in a regulatory takings case rests upon the Fifth Amendment’s prohibition of the taking of private property for public use without just compensation. Unlike eminent domain cases, in which the court is asked to evaluate the presence, nature, and prominence of public benefit produced by the taking of private property, regulatory takings cases involve incidents in which property remains in the hands of the owner, but particular uses and indices of the property are restricted or prohibited. The validity of the state’s action in restricting such use is generally assumed, but the action is challenged as “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” SMCRA enforcement is no stranger to regulatory takings challenges, with a substantial number of cases being decided in the Court of Federal Claims and the Court of Appeals for the Federal Circuit.

This article discusses the case history of regulatory takings challenges to SMCRA implementation. It begins by describing the main statutory components of SMCRA, advances to a discussion of regulatory takings jurisprudence and its application to SMCRA implementation,
and then evaluates Benchmark decision within that context. It is within this context that the Claims Court decided Benchmark, and in several significant ways, the Benchmark decision upholds and clarifies a SMCRA/takings jurisprudence that has developed within that case history. The ripeness component of that jurisprudence, on which Benchmark was decided, was consistently upheld, and additionally, other key dimensions of the federal courts’ regulatory takings doctrine, both generally and as applied to SMCRA, are clarified and strengthened by the ruling of the Claims Court. For those reasons, the Benchmark decision is significant, both as an indication of the current insulation from takings attacks enjoyed by surface coal mining regulation and, if retried, as a predictor of the federal courts willingness to abide its own established doctrine.

STATUTORY FRAMEWORK OF SMCRA

Enactment of the Surface Mining Control and Reclamation Act (SMCRA) in 1977 only occurred after a tragic collapse of a coal waste dam in West Virginia in 1972, killing 125 people, the introduction of more than 100 bills in Congress on surface mining, and two vetoes by President Ford of similar, previous legislation.12 Although it is a product of a moment in American political history which produced the foundational statutes of the environmental regulatory regime, SMCRA does not enjoy the same recognition of other environmental laws, such as the Clean Air Act; the Clean Water Act; the Comprehensive Environmental Response, Compensation, and Liability Act (a.k.a. Superfund); and the Endangered Species Act. Such ambivalence to SMCRA, however, is undeserved; the law broadly covers the environmental, aesthetic, health, safety, cultural, and historical impacts of the production of the nation’s largest source of domestic energy, regulates it across all lands of the United States, and “contains

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inspection and enforcement provisions, which, in many ways, are more progressive that those found in any other major environmental statute.”

SMCRA is comprised to two main parts. Title IV contains the provisions of the Abandoned Mine Lands (AML) program, which uses a tax on coal production to reclaim lands on which coal mining had occurred prior to enactment of SMCRA and had since been abandoned. Title V provisions of the Act deal with the regulation of active surface coal mining and the surface effects of underground coal mining. The dangers associated with abandoned coal mines are tremendous; not only are abandoned mines a continued environmental risk due to such harms as erosion or acid mine drainage (AMD), but they also pose a risk to the safety of individuals who could drown in dangerous pools or fall off of crumbling high-walls. However, the focus of this article is on the active regulatory component of SMCRA, which has significantly more intersections with regulatory takings litigation than the AML program.

“Like many environmental laws, congressional architects chose a partial-preemption regulatory approach for implementing SMCRA…. (T)his approach returns regulatory control to the states, but only after the states adopt enforcement programs that meet national standards.”

Having assumed the power to regulate surface coal mining from the states, SMCRA only allows the states to reassume regulatory authority upon approval of the Secretary of the Interior, which requires that the state establish a surface mining regulatory program which “provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of” the federal law. Even after primacy has been achieved by a state, SMCRA provides significant federal oversight powers to ensure compliance with federal standards. The

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14 30 U.S.C. § 1231-1241
15 Id. at § 1242-1279
16 Scheberle, *supra* note 12 at 155.
17 30 U.S.C. § 1253(a)(1)
Secretary is empowered to “make those investigations and inspections necessary to insure compliance with”18 SMCRA, and is further empowered to provide for federal enforcement if the state program is determined to not be effectively enforcing the law in a manner consistent with the requirements of SMCRA.19

Central to the Title V regulatory provisions, and central to potential regulatory takings challenges, are the permitting practices used to implement the law. To insure that surface coal mining is conducted in a manner that balances environmental, agricultural, and energy interests,20 SMCRA requires that any surface coal mining operation, or underground coal mining operation with surface effects, be conducted with an approved permit, granted by either the federal Office of Surface Mining (OSM) or the state regulatory authority. Issuance of such a permit is conditioned upon the ability of the surface mining operator to conduct such operations in a manner which insures the ability of the operator to reclaim the land, i.e. “to restore the approximate original contour of the land;”21 “minimize the disturbances to the prevailing hydrologic balance;”22 “control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property;”23 “assume the responsibility for successful revegetation;”24 “restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining or higher or better uses;”25 and “conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future through surface coal

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18 Id. at § 1211(c)(1)
19 Id. at § 1254(b)
20 Id. at § 1202(f)
21 Id. at § 1265(b)(3)
22 Id. at § 1265(b)(10)
23 Id. at § 1265(b)(17)
24 Id. at § 1265(b)(20)(A)
25 Id. at § 1265(b)(2)
mining can be minimized." To guarantee post-operations reclamation will occur, operators must post a reclamation bond which will be forfeited if reclamation efforts are abandoned.

In addition to establishing a number of requirements which must be met by any surface coal mine operator, SMCRA also places upon regulatory personnel a strict set of inspection and enforcement requirements. Regulatory authorities are required to conduct, on average, monthly partial inspections and annual full inspections of all surface coal mining operations, and are further required to conduct such inspections irregularly and without prior notice. In the event that the regulatory authority observes a violation of the permit which “can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources,” or “creates an imminent danger to the health or safety of the public,” the agent is required to immediately issue a cessation order (CO), which halts all relevant mining or reclamation practices until the violation is rectified. If the violation does not present an imminent risk, the issuance of a notice of violation (NOV) is required, which, if the violation is not corrected within the time-frame established by the NOV, will result in the issuance of a CO.

Surface coal mining operators, facing the broad requirements of SMCRA placed upon their planned mining activity, have occasionally brought regulatory takings challenges against the regulatory actions of either OSM or state regulatory authorities. Such challenged actions generally restrict the areas from which operators may legally attempt to extract coal, areas which can be considered the property of the operators, who have acquired either mineral rights or property rights in fee simple. These access restrictions are either the product of a determination by regulatory decision-makers that particular practices, which result in leaving some coal behind,

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26 Id. at § 1265(b)(1)
27 Id. at § 1259
28 Id. at § 1267(c)
29 Id. at § 1271(a)(2)
30 Id. at § 1271(a)(3)
must be a condition of a permit to protect environmental or other interests, or the area has been declared as land unsuitable for mining (UFM). Under the UFM designation provisions of SMCRA, individuals may petition the regulatory to designate a particular area as unsuitable for surface mining if mining activities in the area would result in significant damage to natural, historic, aesthetic, cultural, scientific, or resource values, or result in an unacceptable risk to public safety due to increased flooding or geological instability.31 Furthermore, Congress declared certain areas to be unsuitable for surface mining, including lands in the National Parks System and other federal lands programs and lands within specified buffer zones of public roads, occupied dwellings, public buildings, schools, churches, community or institutional buildings, public parks, and cemeteries.32 These unsuitability designations, however, are subject to valid existing rights (VERs). These rights are defined by OSM regulations as “a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface mining operations on lands” on which Congressional designations “prohibit such operations.”33 The existence of a VER is determined through OSM’s “Good Faith/All Permits” standard, which allows for the possibility of surface mining operations when “all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of” SMCRA.34

REGULATORY TAKINGS

From the beginning of the federal judiciary’s consideration of regulatory takings claims, there has been an expressed recognition of the necessity of balancing private property rights with

31 Id. at § 1272(a)(3)
32 Id. § 1272(e)
33 30 C.F.R. § 761.5 (emphasis added)
34 Id. § 761.5(b)(1)
the legitimate authority of the state to restrict such rights for the public good. In the foundational 1922 decision in *Pennsylvania Coal v. Mahon*, Justice Holmes stated that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law…. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.”36 By arguing that property rights are neither sacrosanct nor disposable, Holmes developed the origins of regulatory takings jurisprudence as a balancing act, as the process of determining the point where “if a regulation goes too far it will be recognized as a taking.”37

Much of the rest of regulatory takings jurisprudence can be seen as the process of filling in the gaps left by Justice Holmes, i.e. defining “too far.” The first major step toward clarification came in 1978 in the Supreme Court’s *Penn Central*38 decision. The general formula established was the three-pronged *Penn Central* test: whether government action constitutes a compensable taking depends on the economic impact of the regulation, interference with investment-backed expectations, and the nature of the government’s action, ranging from outright invasion to protection of the common good.39 For some, this attempt at clarification only created more questions. “First, the Court has defined each factor in a variety of ways, without acknowledging the shifts in definition. Second, it is difficult to predict what weight the Court will give to each factor. At different times the Court has actually regarded each one of these so-called ‘factors’ as dispositive of whether a taking occurred.”40 Such flexibility is likely

35 260 U.S. 393 (1922)
36 *Id.*, at 413.
37 *Id.*, at 415.
38 *Penn Central*, supra note 10.
39 *Id.*, at 175.
by design, allowing the Court to assess each factor differently as a case requires, producing a doctrine that is self-admittedly based on “essentially ad hoc, factual inquiries.”

