Utah International, Inc. v. Watt: Adjudicative or Legislative Hearing

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The Surface Mining Control and Reclamation Act of 1977 (SMCRA)\(^1\) has inspired reams of commentary\(^2\) and scores of cases on almost every provision.\(^3\) Its widespread applicability\(^4\) and staged implementations\(^5\) guarantee that this trend will continue for some time to come. Section 1272, "Designating Areas Unsuitable for Surface Coal Mining"\(^6\) is one aspect of SMCRA scrutinized by commentators\(^7\) and courts.\(^8\) This section has pro-

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\(^8\) See Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 304-05 (§ 1272 found not facially unconstitutional in pre-enforcement review); Utah Int'l Inc. v. Watt, 533 F Supp. 872, 886 (D. Utah 1982) (motions for summary judgment stemming from unsuitability designation granted in part and denied in part).
visions and standards for both mandatory⁹ and discretionary¹⁰ designations of unsuitability for surface coal mining. Additional-

⁹ 30 U.S.C. § 1272(e) provides for mandatory designations as follows:
(e) After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—
(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreational Areas designated by Act of Congress;
(2) on any Federal lands within the boundaries of any national forest: Provided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—
(A) surface operations and impacts are incident to an underground coal mine; or
(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, the Federal Coal Leasing Amendment Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: And provided further, That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;
(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;
(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or
(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional buildings, public park, or within one hundred feet of a cemetery.

¹⁰ 30 U.S.C. § 1272(a)(3) provides for discretionary designation as follows:
(3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—
(A) be incompatible with existing State or local land use plans or programs; or
ly, the designation process applies, with some differences, to both federal lands and lands administered by a state regulatory authority.

On December 16, 1980, then Secretary of the Interior Cecil Andrus designated certain areas of the Alton coal fields in southern Utah unsuitable for surface coal mining pursuant to an unsuitability petition filed with the Department of the Interior.

(B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems; or
(C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or
(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(emphasis added).

11 Both federal and state regulatory agencies, through application of 30 U.S.C. § 1272 (a)(4)(D), must provide a petition process as outlined in 30 U.S.C. § 1272(c). Section 1272(b) requires the Secretary of the Interior to conduct a review of federal lands and to withdraw any unsuitable lands from leasing programs or condition mineral leases to limit surface mining operations. States are additionally required to develop specific implementation procedures and structures:

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes—

(A) a State agency responsible for surface coal mining lands review;
(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;
(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and
(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.


12 30 U.S.C. § 1272(b), (e).
13 30 U.S.C. § 1272(a), (e).
14 The unsuitability petition applied only to federal lands. See Utah Int'l v. Watt, 553 F. Supp. at 876. Federal ownership of the mineral eliminates from this limited discussion the position of a mineral owner. See id.
15 The Final Petition Evaluation Document was released on November 26, 1980, Secretary Andrus' decision was issued on December 16, 1980, and the Statement of Reason was published on January 13, 1981. See 553 F. Supp. at 884.
in late 1979. This was the first petition submitted to the Secretary of the Interior under the discretionary provision of section 1272. Secretary Andrus' decision was challenged in three lawsuits, which were later consolidated into Utah International, Inc. v. Watt. One of the issues raised by this case and by later unsuitability petition proceedings is the propriety of the legislative hearing provided by the regulations as opposed to an adjudicatory hearing.

The dichotomy between rulemaking and adjudication is one of the cornerstones of administrative law, but it also presents a difficulty to our legal system. This difficulty is highlighted by the application of this dichotomy within the lands unsuitable petition process.

This Comment focuses on the unsuitability designation petition process found in section 1272 of SMCRA. First, the general legal principles of rulemaking and adjudication will be reviewed briefly. The Comment will then describe the theory underlying the petition process, and indicate some problems the process has.