Any confusion was exacerbated by the creation of an additional two-prong test two years after the Court’s decision in *Penn Central*. The *Agins* test required the state to “substantially advance legitimate state interest” and to not “den[y] an owner economically viable use of his land.” Subsequently, the “substantially advances” component of the *Agins* test was determined to be suggestive of a means/end testing inconsistent with the simpler inquiry into whether or not property has been taken. The question of the legitimacy of governmental land use restrictions has, therefore, been relegated to eminent domain inquiries and partially into adjudicative land-use exactions, in which “government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.” In such cases, the inquiry into the legitimacy of state ends is not fully extensive, but only inquires into the relationship between the ends and the means; the governmental ends are considered legitimate, but the Court requires the existence of a “rough proportionality” between the exaction and the public end, “both in nature and extent to the impact of the proposed development.” As a result, *Penn Central* now stands as the central test used to determine the existence of a regulatory taking.

Although *Penn Central* stands as the primary federal judicial test to evaluate the presence of a taking, other tests and inquiries continue to shape the doctrine. The U.S. Court of Federal Claims has developed a test that it has consistently utilized prior to *Penn Central* investigations.

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41 *Penn Central*, supra note 10 at 124.
44 Id., at 546.
The *Chancellor Manor* test is two-pronged test which first examines “the nature of the interest allegedly taken to determine whether a compensable property interest exists.”46 Only after the Claims Court is satisfied that the plaintiff has a compensable property interest that could be taken will it engage in a *Penn Central* inquiry to determine if, in fact, it has been taken.47 While not an explicit test for the Supreme Court, the Court has consistently and implicitly made the same inquiry prior to using the *Penn Central* test, requiring that a “logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were…part of his title to begin with.”48

Furthermore, the Supreme Court has developed additional tests and rules relevant to the present discussion of regulatory takings and surface coal mining, some of which supplement a *Penn Central* analysis, some of which render it unnecessary. One way in which the Court has developed its *Penn Central* inquiries is the consideration of the chronology of property acquisition and the promulgation of regulations. If an owner acquired property in the presence of pre-existing regulations, the “notice rule”49 would frustrate the owner from satisfying the reasonable investment-backed expectations prong of *Penn Central*. The Court has developed a more nuanced application of this timing rule, refusing to allow “postenactment transfer of title…(to) absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable,”50 while still allowing for “the regulatory regime in place at the time the claimant acquires the property at issue…(to help) shape the reasonableness of expectations.”51 This position is most consistent with Justice O’Connor’s concurring opinion in

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46 *Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003).
47 *Id.*, at 902.
51 *Id.*, at 633 (O’Connor, J., concurring).
Palazzolo, describing the non-talismanic yet relevant role that timing plays in Penn Central, and is quite relevant to the SMCRA cases discussed below.

The Court has also developed two additional components of its regulatory takings doctrine which can be used to avoid Penn Central analyses altogether. The first of these is the development of the Court’s ripeness doctrine, which acts as a “judicial gatekeeper” and safeguard of the separation of powers doctrine. Originating in “Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction,” the ripeness doctrine enables the Court, “through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies,” and also protects “agencies from judicial interference until and administrative decision has been formalized….” The general requirements the Court has established before a takings case will be considered ripe for review are, when applicable, that the plaintiff submit a proposal for use to the appropriate agency, that modified proposals are resubmitted in response to the agency’s objections, and that statutorily allowed variances and administrative compensation be sought before the plaintiff challenges the regulation as a regulatory taking.

52 Id., at 634 (O’Connor, J., concurring).
The purpose of these requirements is to allow administrative expertise to develop conclusive decisions and regulatory takings decisions to be made “in an actual factual setting.” However, the actual factual setting of regulation is occasionally evident without the need for the submittals and resubmittals described above. In the event that regulations or the guiding statute are written so strictly and/or specifically that the “only discretionary step left to [the] agency is enforcement, not determining applicability.” In such situations, “[a]lthough a landowner must pursue reasonably available avenues that might allow relief, it need not…take patently fruitless measures.” Referred to as the futility exception, this practice allows plaintiffs to avoid having to resubmit applications, or even a first application, when the “unequivocal nature” of the regulation and its requirements indicate that no questions remain as to what uses will be permitted and what uses will not.

Finally, the Supreme Court’s 1992 Lucas decision is the origin of the Court’s per se takings doctrine. The general ruling in Lucas is that a regulation which calls upon the owner “to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle,” constitutes a taking, per se, and engagement in a Penn Central analysis is unneeded. In its subsequent judicial interpretations, however, the categorical designation of takings developed in Lucas was not applied as onerously as initially feared by environmentalists and regulators. Justice Scalia’s majority opinion in Lucas implies that even regulations that fully diminish property value may not constitute a taking if the regulation is aimed at property restrictions inherent in the state’s background principles of nuisance.

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57 Virginia Surface Mining, supra note at 294-295.
59 MacDonald, supra note 56 at 359 (White dissenting).
60 Palazzolo, supra note 50 at 619.
61 Lucas, supra note 48.
62 Id., at 1019.
63 Id., at 1029.
Subsequent interpretations by federal justices uphold the idea that inquiries into nuisance and background principles of ownership should occur prior to inquiries into the degree of economic loss.64

The presence of the Lucas total-taking rule has the potential to equip a takings plaintiff with an additional offensive weapon. By creating a special category for regulations resulting in total economic deprivation, the Court has, at least in theory, strengthened arguments of conceptual severance, or “the idea that each incident or set of incidents of ownership in the bundle of rights itself constitutes a fully protectable property interest.”65 To determine the extent of economic impact, the Court must determine the relevant baseline parcel of property, or the “proper denominator in the takings fraction.”66 If the Court, under the idea of conceptual severance, rules that only the affected parcel of property, itself a percentage of a larger parcel, is the relevant parcel, then, “(c)onceivably, every regulation that does not fit into a properly defined nuisance exception could be viewed as a taking under this theory.”67 The Court has, however, refused to sever the regulated property from the “parcel as a whole,”68 arguing that the conceptual severance approach is a circular argument.69

SMCRA AND REGULATORY TAKINGS

Over nearly the last two decades, several challenges to regulatory decisions under SMCRA and its corresponding state statutes have been heard by the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. These decisions comprise an

66 Palazzolo, supra note 50 at 631.
67 Alexander, supra note 65 at 78.
69 Tahoe-Sierra, supra note 64 at 331.
important piece of the larger legal context in which the regulation of coal mining and regulatory takings litigation meet.

In fact, the telling of the legal history of regulatory takings litigation almost always begins with a case involving the regulation of coal mining. In the above-mentioned Pennsylvania Coal\textsuperscript{70} decision, the Supreme Court for the first time ruled that a regulation of property effected a compensable taking under the Fifth Amendment. Well before SMCRA, Pennsylvania sought to control subsidence under private property caused by anthracite coal mining by enacting the Kohler Act, which required coal mining operators to leave behind enough coal to support the surface structure supporting private property.\textsuperscript{71} Although the Court in Pennsylvania Coal recognized that “government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,”\textsuperscript{72} the Court ruled that the Kohler act went “too far”\textsuperscript{73} in that regard.