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17 553 F. Supp. at 876.
19 553 F. Supp. at 876.
20 See Proceedings of Lands Unsuitable for Surface Mining Petition No. LUM 83-1 (available at the Kentucky Department of Natural Resources). Kentucky petition requesting designation of lands in Butler and Ohio Counties was denied. Instead, all permit applicants had to comply with special regulation requiring archeologic survey of permit area, as per Order: In re Lands Unsuitable Petition 83-1 (July 11, 1983) (located in University of Kentucky College of Law Mineral Law Center). See also Application for Intervenor Status filed by Kentucky Energy Cabinet, May 6, 1983 (located in University of Kentucky College of Law Mineral Law Center).
22 553 F. Supp. at 880-81.
23 See note 40 infra for the Administrative Procedures Act (APA) definition of rulemaking.
24 See note 39 infra for definitions of adjudication.
25 """[T]he entire [Administrative Procedures] Act is based upon a dichotomy between rulemaking and adjudication." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURES ACT 14 (1947) [hereinafter cited as ATTORNEY GENERAL MANUAL].
had in practical application. Finally, the application of the legal principles of rulemaking and adjudication to the lands unsuitable petition process as found in Utah International, Inc. v. Watt\textsuperscript{26} will be analyzed.

I. GENERAL PRINCIPLES OF RULEMAKING AND ADJUDICATION

Action by administrative agencies takes essentially two forms:\textsuperscript{27} adjudication,\textsuperscript{28} which is similar to the functioning of a court; and rulemaking,\textsuperscript{29} which is similar to the legislative functions of a body of law makers. Each form of action has procedures and practices appropriate to its character.\textsuperscript{30} For example, an adjudication typically is "on the record,"\textsuperscript{31} so any resultant decision must be based on evidence presented and recorded at a formal hearing. The hearing officer cannot act as investigator as well as judge.\textsuperscript{32} Procedural safeguards such as cross-examination, discovery, and standards of admissibility of evidence generally are part of an adjudication.\textsuperscript{33} Adjudication is the administrative equivalent of a trial.

\textsuperscript{26} 553 F. Supp. at 872. See notes 74-75 infra and accompanying text for a brief background on the case.

\textsuperscript{27} See generally APA, Pub. L. No. 89-554, 80 Stat. 378 (codified as amended at 5 U.S.C. §§ 500-76 (1982)). The APA governs the action and procedures of administrative agencies and was enacted to "introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other." Wong Yang Sung v. McGrath, 339 U.S. 33, 41, modified on other grounds, 339 U.S. 908 (1950). Section 553-57 of the APA outline the procedures for rulemaking and adjudication. For discussion of the relevant sections of the APA, see generally 339 U.S. at 38-41 (discussing the APA and its legislative history); ATTORNEY GENERAL MANUAL supra note 24 at 14; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12:3 (2d ed. 1979) (discussing the distinction between adjudicative and legislative facts); Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111 (1972-73) (discussing criticism of current administrative procedures); Note, The Requirement of Formal Adjudication Under § 5 of the Administrative Procedures Act, 12 HARV. J. ON LEGIS. 194 (1974-75) (discussing the adjudication procedures under the APA).


\textsuperscript{31} See 5 U.S.C. § 554(a).

\textsuperscript{32} See 5 U.S.C. § 554(d).

\textsuperscript{33} See 5 U.S.C. § 556(d).
On the other hand, a legislative hearing or a rulemaking action resembles a session of the legislature.\(^ {34} \) Public comment is invited, but usually rules of evidence, testimony under oath and cross-examination are not available. In fact, there may be no oral hearing at all.\(^ {35} \) Decisions can be based on the investigations of the decision-making officer, advice from the administering agency, or evidence gleaned from the public.\(^ {36} \) Therefore, the decision is not restricted to evidence on the record.\(^ {37} \)

The difference between the two forms of administrative action is easy to understand. The difficulty lies in determining which form is appropriate in a particular circumstance. This difficulty has inspired courts and commentators to devise many and varied approaches to its solution.\(^ {38} \)

\(^ {34} \) See 5 U.S.C. § 533 (1982).