Sixty-five years later, the Supreme Court issued its decision in Keystone,\textsuperscript{74} a case involving another Pennsylvania statute controlling for subsidence and with facts very similar to those of Pennsylvania Coal.\textsuperscript{75} While the facts of Pennsylvania Coal and Keystone were indeed quite similar, the Court in Keystone argued “that the similarities are far less significant than the differences, and that Pennsylvania Coal does not control this case.”\textsuperscript{76} In this case dealing with the Subsidence Act, which “prohibits mining that causes subsidence damage to three categories

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\item \textsuperscript{70} Pennsylvania Coal Co v. Mahon, 260 U.S. 393 (1922).
\item \textsuperscript{71} Id. at 412-413.
\item \textsuperscript{72} Id. at 413.
\item \textsuperscript{73} Id. at 415.
\item \textsuperscript{74} Keystone Bituminous, supra note 68.
\item \textsuperscript{76} Keystone Bituminous, supra note 68 at 481.
\end{itemize}
of structures,” the Court demonstrated “hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances….” Central to the Court’s argument was the characterization of the Subsidence Act as a statute protecting the common good and the Kohler Act as protecting the property of a privileged few. Given the high demand for the cleaner burning anthracite coal, the State of Pennsylvania sought to increase revenues through the Fowler Act. “The Fowler Act, adopted on the same day as the Kohler Act, enacted a tax on anthracite coal. It was not an ordinary tax, though. Coal mining companies did not have to pay it unless they wanted relief from the obligations of the Kohler Act.” The presence of the Kohler Act had less to do with the protection of public safety and more to do with persuading anthracite coal miners to pay the tax. “Because many cities banned the burning of the smoky bituminous coal, demand for anthracite was inelastic. Much of the burden of the regulation and tax would thus be shifted forward to consumers in other states.”

The nuisance exception, which holds that the “right to compensation…of private property taken for public uses is foreign to the subject of preventing or abating public nuisances,” as stated in Keystone would be a common component of regulatory takings decisions involving SMCRA. Such challenges would begin with the first major takings challenge to SMCRA, the Supreme Court’s 1981 Virginia Surface Mining decision. This case involved a facial challenge to SMCRA’s Title V performance requirements, with plaintiffs arguing that the Act itself was “an uncompensated taking of private property by requiring operators to perform the ‘economically and physically impossible’ task of restoring steep-slope surface mines to their

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77 Id. at 476.
78 Id. at 491.
79 Id. at 483.
80 Fischel, supra note 75 at 33.
81 Id. at 35.
82 St. Louis v. Stern, 3 Mo. App. 48, 53 (1876); see also Mugler v. Kansas, 123 U.S. 623, 667 (1887)
83 Virginia Surface Mining, supra note 57.
approximate original contour.”84 The Court’s decision upheld the constitutionality of SMCRA, stating that the “constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary,”85 but still allowed for the possibility that a particular case of SMCRA implementation could require a compensation for a taking of private property.

Given such a legal possibility, several regulatory takings challenges have been brought before the U.S. Court of Federal Claims and, on appeal, to the Court of Appeals for the Federal Circuit. In 1989, Whitney Benefits challenged the application of SMCRA restrictions on its long-held mining interests in 1327 acres of coal under an alluvial valley floor (AVF) in the Powder River Basin in Wyoming.86 Surface mining of coal under AVFs west of the 100th meridian is prohibited by SMCRA if such activity would “interrupt, discontinue, or preclude farming.”87 After seeking to take advantage of a SMCRA exchange program, which permitted the Secretary to exchange available federal coal deposits for restricted AVF deposits if “substantial financial and legal commitments were made by an operator prior to January 1, 1977,”88 but, ultimately being unsatisfied with the government’s offer,89 sued under a takings claim. The United States claimed that the property in coal was valueless,90 given the difficulty in mining beneath AVFs, but the Claims Court countered that “(p)laintiffs adequately showed dealing with alluvial water as a mining cost and that it would be taken care of in normal mine operations.”91 The Appeals Court upheld the finding of a taking, stating that “(b)efore SMCRA was enacted, Benefits had a property right it could expect to exercise, i.e., to surface mine the

84 Id. at 293.
85 Id. at 294-295.
87 30 U.S.C. § 1260(b)(5)(A)
88 Id. § 1260(b)
89 Whitney Benefits I, supra note 45 at 398.
90 Id. at 400.
91 Id. at 403.
Whitney coal. The moment SMCRA was enacted, Benefits no longer had that property right, for it had no permit and could not possibly under the statute obtain one for a mine that would obviously violate the conditions expressly set forth in SMCRA."\(^92\) The Appeals Court, therefore, ruled that Whitney Benefits was “entitled to $60,296,000, plus pre-judgment interest….”\(^93\)

Subsequent regulatory takings challenges to SMCRA in the federal courts were more likely to find rulings against plaintiffs and supporting the government’s regulatory actions without compensation. The U.S. Court of Federal Claims has been apt to rule that regulatory restrictions on coal mining “represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under…nuisance law.”\(^94\)

Even in situations where the Claims Court does find a compensable taking in the implementation of SMCRA, the U.S. Court of Appeals for the Federal Circuit has traditionally overturned such decisions.\(^95\) A number of observable consistencies have emerged from this body of federal rulings, which might be considered surprising, given the “essentially ad hoc, factual”\(^96\) nature of regulatory takings jurisprudence. When confronted with a regulatory taking challenge to SMCRA, the federal courts have consistently utilized the two-tiered Chancellor Manor test.

“First, a court should inquire into the nature of the land owner’s estate to determine whether the use interest proscribed by the governmental action was part of the owner’s title to begin with.”\(^97\)

This inquiry asks whether such uses were already limited by “the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.”\(^98\) If

\(^92\) Whitney Benefits, Inc. v. United States, 926 F.2d 1169, 1172 (1991) [Whitney Benefits II]
\(^93\) Id. at 1178.
\(^94\) Rith I, supra note 64 at 115; see also M&J Coal Company v. United States, 30 Fed. Cl. 360 (1994) [M&J Coal I]; Apollo Fuels, Inc. v. United States, 54 Fed.Cl. 717 (2002) [Apollo Fuels I]
\(^95\) Wyatt v. United States, 271 F.3d 1090 (2001); The Stearns Company, Ltd. v. United States, 396 F.3d 1354 (2005) [Stearns II]
\(^96\) Penn Central, supra note 10 at 124.
\(^97\) M&J Coal Company v. United States, 47 F.3d 1148, 1154 (1995) [M&J Coal II]
\(^98\) Lucas, supra note 48 at 1029.
the owner never possessed a property right in the restricted use, then the court need not undertake the second tier of the analysis. If, however, “the claimant can establish the existence of such an interest, the court must then determine whether the governmental action at issue constituted a compensable taking….”99 This generally involves determining whether there was a categorical, per se taking, involving a loss of “all economically beneficial uses in the name of the common good,”100 or engaging in a *Penn Central* analysis, weighing the economic impact, interference with reasonable investment-backed expectations, and the nature of the government action.101

When the federal courts have considered takings challenges to SMCRA, their first tier inquiries into the nature and extent of the property rights of the owner of the particular interest in coal have focused on the nuisance exception to regulatory takings. If the purpose of restrictions placed on coal mining is to prevent a nuisance to the public, then such a restriction—“even a restraint barring all such use--cannot become the basis of a compensable taking,”102 because such a regulation would be considered nothing more than “a traditional exercise of police power to protect public safety, health and welfare from the 'unacceptable risks' that coal mining operations…would pose.”103

A clear example of a court’s use of the nuisance exception can be found in the Claims Court’s decision in *M&J Coal*. Little dispute was present as to what was owned by whom: the coal rights in central West Virginia obtained by M&J were originally purchased through mineral severance deeds which severed the underground mineral estate from the surface estate, and freed the owner of the mineral estate from liability “for any injury or damage done to the overlying

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99 *M&J Coal II*, *supra* note 97 at 1154.
100 *Lucas*, *supra* note 48 at 1019.
101 *Penn Central*, *supra* note 10 at 124.
102 *Rith I*, *supra* note 64 at 113.
103 *Cane Tennessee, Inc. & Colten, Inc. v. United States*, 57 Fed. Cl. 115, 127 (2003) [*Cane II*]
surface, or to anything therein or thereon…. (M&J) assumed they could subside structures
where the surface owners had conveyed the right to subjacent support, and as to those structures
required by law to be protected, the angle of draw would be 15 degrees.”

Eventually, but suddenly, M&J’s mining practices began to subside the Dingus and Tarley residences:

“When it happened, my daughter was taking a bath and I was working in the
kitchen starting dinner,” said Margaret Tarley. “It sounded like a gunshot. I went
down into the basement. When I came back up into the kitchen, I could see the
walls pulling apart. It was scary. We moved in three hours. We were lucky. We
had mine subsidence insurance.” The Dingus family next door wasn’t as lucky,…
“We spent the next 12 days in a motel. Charles Sorbello, who owns the company,
handed me six $50 bills and paid our motel bill of $739. That’s all we got.”
Dingus had no subsidence insurance.