\(^ {35} \) See 5 U.S.C. § 553(c). See also 5 U.S.C. § 556 (procedures when a legislative hearing is required by statute).

\(^ {36} \) See 5 U.S.C. § 553(c).

\(^ {37} \) Id. (unless specifically required by statute).

Another difficulty involves defining "adjudication" and "rulemaking." By defining these terms, the nature of the action

An early analysis of the difference between adjudication and rulemaking forms was presented by Supreme Court decisions in BiMetallic Inv. Co. v. State Bd. of Equalization, 239 U.S. at 441, and Londoner v. Denver, 210 U.S. at 373. Londoner involved an individual taxpayer's protest of an assessment for street repairs as a denial of his right to an adjudicatory hearing. 210 U.S. at 374-75. The assessment affected only a small number of people. The Court in Londoner concluded that the individual's lack of opportunity to be heard was a denial of the due process clause of the fourteenth amendment. 210 U.S. at 385-86.

Conversely, BiMetallic Investment was a tax protest of a city-wide change in assessment rates implemented without affording each affected taxpayer the opportunity of an adjudicatory type hearing. 239 U.S. at 444. The Court in BiMetallic Investment concluded that where a proceeding affects a group of people, no adjudicatory hearing need be afforded each individual. Id. at 445-46. The Court explained its distinction of the two cases as follows:

The question then is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned.

Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. There must be a limit to individual argument in such matters if government is to go on.

Id. at 445.

Initially, these cases were interpreted to mean that the number of individuals affected was the deciding factor in determining the kind of form and procedure to be applied. See generally Hercules, Inc. v. EPA, 598 F.2d at 118; Anaconda v. Ruckelshaus, 482 F.2d at 1306-07 (discussing the quantitative factor rule of Londoner and BiMetallic Investment). However, subsequent cases indicate that, although a significant factor, such numbers are not dispositive in choosing adjudicative or rulemaking procedures. See generally United States v. Florida E. Coast R.R., 410 U.S. 224, 244-46 (1973) (rulemaking procedures held appropriate for formulating industry wide regulations); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. at 756-57 (rules alleviating freight car shortages formulated by legislative procedures upheld); ICC v. Louisvile & N.R.R., 227 U.S. 88 (rate change applied to a single railroad was violative of due process absent proper hearing); WBEN, Inc. v. United States, 396 F.2d 601, 620-21 (2d Cir.) (rulemaking held appropriate for change affecting entire industry), cert. denied, 393 U.S. 914 (1968); American Airlines v. Civil Aeronautics Bd., 359 F.2d at 627 (general rulemaking permissible means of agency regulation of carriers), cert. denied 385 U.S. 843 (1966).

Compare the APA definition of adjudication in 5 U.S.C. § 551(7) (1982) ("agency process for the formulation of an order") and the APA definition of order in 5 U.S.C. § 551(6) (1982) ("the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing") with Cramton, supra note 37, at 587-88 ("Adjudication may be defined as a process in which the affected parties are guaranteed a right to participate through presentation of proofs and reasoned argument, and in which a decision is made by rationally applying general principles to particular facts").

The APA defines rulemaking as an "agency process for formulating, amending
can be more clearly identified, thus allowing the selection of appropriate procedures. Toward this end, one commentator, Kenneth Culp Davis, introduced the concept of "legislative facts" and "adjudicative facts." Davis suggests that courts and agencies should characterize the nature of the facts to be determined, rather than try to characterize the nature of the action. Thus, if legislative facts are involved, rulemaking procedures are required, whereas if adjudicative facts are to be determined, an adjudication is necessary. Yet, Davis himself admits that the distinction...

or repealing a rule." 5 U.S.C. § 551(5). A rule is defined as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.