After the state refused to engage in any enforcement actions against M&J, OSM issued a
CO against the company and required the creation of a new subsidence control plan, which
increased the angle of draw from 15 to 30 degrees and prohibited M&J from damaging single
family dwellings. Even after OSM took enforcement action against M&J, subsidence
continued as damage was caused to a section of a public road and town’s new water tower began
to tilt, which were damages prohibited by West Virginia state law.

Given the new mining restrictions placed upon the company, M&J “alleged that OSM’s
enforcement actions which required plaintiffs to increase the draw angle under protected
structures and to protect single family dwellings deprived plaintiffs of 99,700 tons of coal they
otherwise would have mined, and resulted in $580,000 in lost profits.” In other words, M&J
argued that OSM actions took their property in the support estate, which was part of their
severance deed, and transferred it to the surface estate owners, a property taking which should be

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104 M&J I, supra note 94 at 361-62. The angle of draw is the angle from the vertical line, marking the edge of
allowed underground mining, to the edge of an area on the surface where subsidence is to be prevented.
1B.
106 M&J I, supra note 94 at 364.
107 Id. at 364-65.
108 Id. at 365-66.
compensated. The Claims Court disagreed and focused on the first-hand accounts of the subsidence provided by Mr. Tarley, which described a severed gas line, which could have exploded, deep cracks in the yard, which had already claimed the life of a dog and could easily do the same to child, and electric lines from the house, which were “stretching tight as a fiddle string.”

It was OSM’s response to the need for public safety which separated the case from facts of Whitney Benefits, and insulated the enforcement actions from regulatory takings claims. On appeal, the Appeals Court upheld the finding of no taking, stating that, although the deed possessed by M&J included the support estate, “M&J’s acquisition of rights by deed did not give it the right to mine in such a way as to endanger the public health and safety.”

In other cases involving nuisance determinations, the Claims Court has sought to ground a particular nuisance in something more referential than a declaration of a threat to public safety. In particular, the Claims Court has looked for definitions of nuisance in state common law, heeding Justice Scalia’s requirement that nuisance restrictions “inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.”

“Thus, if the Government shows that the activity it was regulating constituted a nuisance in the state's common law, it can avoid paying compensation because the right to engage in the activity was excluded from the owner’s title.” In its 1999 Rith Energy and 2002 Apollo Fuels decisions, the U.S. Court of Federal Claims ruled that certain coal mining operations “constitute(d) an enjoinable nuisance under state law.” In Rith, although initial testing by the company demonstrated a low risk of AMD, subsequent testing demonstrated a

109 Id. at 363.
110 Id. at 370.
111 M&J II, supra note 97 at 1154.
112 Lucas, supra note 48 at 1029.
113 Apollo Fuels I, supra note 94 at 734.
114 Rith I, supra note 64 at 115; see also Apollo Fuels I, supra note 94 at 735.
500% variance in the tests and OSM determined that the mining activities presented too great a risk of contaminating the Sewanee Conglomerate aquifer. In Apollo Fuels, OSM designated an area unsuitable for surface mining (although it allowed for underground mining from outside the area) due to the risk that AMD posed to the endangered blackside dace, the Cumberland Gap Historical Park, and, most importantly (according to OSM), the water supply aquifer for the town of Middleboro. In both cases, the Claims Court looked to Tennessee common law and the Tennessee Water Quality Control Act (TWQCA) to determine that water pollution was an actionable nuisance under state law. Ironically, in both cases, the Appeals Court upheld the findings of no takings, but ignored the nuisance question, engaging instead in Penn Central analyses, which will be described below.

A final note on the nuisance exception in regulatory takings challenges to SMCRA: despite the substantial impacts that can be caused by coal mining, the nuisance exception has not always been sufficient to insulate SMCRA enforcement from a takings claim, much less from the necessity to engage in Penn Central or categorical taking analyses. The nuisance exception seems to be weakest when the courts subject the act of mining itself to nuisance criteria instead of the externalities of mining. In the cases described above, the Claims Court looked to issues such as subsidence of property and AMD as the potential nuisances. In Whitney Benefits, the Appeals Court looked at the provisions of SMCRA and observed that “Congress expressly permitted, in the grandfather clause, the continued mining beneath AVFs of all grandfathered mines and all mines found by State Authorities to have minimal AVF involvement, hardly the

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115 Id. at 111.
116 Id. at 114.
117 Apollo Fuels I, supra note 94 at 720.
118 Rith I, supra note 64 at 114; Apollo Fuels I, supra note 94 at 735.
action of one out to abate a ‘nuisance.’”  Likewise, in Eastern Minerals, the Claims Court has stated that mining itself does not constitute a nuisance. In this case, OSM denied a permit to the company due to concerns about noise and hydrological impacts on a nearby public park, which is protect by SMCRA from adverse effects of mining. The Claims Court read these concerns as speculative, which coupled with the historical presence of mining on the property, led to court to conclude that the government had not demonstrated that the plaintiffs proposed mining activities would constitute a nuisance.

When a court determines that a proposed mining activity would not result in the creation of a nuisance, or elects not to consider making that determination, and the proposed activity is, therefore, part of the owner’s bundle of property, the courts then determine whether a compensable taking of that property has occurred. As stated above, the court first considers whether a categorical taking has occurred; just as when the restriction involves prevention of a nuisance not inherent in the owner’s title, a more detailed consideration of the extent of the property value’s diminution is not necessary if the diminution is total or the property is physically invaded by the government. If the owner is left with some viable use of his or her property, i.e. in the absence of a categorical taking, the court then utilizes the three-pronged Penn Central analysis, which considers the economic impact of the restriction, interference with investment-backed expectations, and the nature of the governmental action.

The test for a categorical taking and the economic impact prong of the Penn Central test are essentially the same; if the impact is not a total loss, hence, not a categorical taking, then the

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120 Whitney Benefits II, supra note 92 at 1177.
122 Id. at 545.
123 Id. at 551.
124 Rith II, supra note 119 at 113.
125 Penn Central, supra note 10 at 124.
impact is considered and balanced with the remaining two *Penn Central* prongs. The Claims Court has found a particular implementation of SMCRA to result in a categorical taking, and given the large scale on which surface coal mining can occur, the potential compensatory liability of the government is significant. Therefore, the role of courts in determining the relevant parcel to be considered in a takings analysis should be considered a key plot point in any storytelling of takings cases. Furthermore, determination of the relevant parcel is essential; to determine the economic impact of a particular regulatory restriction, one must first determine “the proper denominator in the takings fraction.” This property fraction exists both spatially and temporally, and plaintiffs in takings cases involving SMCRA have argued that, for purposes of a takings analysis, the relevant parcel should only be considered to be the area restricted by regulation and property value should only be evaluated by the court from the date of regulation forward. Federal courts, however, have been reluctant to follow plaintiffs’ lead, heeding the Supreme Court, which “has counseled against labeling the property subject to the regulation as the appropriate parcel, noting that ‘[t]o the extent that any portion of property is taken, that portion is always taken in its entirety,’” further noting that “defining the property interest taken in terms of the very regulation being challenged is circular.”

Since the Claims and Appeals Courts hearing SMCRA takings cases have been hesitant to view the regulated parcel, spatially and temporally, as the relevant denominator parcel, findings of categorical takings have been rare. This still leaves the possibility, however, of a less-than-total diminution in value that, when balanced with the other *Penn Central* factors, can

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126 *Whitney Benefits I*, *supra* note 86 at 406.
127 *Palazzolo*, *supra* note 50 at 631.
128 *Cane II*, *supra* note 103; *Apollo Fuels I*, *supra* note 94.
129 *Rith II*, *supra* note 119.
131 *Apollo Fuels II*, *supra* note 119 at 1346; *Tahoe-Sierra*, *supra* note 64 at 331.
result in a taking. In evaluating the economic impact of regulations on the parcel as a whole, courts have been forced to consider the remaining value of other interests in coal, as well as the remaining value of non-coal interests. In *Rith*, the company was able to extract substantial amounts of coal under its permit, prior to the discovery of excessive AMD and subsequent regulation by OSM. In *Cane and Colten*, both companies possessed separate tracts of coal-bearing lands, which the Claims Court determined were treated by both companies as single investment opportunities. Additionally, the presence of non-coal values to the regulated land, in such areas as timber and development, have generally been considered by court, in evaluating both the economic impact of regulation and the possibility of a categorical taking.