Davis, An Approach to Problems of Evidences in the Administrative Process, 55 Harv. L. Rev. 364, 402-10 (1942). This distinction and analysis has been more fully delineated in Davis, supra note 27, at § 12:3 (a full delineation of the distinction). The Londoner-BiMetallic analysis (see note 38 supra) and Davis's "legislative and adjudicative facts" distinction (see notes 43 and 44 infra) are parallel themes which are in general accord.

Legislative facts do not usually concern the immediate parties but are the general facts which help the tribunal decide questions of the law and policy and discretion.

Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.

Id. § 12:3, at 413.

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent.

Facts pertaining to parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than any one else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts.

Id.
between these classifications is "unhelpful and unsatisfactory on some problems."  

The problem of choosing appropriate procedures for an agency action is rooted in the difficulty of determining the nature of the action. Each dispute presents a different context in which definitions must be applied, and frequently, a proposed proceeding has elements fitting the definitions of both rulemaking and adjudication. The lands unsuitable petition process is one such hybrid situation.

Perhaps the most effective means of determining appropriate procedures is a balancing of the competing interests. Legislative procedures protect the interests of efficiency and practicality. Broad issues create actions involving a multitude of interests, people and organizations, each with a unique outlook on the action. In such a situation, a bi-polar proceeding becomes difficult. Thus, legislative proceedings have been found to be more effective in the formulation of broad policy decisions affecting large portions of society. On the other hand, adjudicative procedures are a protection of individual rights and are especially effective in adversarial and bi-polar situations. Information collected in an adjudication may be more accurate than that of a legislative hearing, due to the availability of discovery, standards of evidence, rebuttal and cross-examination. In determining which pro-

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45 Id. § 12:3, at 415.
46 See id. § 12:4.
47 See id.
48 Id. § 12:3, at 416.
49 Increasingly, agencies are formulating hybrid actions composed of a mixture of legislative and adjudicative procedures. See Boyer, supra note 27 at 116-69 (discussing the procedural needs of multifaceted issues). This hybrid approach has been met with mixed success and response. "[P]olycentric controversies exhibit a blend of technical, factual and political attributes that often seem nearly impossible to separate or accommodate within a single procedural network framework." Id. at 169. See also Stewart, supra note 38 at 729-33.
50 Boyer, supra note 27, at 169; DAVIS, supra note 27, at 386-88.
51 See DAVIS, supra note 27, at § 12:3.
52 Boyer, supra note 27, at 169.
53 See generally Cramton, supra note 38, at 585 (discussing adjudicatory procedures within a nuclear power administrative setting); Davis, supra note 41 (discussing procedural problems within an administrative hearing setting).
54 See Boyer, supra note 27, at 169.
55 DAVIS, supra note 27, § 12:2, at 410.
procedure to use, courts have balanced the efficiency and effectiveness of requiring a hearing for an affected individual against the due process rights of that individual. This type of analysis can be a useful tool in an examination of the current dispute within the SMCRA lands unsuitable petition process.

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56 BiMetallic Inv. Co. v. State Bd. of Equalization, 239 U.S. at 445. This type of balancing can be seen in the BiMetallic Investment-Londoner analysis. See note 38 supra. One commentator has outlined a criteria of “accuracy,” “efficiency,” and “acceptability” to balance “the advantages and disadvantages of each procedural system.” See Cramton, supra note 38, at 592-93. Cramton outlines his criteria as follows:

In striking this balance, I believe that the following formulation of competing considerations is more helpful than “fairness” or “due process” the extent to which the procedure furthers the accurate selection and determination of relevant facts and issues, the efficient disposition of business, and, when viewed in the light of the statutory objectives, its acceptability to the agency, the participants, and the general public.

The first consideration, accuracy, serves as a short-hand reference to the rational aspects of a decision-making process. The ascertaining of truth or, more realistically, as close an approximation of reality as human frailty permits, is a major goal of most decision-making. There are better and worse ways, in various contexts, of gathering relevant information, selecting or formulating controlling principles, and applying the correct principles to the probable facts. Accuracy, moreover, is not only a facet of each case but an aggregative or system characteristic of uniform and consistent results that give equal treatment to similarly situated persons. Accurate results in a particular instance (“justice in the individual case”) may be less important in many areas than a high degree of consistency in the decision of a large number of cases.

The second consideration, efficiency, emphasizes the time, effort, and expense of elaborate procedures. The work of the world must go on, and endless nit-picking, while it may produce a more nearly ideal solution, imposes huge costs and impairs other important values. In the polycentric administrative case, the efficiency of trial procedures meets the severest test. This criterion, unlike the others, is capable of quantitative statement since time and effort may usually be stated in dollar terms. Concern with public costs and expenditures must not be allowed to obscure the fact that the private costs of administrative delay are usually far higher than the total of governmental costs.

The final consideration, acceptability, emphasizes the indispensable virtues of procedures that are considered fair by those whom they affect, as well as by the general public. Usually this translates into meaningful participation in the decisional process. The authority of decisions in a society resting on the consent of the governed is based on their general acceptability. Moreover, if procedures are deemed fair by those immediately affected, their cooperation and assistance can be obtained, with the result that administrative action will be better informed and thought out.

Id. at 592-93 (citations omitted; italics in original).
II. LANDS UNSUITABLE: THEORY AND PRACTICAL APPLICATION

The Designation of Lands Unsuitable for Surface Coal Mining is an aspect of land use control and protection under the SMCRA. In theory, the process of petitioning to have certain areas declared unsuitable for mining could be of assistance to the coal industry, the regulatory authority and concerned citizens by identifying large areas to be removed from surface coal mining prior to the permit stage. By making the assessment at a pre-permit stage, thereby avoiding the extensive and expensive per-

Applying this balancing test to Londoner and BiMetallic Investments illustrates its usefulness. In Londoner, the validity of the taxpayer's protest can be more accurately assessed by allowing the protestor to present and defend proof of his claims than by collecting written comments. Hearing the protests of a few taxpayers should not seriously hinder the agency's efficiency. Additionally, because this assessment was applicable to only a few individuals, acceptability of the assessment action is essentially directed to just those few taxpayers. Using these factors, the balance swings in favor of adjudicatory procedures. See Londoner v. Denver, 210 U.S. at 373. See also note 38 supra for a discussion of BiMetallic Investment and Londoner.

On the other hand, BiMetallic Investment's tax protest involved all taxpayers in the city of Denver. Accuracy might be served to some extent by individual hearings, but any gain in accuracy is far offset by the burden placed upon efficiency. Additionally, the taxpayers of Denver were all treated equally, making the action more acceptable than one which singled out just a few. See 239 U.S. at 441. See also note 38 supra.

57 For a brief analysis of the designation section of SMCRA, § 1272, see Correll & Russell, supra note 7, at 59-60:

Section 522 of SMCRA sets forth three ways in which lands can be designated unsuitable for all or certain types of surface mining. First, section 522(e) contains a per se prohibition on surface mining operations in certain areas such as those within the boundaries of national parks and other federal systems or within specified distances from various facilities such as public roads, parks and occupied dwellings. Second, section 522(b) requires the Secretary of the Interior to conduct a review of federal lands to determine areas which are unsuitable for all or certain types of surface coal mining. If the federal lands review indicates that in certain areas mining would be incompatible with historic, ecological or other values, the Secretary is required to withdraw those lands from mineral development. Finally, section 522(a) of SMCRA establishes a petition process by which the regulatory authority can designate areas on state lands as unsuitable for all or certain types of coal mining where mining would conflict with other landuses or where other values are found to be more important than mining.

Id. (citations omitted).

mit application and review process, the regulatory authority would save all parties both time and money.