On this last issue, courts have been more hesitant about adding non-coal value to the relevant parcel than additional, accessible coal value. In *Whitney Benefits*, the government argued that the presence of surface rights, on which one could engage in agricultural activities, should prevent the company from making a claim of a total taking. The Claims Court disagreed, stating that the surface rights were purchased merely as a means to facilitate access to the company’s property in coal and, since the company was only claiming that their property in coal was taken, the surface property should not be considered in the relevant parcel. “Courts have been willing to designate the area subject to government regulation as the appropriate denominator if the area contains the whole of a claimant's viable economic interests.” Only if the separate property parcel has been rendered valueless by the regulation of the main parcel or

132 *Rith II*, *supra* note 119 at 1362.
133 *Cane II*, *supra* note 103 at 121-122, 130.
135 *Whitney Benefits I*, *supra* note 86 at 405.
136 *Apollo Fuels I*, *supra* note 94 at 727; see also *Florida Rock Industries v. United States*, 45 Fed. Cl. 21 (1999)
the owner can demonstrated that the separate parcel was purchased as a separate investment\textsuperscript{137} will such separate parcels be omitted from the property denominator.

The Courts have not provided a set figure or percentage for determining whether an economic impact exceeds an acceptable level and, therefore, constitutes a taking. In \textit{Cane and Colten}, the Claims Court has stated that the ability of the owner to recoup his or her investment “can sometimes be relevant. For example, if a party were able to recoup its investment after the government action, it is less likely that a taking has occurred.”\textsuperscript{138} However, the Claims Court immediately cautioned against the overuse of such a determinant, stating that the opposite, ruling for a taking if investments cannot be recouped, “would reward parties who make bad investments.”\textsuperscript{139}

The preceding dictum regarding bad investments is a component of the federal courts’ regulatory takings jurisprudence that recognizes the inherent risk involved in coal mining and increases the burden placed upon plaintiffs alleging takings by SMCRA implementation. Although the second prong of the \textit{Penn Central} test requires the court to judge something subjective, i.e. the expectations of the plaintiff, a reasonableness standard has been applied to those expectations, since behavior that may indicate an expectation of a lesser regulatory presence “could serve equally well as evidence of an improvident investment.”\textsuperscript{140} In assessing the investment-backed expectations of coal mining operators, the Courts have recognized that coal mining is quite complex and operators must be aware of the potential risks that may limit their activities as to avoid causing public nuisances. In \textit{M&J}, the Court of Appeals ruled that any

\textsuperscript{137} \textit{Cane II, supra} note 103 at 122.

\textsuperscript{138} \textit{Id.} at 123.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.} at 127.
permit issued by the state was always conditioned by the need to protect public safety.\(^{141}\) The Courts in the *Rith* decisions observed that the company had been made aware of the presence of the aquifer.\(^{142}\) Therefore, “when Rith purchased its coal leases it did not have any reason to expect that it would be permitted to mine in a way that was likely to produce acid mine drainage;”\(^{143}\) such activity would have violated state nuisance law.\(^{144}\)

In addition to the complexities of coal mining, the Courts have also pointed to the historical presence of a regulatory regime surrounding coal mining. The presence of a regulatory agency, with the vested power to use its discretion to determine whether particular coal mining activities will be permitted, is part of the economic environment in which operators initially pursue mining investments. Part of that environment must include “an uncertainty that was part of the business risk that plaintiffs took when they made their investment.”\(^{145}\) Therefore, the reasonable investment-backed expectations of individuals and companies entering into or continuing business in the heavily regulated coal mining industry must account for potentially restrictive regulations as “easily foreseen, not necessarily as a certainty, but as a reasonable possibility.”\(^{146}\)

The Courts have paid particular attention in these cases to the chronology of property acquisition and regulatory enactment. Referred to by some as the notice rule,\(^{147}\) the Courts have stated that “if at the time of sale an existing law or regulation precluded a certain use, that use was never a ‘stick’ in the purchaser's ‘bundle of rights.'”\(^{148}\) In the major Claims Court case that

\(^{141}\) *M&J* II, *supra* note 97 at 1154.

\(^{142}\) *Rith I*, *supra* note 64 at 110.

\(^{143}\) *Rith II*, *supra* note 119 at 1362.

\(^{144}\) *Rith I*, *supra* note 64 at 115.

\(^{145}\) *M&J II*, *supra* note 94 at 368.

\(^{146}\) *Apollo Fuels* II, *supra* note 119 at 1350.

\(^{147}\) *Burling*, *supra* note 49.

\(^{148}\) *M&J I*, *supra* note 94 at 367; see also *Rith II*, *supra* note 119 at 1364; *Lucas*, *supra* note 48; *Presault v. Interstate Commerce Commission*, 494 U.S. 1 (1990)
awarded compensation due to SMCRA restrictions, *Whitney Benefits*, plaintiffs acquired mining rights prior to the enactment of SMCRA.\(^{149}\) Furthermore, evidence of congressional history that indicated that Congress directly considered the impact on Whitney Benefits coal resulted in a decision by the Claims Court that the plaintiff’s property in coal was taken on the date of the enactment of SMCRA.\(^ {150}\) In cases where plaintiffs acquired their coal rights after the enactment of SMCRA, mining operators and investors have not fared as well. In *Cane and Colten*, the Claims Court drew special attention to the investor’s lack of experience in coal mining\(^ {151}\) and stated that “(a) reasonably prudent individual investing $5 million would, in the court’s view, become acquainted with all of these regulations, as well as the possible impact of the adjacency of a major state park. Cane did not do so in this case. Because a reasonably prudent investor could not have believed that its investment was without regulatory risk, Cane cannot now claim that it had reasonable investment-backed expectations that were unexpectedly impacted by government action.”\(^ {152}\)

There are, however, limits to the notice rule acknowledged by the Courts. In *Eastern Minerals*, the predecessor case to the eventual *Cane and Colten* cases, the Claims Court found a taking in the restrictions placed upon the plaintiffs. The Claims Court stated that “(m)ere awareness that Eastern’s permits could be affected by future regulations does not destroy plaintiffs’ property interests. Plaintiffs who choose to do business in a heavily regulated industry do not forfeit all property interests.”\(^ {153}\) Although the case was eventually overturned by the Court of Appeals for the Federal Circuit, it did mirror the Supreme Court’s eventual ruling in its 2001 *Palazzolo* decision, in which the Court considered whether “(a) purchaser or a successive

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\(^ {150}\) *Id.* at 407

\(^ {151}\) *Cane II, supra* note 103 at 119.

\(^ {152}\) *Id.* at 127.

\(^ {153}\) *Eastern Minerals, supra* note 121 at 549.
title holder…is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.”154 In the majority decision, Justice Kennedy refused to “put so potent a Hobbesian stick into the Lockean bundle”155 by stating, if such post-enactment restrictions were the rule, “(a) State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”156 Of particular significance to this ruling was Justice O’Connor’s concurring opinion:

Today’s holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the Penn Central analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. Our polestar instead remains the principles set forth in Penn Central itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.157

Justice O’Connor’s interpretation of Palazzolo’s holding, that the chronology of property acquisition and regulatory enactment is neither irrelevant nor deterministic in a takings decision, remains present in the takings jurisprudence as it relates to SMCRA. The appeal of the Claims Court’s decision in Rith, which relied heavily on the fact that “SMCRA was enacted eight years before Rith purchased the coal leases…(and, therefore,) Rith could not reasonably have expected that it would be free from regulatory oversight,”158 was decided almost two months before the Supreme Court handed down its decision in Palazzolo. The case was appealed back to the Court of Appeals so that the case could be decided again, this time in the light of Palazzolo. The Court of Appeals upheld its previous finding of no taking, interpreting the Palazzolo decision as having

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154 Palazzolo, supra note 50 at 626.  
155 id. at 627.  
156 id.  
157 id. at 633. (O’Connor concurring)  
158 Rith I, supra note 64 at 1364.
“rejected the argument that when governmental action regulates the use of property, a person who purchases property after the date of the regulation may never challenge the regulation under the Takings Clause…. In rejecting such a ‘blanket rule,’ however, the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking.”\textsuperscript{159} Although the acquisition of mining rights in the regulatory presence of SMCRA may not eliminate takings claims in reaction to regulatory restrictions, the well established presence of SMCRA within an industry that is heavily regulated indicates that “investment-backed expectations are an especially important consideration in the takings calculus. A party in Rith’s position necessarily understands that it can expect the regulatory regime to impose some restraints on its right to mine coal under a coal lease.”\textsuperscript{160}

The final prong of the \textit{Penn Central} test focuses on the nature of the government action. While the explanation of this test in the \textit{Penn Central} decision focused on such criteria as whether the regulation involved a public use or a physical invasion,\textsuperscript{161} a broader set of questions asked by the Courts targets the timeliness and completeness of the government’s regulatory actions. When the Courts consider such questions, they are working to protect the property rights of coal operators from potential stall and delay tactics of regulatory personnel. In regulatory takings jurisprudence the issues of temporary takings and ripeness are closely related. As discussed above, the ripeness doctrine protects the separation of powers by preventing courts from judging the impact of agency action before an agency has had a chance to finalize that

\textsuperscript{159} Rith II, \textit{supra} note 119 at 1350.
\textsuperscript{160} \textit{Id.} at 1351.
\textsuperscript{161} \textit{Penn Central}, \textit{supra} note 10 at 124.
The general rule for ripeness in a regulatory takings case is the requirement of a final decision by the regulatory agency, thus preserving the possibility that property can still be used profitably through variances of approved re-submittals. The requirement for repeated submittals of permit applications is tempered by the futility exception, which removes the requirement of re-submittal to reach a final administrative decision by recognizing that there may be situations “in which there was no indication that upon application the property owner would not be allowed to develop his [sic] property in some economically beneficial manner, and…further application would allegedly be futile.” In addition to the futility exception, the property owner is protected by being allowed to issue a challenge of a temporary taking. If the administrative delay is excessive, courts can rule that such delays took plaintiff’s property for the period of time during which the permitting process prevented the owner from using his or her property. Such delays, however, must be “extraordinary” in nature to amount to a compensable taking.