The petition process, the segment of section 1272 with which this Comment is concerned, generally applies to cohesive units of land that possess common area-wide characteristics which mandate that they be withdrawn from future mining. Unfortunately, the petition process has not lived up to theory in the few instances in which it has been used.

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59 Congress apparently intended the petition process for designating lands unsuitable for mining to fall between the site specific permit review process and the general federal and state land use reviews. The legislative history reveals that the petition process was designed as an administrative means for private parties to request review of areas larger than mine sites where common area-wide characteristics justify an unsuitability designation.

Correll & Russell, supra note 7, at 62 (citing H.R. REP. No. 218, 95th Cong., 1st Sess. 95 (1977) [hereinafter cited as H.R. RP. No. 218, with page references to the report]).

60 The petition process is outlined at 30 U.S.C. § 1272(c):

Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any other party to the hearing, a written decision regarding the petition, and the reasons therefore. In the event that all petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

61 See generally Petition Process for Designation of Federal Lands as Unsuitable for All or Certain Types of Surface Coal Mining Operations and for Termination of Previous Designations, 30 C.F.R. § 769 (1982) (describing the administrative procedure process).

62 See, e.g., Petition of The Sierra Club, supra note 16, at 3,398; Petition of the West
For example, the decision not to designate as unsuitable the lands affected by a West Virginia petition was based, at least in part, on the fact that the petition area did not exhibit common area-wide characteristics. A Montana petition concerning lands near the Tongue River was denied because of the impossibility of reaching area-wide conclusions regarding the physical state of the land. Whether there are any large areas which exhibit common area-wide characteristics leading to unsuitability designation has yet to be demonstrated.

The factual problems inherent in implementing this law create procedural problems which the regulations are not designed to meet. According to the regulations, unsuitability designation is based on agency review, supplemented by legislative fact-finding hearings. A legislative hearing is generally called for when


A petition was filed with the Kentucky Department for Natural Resources on February 9, 1983, by Charles Niquette of Lexington, Ky., seeking an unsuitability designation of lands in Ohio and Butler Counties. See LUM 83-1. Public hearing was held in Hartford, Ky. on May 10, 1983 (petition located at Kentucky Department of Natural Resources). See Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet, Order: In re Lands Unsuitable Petition 83-1 (July 11, 1983) (order located at University of Kentucky College of Law Mineral Law Center).

64 See Decision and Policy Recommendations in Response to a Petition Filed by West Virginia Rivers Coalition at 11, Reclamation Commission of the West Virginia Dep't of Natural Resources (Jan. 29, 1982) (recommendations located at the University of Kentucky College of Law Mineral Law Center).
65 See Powder River, note 62 supra.
66 Decision and Statement of Reasons: Petition to Designate Lands Unsuitable for Surface Coal Mining at 11, Montana Department of State Lands (Dec. 1981) (located at the University of Kentucky College of Law Mineral Law Center).
67 See generally Gorrell & Russell, supra note 7, at 69-71 (discussing the Montana case (note 66 supra)).
68 See id. at 72-74 (procedural problems mentioned include property interests, nature of the proceeding, and understanding the adversarial nature of the hearing).
69 30 C.F.R. § 768.17(a) (1982). The regulations specifically state that the public hearing shall not include cross-examination. Id. Other common procedural safeguards have also been omitted. See id. Once a petition is found to be complete, petitioner has no burden to prove his allegations. 30 C.F.R. § 769.14(d) (1980). "The failure to assign the ultimate burden of proof to a party making an allegation leaves in doubt the standard for a decision where scientific data on that issue are lacking, inconclusive or conflicting." Buskirk
broad issues of policy and specialized scientific data must be considered.\textsuperscript{70} A designation proceeding must examine large areas for consistently fragile, historic or environmental factors.\textsuperscript{71} Additionally, this type of proceeding usually concerns large numbers of interested parties. A legislative hearing thus would allow all parties an opportunity to comment, without the procedural nightmare of deciding which parties should be permitted to cross-examine, subpoena, or conform to other similar procedural safeguards.\textsuperscript{72}

Conversely, the petition process is often one fraught with adversity and one which deals directly with interests which mandate the protections of adjudication. \textit{Utah International, Inc. v. Watt}\textsuperscript{73} illustrates some of the potential interests which may be involved in the petition process.

\& Dragoo, \textit{supra} note 7, at 391. "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue." Greene \textit{v} McElroy, 360 U.S. 474, 496-97 (1959) (discovery and rebuttal). "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." Willner \textit{v}. Committee on Character and Fitness, 373 U.S. 96, 103 (1963) (procedural requirements of denial of admission to the bar). Among other procedural requirements lacking are power to subpoena witnesses and standards of admissibility of evidence. See 30 C.F.R. § 769.

\textsuperscript{70} Trial-type procedures, it is argued, are not well adapted to the broad investigations of social, economic and scientific fact and policy that are required in order to set rates in regulated industries, to determine appropriate levels of competition, to monitor the introduction of new technology, or to protect the public from unsafe products or harmful commercial practices.

\textsuperscript{71} See H.R. Rep. No. 218, \textit{supra} note 59, at 95. \textit{See also} 30 U.S.C. § 1272(a)(3) (see note 10 \textit{supra} for text of this provision).

\textsuperscript{72} Even when the new law or new policy will have direct and vital impact on the interests of nonparties to adjudication in court or in an agency, nonparties customarily are given no notice or opportunity to be heard, whereas in notice and comment rulemaking anyone who cares to do so may present written comments and have them considered. In this vital respect, adjudication procedure is seriously inferior to notice and comment rulemaking procedure.

\textsuperscript{73} 553 F Supp. 872 (D. Utah 1982) (mem.) This is a consolidation of three suits arising from the December 16, 1980 decision of then Secretary of the Interior Cecil Andrus designating certain lands in southern Utah as unsuitable for mining pursuant to a petition.
III. *Utah International, Inc. v Watt*

The Alton coal fields petition,\(^74\) and its resultant decision, *Utah International*, highlight the hybrid nature of the lands unsuitable proceeding. Factors which can best be handled by legislative action, such as policy decisions and a wide range of affected parties, are present. Yet other important factors are present which must be dealt with by adjudication. The federal lands designated unsuitable by Secretary Andrus were subject to outstanding coal leases to two mining companies, Utah International, Inc. (UII) and Nevada Electric Investment Co. (NEICO).\(^75\) A mineral lessee's property rights\(^76\) are significant and deserve the due process protection afforded by an adjudicatory hearing. Additionally, while the evidence used to support the unsuitability designation concerned the existing and planned operations of those affected companies, neither rebuttal nor cross-examination on this evidence was available, thus bringing into question the accuracy of both the evidence and its interpretation.\(^77\)

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\(^74\) The petition applied only to federal lands. Only a portion of the 203,900 acres of federal land included within the petition area was designated as unsuitable for surface mining. This area is commonly referred to as the Alton Coal Fields and lying generally northeast of these coal fields is Bryce Canyon National Park which is situated on the edge of the Paunsaugunt Plateau. UII and NEICO had obtained coal leases for areas located within the designated areas during the period 1961-68 and claim to have spent substantial amounts in their development. The unsuitability designation precluded UII and NEICO from extracting the coal through surface mining. The original petition suggested several reasons why the area should be designated as unsuitable for surface mining. Contentions were made that the land could not be reclaimed following surface mining, that mining would adversely impact Bryce Canyon National Park and visitors to the park, that mining would adversely affect water resources and renewable resource lands (i.e., grazing and agricultural lands), and that alternative energy resources were available. The Secretary rejected all reasons contained in the petition except the adverse impact on the park and its visitors. *Id.* at 876.

\(^75\) *Id.* at 875.

\(^76\) See text accompanying notes 85-97 *infra* for a discussion of lessee property rights.