The ripeness requirement has been used by the Courts to insulate implementation of SMCRA from takings claims. In the Stearns decisions, a coal company sold surface rights to the U.S. Government for the creation of a national forest, well before enactment of SMCRA, but retained its mineral rights. After the eventual enactment of the “good faith, all permits” requirement for VER, it was determined by OSM that the company did not satisfy the test and, therefore, did not have VER. However, OSM stated that the plaintiff could still apply for a permit to mine and, referencing the historical presence of mining in the area and the general

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163 *Williamson Planning*, *supra* note 56.
164 *MacDonald*, *supra* note 56 at 359-360 (White dissenting).
165 *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1349-50 (2002); *Tahoe-Sierra*, *supra* note 90 at 332.
167 *Id.* at 449.
good track record of the plaintiff, stated that this permitting process “was essentially a rubber stamp.”\textsuperscript{168} In the trial, the Claims Court stated that the VER determination had “reversed the basic structure of rights between surface and subsurface owners” and a focus on the possibility of still receiving a permit “misses the point. Ownership and use are not synonymous. The fact that my neighbor always lets me use his lawnmower does not mean I own it.”\textsuperscript{169}

This decision, however, was overruled by the Court of Appeals for the Federal Circuit, which declared the case to be unripe. The decision hinged on defining the conflict as a regulatory takings case, not a physical invasion of property. “Here, the government has not occupied Appellee’s mineral property or the accompanying implied appurtenant easement…. Appellee’s argument to the contrary is little more than an incredible attempt to transform a regulatory taking claim into a per se physical taking. Under Appellee’s theory, the implied appurtenant easement that attends the mineral estate creates a power in Appellee to be free from regulation that addresses the circumstance of access to that mineral estate.”\textsuperscript{170} Once the Appeals Court determined the issue at hand to belong to a regulatory takings inquiry, the simple absence of a final administrative decision, leaving the possibility of profitable use of the property open, rendered the case unripe.\textsuperscript{171}

Whereas the ripeness doctrine protects OSM and the various state regulatory authorities from premature takings claims, the futility doctrine has been used to limit that protection. In the \textit{Whitney Benefits} case, the government argued that the case was not ripe since it had not been able to effectively evaluate the AVF overlying the company’s property in coal. “The Government (did) not suggest, and did not suggest at trial, any basis whatever on which a permit

\textsuperscript{168} \textit{Id.} at 451.
\textsuperscript{169} \textit{Id.} at 447.
\textsuperscript{170} \textit{Stearns II, supra} note 95 at 1357.
\textsuperscript{171} \textit{Id.} at 1358.
could be legally granted to surface mine Whitney coal.... Indeed, the record is clear that any such application was obviously and absolutely foredoomed on the day SMCRA was enacted.”

By deciding that any attempt on the part of Whitney Benefits to secure a surface mining permit for the coal underlying the AVF would be futile and that the regulatory takings challenge was, therefore, ripe for consideration, the Court of Appeals judged the regulatory behavior of the government by stating that it had “carried its attempt to deny the impact of SMCRA on Whitney coal to unreasonable lengths in an apparent hope of postponing the day of reckoning into eternity.”

In the various cases arising out of the regulatory restrictions placed upon the coal properties at issue in *Eastern Minerals*, the ripeness of the takings claims and the behavior of the regulating agency were constantly in question. This issue begins with the fact that Eastern Minerals allowed its lease to expire, wishing to avoid rent liabilities during the regulatory process. The Claims Court stated that this action was caused by the government’s delay in the permitting process and any further permit-seeking actions on the part of the company would have been futile. On appeal, however, the Court ruled that such reasoning was “speculatory,” and “the futility exception can never excuse the prerequisite that there exist a valid property interest for all takings cases.”

In addition to its ruling that the case brought by Eastern Minerals lacked a property interest, the Appeals Court also considered whether delays in the actions of the government took plaintiffs’ property temporarily prior to them abandoning their lease. The Court ruled that the

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172 *Whitney Benefits II*, supra note 92 at 1171-72.
173 *Id.* at 1173.
174 *Eastern Minerals*, supra note 121 at 545.
175 *Id.* at 550.
176 *Id.* at 547.
177 *Wyatt*, supra note 95 at 1097.
178 *Id.*
delays were not extraordinary, and further stated that “it is the rare circumstance that we will find a taking based on extraordinary delay without a showing of bad faith.”\textsuperscript{179} The bad faith requirement also excused a lengthy decision-making process over a subsequent UFM petition on the property.\textsuperscript{180} Proving that regulatory delays were extraordinary due to bad faith may prove quite difficult for coal mining operators. The courts are apt to defer to the decision-making expertise of regulatory agencies, especially “when the permitting process requires detailed technical information necessary to determine environmental impacts.”\textsuperscript{181} Furthermore, there always remains the possibility “that delay in the permitting process may be attributable to the applicant as well as the government.”\textsuperscript{182} The Appeals Court ruled that the delays encountered in Eastern Minerals’ application process were at least partially caused by failures to properly respond to technical deficiency letters (TDLs) and administrative violations on the part of the investor.\textsuperscript{183}

In addition to federal cases involving regulatory takings challenges to the implementation of SMCRA, a few cases from state courts are also worth mentioning. In 1998, a Pennsylvania Commonwealth Court ruled that a UFM designation by the state’s Department of Environmental Regulation had taken a mining company’s property in the mineable coal within the designated area.\textsuperscript{184} The decision turned on the Commonwealth Court’s declaration of the separated coal estate as the relevant parcel for the takings denominator, despite the facts, as pointed out by a dissenting judge, that alternative uses of the property existed, and only a portion of the land was affected.\textsuperscript{185} The Pennsylvania Supreme Court reversed and remanded the decision, taking issue

\textsuperscript{179} Id. at 1098.
\textsuperscript{180} Cane II, supra note 103 at 133.
\textsuperscript{181} Wyatt, supra note 95 at 1098.
\textsuperscript{182} Id.
\textsuperscript{183} Id. at 1098-99.
\textsuperscript{185} Machipongo Land and Coal Co., Inc. v. Commonwealth, 799 A.2d 751, 760 (Pa. S.C. 2002) [Machipongo II]
with the Commonwealth Court’s determination of the property denominator. The Court observed that property can be conceptualized vertically, horizontally, and temporally,\textsuperscript{186} and then noted that the U.S. Supreme “Court has refused to allow: vertical severance of the mineral estate in Keystone; vertical segmentation of 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 mineral rights.”\textsuperscript{187} The Court then considered whether the restrictions placed on plaintiffs’ property was necessary to prevent a nuisance, namely, the potential AMD that the state sought to prevent through its UFM designation. Just as with the federal courts, the Pennsylvania Supreme Court ruled against the finding of a taking by considering whether the externalities of mining (“pollution of public waterways”), as opposed to the mining itself constituted a taking.\textsuperscript{188} Additionally, the Court considered the level of burden placed upon the state in proving its finding of a nuisance; the Court stated, “We see no reason to require the Commonwealth to prove that the alleged pollution is practically certain to occur. It is enough if the Commonwealth can prove what its technical study found, that further mining in the UFM area had a ‘high potential to cause…(AMD) that would adversely affect the use of the stream as an auxiliary water supply.’”\textsuperscript{189}

Most recently, the Ohio Supreme Court heard a takings challenge to a UFM designation by the state Department of Natural Resources to protect a sole-source aquifer for the Village of Pleasant City.\textsuperscript{190} Unlike the Pennsylvania Supreme Court, the Ohio Supreme Court ruled that the designation constituted a categorical taking of the company’s coal estate property. In determining the relevant parcel in the vertical context, the Court stated that “mineral rights are

\begin{itemize}
  \item \textsuperscript{186} Id. at 766.
  \item \textsuperscript{187} Id. at 768.
  \item \textsuperscript{188} Id. at 774.
  \item \textsuperscript{189} Id. at 775.
  \item \textsuperscript{190} R.T.G. v. Ohio, 98 Ohio St. 3d 1 (Oh S.C. 2002)
\end{itemize}
recognized by Ohio law as separate property rights” and the company “acquired all the property at issue herein, whether in fee or through coal leases or purchases, for the sole purpose of surface-mining the coal from these premises.” 191 Horizontally, the Court ignored the 1/5 of the property outside the UFM area, stating “when the UFM designation prevented (the company) from mining a majority of its coal reserves within the regulated area, it made mining those minimal reserves outside the UFM-designated area economically impracticable.” 192 Although this determination of the relevant parcel relies on precedent from U.S. Claims and Appeals Courts, it runs counter to the U.S. Supreme Court’s reluctance to regard only the regulated property as the relevant parcel. 193 Therefore, instead of utilizing a Penn Central analysis, under which the Court still could have found the economic impact to be so great as to warrant the finding of a taking, a categorical analysis was used, and resulted in the finding of a total taking. 194 Additionally, the Court still had to determine whether an uncompensated, total taking would be permitted under the nuisance exception, but in making that determination, analyzed whether mining itself was the nuisance, as opposed to the AMD the state sought to prevent. The Court “concluded that coal mining is not an absolute nuisance, because it can be conducted safely when care is taken” and the company “had acted in a reasonable manner in mining the property and until the UMF designation was issued was allowed to mine the property pursuant to permits.” 195 Absent from the opinion and, in particular, the very short section dealing with the nuisance question, was any discussion about whether the Court considered factual evidence about the feasibility of safe mining practices in the UFM area.

191 Id. at 11; see also Whitney Benefits I, supra note 86.
192 Id. at 12; see also Florida Rock, supra note 136.
193 Concrete Pipe, supra note 130.
194 R.T.G., supra note 190 at 12.
195 Id. at 13.
THE BENCHMARK DECISION

With the exception of Whitney Benefits, the federal judiciary has been reluctant to declare specific implementation of SMCRA as a regulatory taking. Even in the cases in which a single judge on the U.S. Court of Federal Claims has found a taking, the three-judge panels of the Court of Appeals for the Federal Circuit have consistently overruled those findings. The Ohio Supreme Court’s decision in R.T.G. runs counter to federal precedent on regulatory takings challenges to SMCRA, not because a taking was found, but because the state supreme court deviated from the federal judiciary’s approaches to the assessments of relevant parcel and nuisance. Shortly after R.T.G., the Claims Court found a taking in SMCRA application, but that case involved coal rights acquired prior to SMCRA enactment,\(^{196}\) contained substantial dicta indicating that the plaintiffs would be able to mine coal after submission of an application,\(^{197}\) and was subsequently overturned by the Court of Appeals on ripeness grounds.\(^{198}\) Although the Claims Court has been more apt to find a taking in SMCRA implementation than the Court of Appeals for the Federal Circuit, the general trend in the Claims Court, through decisions such as M&J Coal, Rith, and Apollo Fuels, demonstrates a general deference to OSM and state enforcement agencies. Benchmark, for that reason, stands as a significant demonstration of the Claims Court’s adherence to the federal doctrine on regulatory takings challenges to SMCRA.

The facts in Benchmark involve two plaintiff corporations seeking compensation for an alleged taking caused by a UFM designation of the Rock Creek Watershed in Hamilton and Bledsoe Counties, Tennessee,\(^{199}\) a state in which the OSM exercises direct federal enforcement. A significant portion of the decision deals with the Tucker Act statute of limitations, which

\(^{196}\) Stearns I, supra note 166 at 447.

\(^{197}\) Id., at 451.

\(^{198}\) Stearns II, supra note 95.

\(^{199}\) Benchmark II, supra note 1 at 460.
requires takings challenges brought before the Claims Court within six years,200 and a third
plaintiff’s complaint was dismissed for failure to file a timely claim.201 However, the most
significant portion of the decision dealt with the determination of the ripeness of plaintiffs’
claims, and the following analysis will focus on that aspect.

The challenge to prove their case ripe was an uphill battle from the start for Benchmark
and Gentry, the two plaintiff corporations, since they never submitted a permit application to
mine the property affected by the UFM designation. The Claims Court began its ripeness
analysis by recognizing that “(t)he touchstone of the ripeness doctrine in regulatory takings is
finality of agency decisions,”202 and that, “under ordinary circumstances, the doctrine of
exhaustion of administrative remedies would require filing of a permit with the OSM.”203
Plaintiff arguments that written correspondence between the single president of both
corporations and OSM exhausted administrative remedies were rejected by the Court as not
constituting a permit application.204

The application of the ripeness doctrine in this case does more than shore up the permit
application requirement of the federal ripeness doctrine205; the additional consideration of the
futility exception by the Claims Court not only remained consistent with past rulings, but also
supported the parcel-as-a-whole rule.206 To argue that their taking claim was ripe, the plaintiffs
argued that any application for a permit, even an initial application, would be futile, as the UFM
designation by OSM declared:

201 Benchmark II, supra note 1 at 472.
202 Id., at 463.
203 Id., at 464.
204 Id., at 464-65.
205 Williamson Planning, supra note 56; Stearns II, supra note 95 at 1538.
206 Penn Central, supra note 10 at 130-31; Keystone Bituminous, supra note 68 at 497.
a. All surface minable reserves of the Sewanee coal seam within the Rock Creek watershed, Tennessee as unsuitable for coal mining operations using conventional overburden mixing techniques for reclamation;
b. The Hall, Middle, and Rock Creek gorges as unsuitable for all surface coal mining operations and surface disturbance incident to underground mining.207

The Claims Court interpreted such exhaustive language in the UFM designation to constitute a final agency decision and, thereby, determined that any “permit application regarding potential surface mining within the area designated as unsuitable is futile.”208

Although the Claims Court recognized the futility of any application for surface mining within the designated area, the Court did not excuse the plaintiffs from the ripeness requirement of a permit application. Despite the strong language of the UFM designation, the Claims Court agreed with OSM’s assessment that the plaintiffs could still apply for and receive a permit to mine coal on their property. Not all of the plaintiffs’ property was within the petitioned area, not all of the petitioned area was designated as UFM, and some areas within the designated area allow for specific types of mining, such as underground mining or surface mining which uses special overburden mixing, materials handling, and/or reclamation techniques.209 Despite the claims by plaintiffs that those options could not be exercised profitably, thus rendering their property worthless,210 the Claims Court concluded that any such determination would have to be made through the permitting process before any such claim could be considered ripe for adjudication.211

The manner in which the Claims Court addressed the question of futility demonstrates an adherence to the parcel-as-a-whole rule. While not an explicit part of a ripeness inquiry, the

208 Benchmark II, supra note 1 at 466.
209 Id., at 467.
210 Id.
211 Id., at 469.
determination of the relevant property denominator is a crucial step in the *Penn Central* analysis of economic impact. As discussed above, takings plaintiffs have argued that the regulated property should be considered as the total relevant parcel, which is favorable for the finding of a total or significant economic impact.\(^{212}\) The federal judiciary has remained consistent, however, in SMCRA takings cases, insisting that the impact of regulations on the economics of coal mining be assessed in the light of the owner’s total property interests,\(^{213}\) which may include prior coal revenues,\(^{214}\) non-coal interests,\(^{215}\) and/or additional tracts of coal property outside of the regulated property,\(^{216}\) the condition most applicable to *Benchmark*. By considering the plaintiffs’ property in coal outside of the UFM area in its ripeness determination, the Claims Court has established the likelihood that, if it is called upon to consider the economic impact of the UFM designation within the context of *Penn Central*, it will do so with attention to *Benchmark* and Gentry’s additional property interests outside the designated area.

This begs the question of how the Claims Court might decide the regulatory takings claim in *Benchmark* if the ripeness requirement is met through permit applications to OSM. In doctrinal terms, half of that decision has already been made by the Claims Court. Once ripeness is determined, the Claims Court traditionally utilizes the two-tier inquiry from *Chancellor Manor*, first assessing whether a compensable property interest exists, followed by an assessment of whether a taking occurred, if the first prong is answered affirmatively.\(^{217}\) The Court has already determined that the plaintiffs in *Benchmark* possessed protected property interests at the time of the alleged taking, over OSM’s claim to the contrary.\(^{218}\) The property in question

\(^{212}\) *Cane II*, *supra* note 103; *Apollo Fuels I*, *supra* note 94.
\(^{213}\) *Apollo Fuels I*, *supra* note 94 at 723.
\(^{214}\) *Rith II*, *supra* note 119 at 1362.
\(^{215}\) *Cane I*, *supra* note 134 at 106-08.
\(^{216}\) *Cane II*, *supra* note 103 at 121-22, 130.
\(^{217}\) *Chancellor Manor*, *supra* note 46 at 901-02.
\(^{218}\) *Benchmark II*, *supra* note 1 at 473.
involves 7000 acres in fee simple and the mineral rights of approximately 24,000 surrounding acres.\textsuperscript{219} That property in coal, however, was leased to another corporation, giving it exclusive mining rights and the sole option of contract renewal, indicating that the plaintiffs do not possess a protected property interest in mineable or merchantable coal on the lease property.\textsuperscript{220} The coal lease does, however, reserve for plaintiffs a right to royalties of the coal mined from the property, a protectable right in property under federal takings jurisprudence.\textsuperscript{221}

Since the plaintiffs do possess a protectable property interest, a subsequent trial would likely proceed to an inquiry into whether or not a taking occurred when areas in the Rock Creek Watershed were designated as unsuitable for surface mining. Two aspects of the case would likely play a significant role in that determination. One factor is the timing of property acquisition. The history of ownership of this property is particularly complex, involving multiple exchanges over numerous years and involving parties from numerous states and a handful of foreign nations. Of the two remaining plaintiffs, Gentry acquired its property prior to the alleged taking, the 1987 UFM designation, while the Benchmark portion was acquired after that date.\textsuperscript{222} While Benchmark’s postenactment acquisition does not “absolve the State of its obligation to defend any action restricting land use,”\textsuperscript{223} Gentry may have a stronger claim that, like Whitney Benefits, they had a property claim prior to enactment of a regulation, and none after.\textsuperscript{224}

The date of the alleged taking may not, however, be so important. Although the notice rule has not be adopted, the Claims Court and the Court of Appeals for the Federal Circuit have

\textsuperscript{219} Id., at 460.
\textsuperscript{220} Id., at 476.
\textsuperscript{221} Id.; Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003).
\textsuperscript{222} Benchmark I, supra note 2 at Footnote 1.
\textsuperscript{223} Palazzolo, supra note 50 at 627.
\textsuperscript{224} Whitney Benefits II, supra note 92 at 1172.
consistently stated that the heavily regulated nature and history of the coal mining industry should shape the reasonableness of the expectations of any individual entering the industry, who subsequently cannot assume that their mining operations will occur in a manner unimpeded by potentially stringent regulatory restrictions. For that reason, enactment of SMCRA in 1977 is a more significant date, a date that predates property acquisition in Benchmark, as it established the expectation of the plaintiffs that a UFM designation was possible.

The second aspect that would shape a takings determination in this case is the purpose of the unsuitability designation. When the federal courts have stated that an onus exists on owners of coal property to recognize that their use of that property could likely be restricted due to the strong regulatory environment surrounding coal, it has been in reference to the externalities of coal mining. In the Rith decision discussed above, the Court of Appeals for the Federal Circuit stated that the acquisition of coal property was not accompanied by a legitimate expectation to be allowed to cause acid mine drainage. The more the UFM designation focused on harms associated with traditional understandings of nuisance, the more likely any future inquiry in Benchmark is likely to result in the finding of no taking, since even a regulation that results in a total deprivation of property value can be free from the requirement of compensation if the regulation prevents a nuisance.

The OSM unsuitability decision designated two specific areas within the petition area as unsuitable for mining: one area is the Sewanee Coal Seam and the other consists of the Hall, Middle, and Rock Creek Gorges. Regarding the gorges area, the Statement of Reasons issued

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225 See M&J Coal II, supra note 97 at 1154; Rith II, supra note 119 at 1362; Apollo Fuels II, supra note 119 at 1350; Cane II, supra note 103 at 119.
226 On Dec. 28, 1977, the date the third party coal lease was executed, the property was owned by MTB Holding Corp., “which had no relationship to Benchmark or Gentry.” Benchmark II, supra note 1 at 471.
227 Rith II, supra note 119 at 1362.
228 Rith I, supra note 64 at 113.
by the OSM in 1987 states that “the steep slopes of the gorges do not lend themselves to return to approximate original contour,“\textsuperscript{230} and mining operations would “result in significant damage to important esthetic values and natural systems,“ as well as “recreational values.”\textsuperscript{231} Aesthetic, ecological, and recreational values have not held up against compensation challenges as well in the Claims Court as they have at the federal appellate level. In the \textit{Stearns} decision, for example, SMCRA enforcement was aimed at the protection of a national forest,\textsuperscript{232} and in \textit{Eastern Minerals}, the concern was impacts on a public park.\textsuperscript{233} Both decisions resulted in the finding of a taking in the Claims Court, although both were subsequently overturned. If the unsuitability determination relied solely on aesthetic, ecological, or recreational values, the outcome of a regulatory takings case on the merits could result in the requirement of compensation.

The Statement of Reasons, however, addresses a concern that the Claims Court has consistently weighed more heavily than the private property interests of coal mining companies. Regarding the Sewanee Coal Seam, OSM determined that the overburden (the earth over the coal seam that must be removed in surface mining operations) is characterized by “consistent zones of toxic materials,”\textsuperscript{234} and “that conventional overburden mixing and backfilling techniques will not be adequate to prevent formation of acid mine drainage….“\textsuperscript{235} The concern raised by OSM was that there was a high likelihood that AMD would severely damage surface streams, which possess “low natural buffering capacity and natural acidity,”\textsuperscript{236} and that conventional mining techniques would not be “adequate to ensure protection of domestic wells from the potential of

\textsuperscript{231} Id.
\textsuperscript{232} \textit{Stearns I}, supra note 166 at 447.
\textsuperscript{233} \textit{Eastern Minerals}, supra note 121 at 545.
\textsuperscript{234} Statement of Reasons, supra note 230 at 6.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
water-quality impacts from mining….”237 When the Claims Court has assessed problems associated with coal mining to determine whether they amount to a nuisance, issues of safety have more easily risen to the level of nuisance.238 Furthermore, the Claims Court has been particularly willing to rule that water quality issues, especially when that water is drinking water, constitute nuisances and their regulation, therefore, does not require compensation.239 The stated purpose within the Statement of Reasons for the UFM designation of the prevention of AMD, which the Claims Court has twice recognized as a nuisance under Tennessee law,240 should be sufficient to insulate OSM from compensation for its designation of the Rock Creek Watershed as unsuitable for surface mining operations.

CONCLUSION

The Surface Mining Control and Reclamation Act is hardly a statute that has risen to a position of prominence in the collective consciousness of the American public. Likewise, regulatory takings caselaw, unlike its eminent domain cousin, still remains a fairly innocuous and seldom seen component of public discourse. Both are obviously important; in tandem, their significance becomes more apparent. One regulates the industry which provides this country with its largest energy source and the dangerous externalities of that industry, the other affects the cost and efficiency with which the government can perform that very task.

As a whole, the body of federal cases dealing with regulatory takings challenges to SMCRA enforcement does more than tell us where the balance between private property rights and the common good exists for a particular industry. SMCRA takings cases provide an example of the existence of a relatively consistent and applicable doctrine within a jurisprudence

237 Id., at 8.
238 M&J Coal I, supra note 94 at 364-65.
239 See Rith I, supra note 64 at 114; Apollo Fuels I, supra note 94 at 720.
240 Rith I, supra note 64 at 114; Apollo Fuels I, supra note 94 at 735
that the highest court in the land has described as beyond the reach of a “set formula.”241 Even in the instances in which the Claims Court has found a compensable taking in SMCRA enforcement, the Court of Appeals for the Federal Circuit has overturned those decisions. The end result is an acknowledgement by the federal judiciary that the goals of regulations embedded within SMCRA are of such a protective public nature, than non-compensated restrictions on the property rights of coal mining operations are justified. The Benchmark decision is significant, not for changing that position, but for shoring up part of that position, and possessing the facts to potentially shore up the rest. In particular, adherence to Chancellor Manor, the application requirements for ripeness, the assessment of futility, and an avoidance of conceptual severance in determining the appropriate property baseline, as presented in Benchmark are hallmarks of the federal SMCRA cases. The only question that is left to answer is the degree to which the externalities of coal mining constitute nuisances of which mining operations should be aware, given the historical presence of SMCRA regulation, in particular, and coal mining regulation, generally. In Benchmark, the threats to water supplies can predictably be seen as a nuisance; but it is in this area that the Claims Court has been most unpredictable.

241 Penn Central, supra note 10 at 123.