\(^77\) 553 F Supp. at 880-81.
In determining the ideal procedural means for dealing with these competing interests, it must be remembered that administrative agencies have broad discretionary powers in determining applicable procedure within their mandated authority. The Administrative Procedures Act serves as a floor by setting out rules which delineate the minimum procedural requirements with which agencies must comply. In addition to the statutory floor, the courts have long recognized exceptions to the agencies' absolute discretion. The United States Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council outlined two such exceptions: "constitutional constraints or extremely compelling circumstances." A mineral lessee's property rights should satisfy the "constitutional constraint" of due process.

A. Property Rights of a Mineral Lessee

In essence, the unsuitability designation stripped UII and NEICO of their property rights. A mineral lease is a property interest in the coal in place, "sufficient to maintain an action..."
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for trespass,” and sufficient to share in a condemnation award. Thus, if the Department of the Interior wished to condemn a part of the leased property for a right of way, rather than designate it unsuitable for mining, the government would be required to compensate both the surface owner and the mineral lessee. If this interest is sufficient for a condemnation award, surely it is a sufficient property interest to trigger due process protections. The court in Utah International stated: “The extent of procedural rights available for protection of a property interest is dependent upon legal arrangements which may qualify or define the scope of a party’s legal interest in the property”

The court further stated that because the leased property in Utah International was not permitted for mining, the lessee’s interest was not sufficient to require due process. This would

tirely aside from the matter of compensability, it is that only a lease, and not a license, gives an immediate interest in minerals in their natural state.” Id. at 4. In this lease, the grantor “was conveying to the other party title to minerals while in place, and according to him the right to take them from the ground as and when he desired, provided he paid the reserved royalties.” Id. at 5. See generally Hodel v. Virginia Surface Mining and Reclamation Ass’n, 452 U.S. at 306 (Powell, J., concurring) (who considers “taking” of proprietary rights to be a factual determination to be resolved in each case).

Allowance of compensation of Atomic is not payment for the frustration of a prospective business opportunity as the Government suggests. Here the United States has taken the minerals in the ground belonging to Atomic in the lease period. This is vastly different from the mere preclusion of a future exploitation of the mining lands. It is reimbursement for property actually taken. The potential productivity of the lease is looked to only to ascertain its value.

United States v. Atomic Fuels, 383 F.2d at 5 (citations omitted).

Utah Int'l v. Watt, 553 F Supp. at 879 (citation omitted). This author agrees with the court's statement, but questions the interpretation of a mineral lease. Cf. Correll & Russell, supra note 7, at 73 (“The United States Supreme Court has interpreted the due process guarantees of the fifth and fourteenth amendments to require a meaningful hearing when property interests are at stake.”) (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).

553 F Supp. at 879.
perhaps be true of a mere license\textsuperscript{90} or possibly a profit à prendre\textsuperscript{91} where the developer's interest in the coal is not vested until the coal is removed. A lease, however, transfers an immediate property interest in the coal in place\textsuperscript{92} regardless of the status of mining permits.\textsuperscript{93}

The court in \textit{Utah International} believed that prohibiting surface mining did not foreclose the possibility of deep mining.\textsuperscript{94} But many areas potentially affected by the designation process can only be mined by surface methods.\textsuperscript{95} Further, the definition of "surface coal mining operations" includes the surface effects of underground coal mining and support facilities, as well as the mining methods of contour strip, area strip, auger and mountaintop removal.\textsuperscript{96} Consequently, the application of this definition could serve to preclude deep mining as well as surface mining. In such situations, an unsuitability designation is tantamount to complete divesture of a mineral lessee's property rights.\textsuperscript{97}

\textsuperscript{90} A license is a privilege to remove coal, personal to the licensee. It is generally revocable at will, non-exclusive, and not a sufficient possessory interest to support an action for trespass or ejectment. A license also will not be a sufficient property interest to share in a condemnation award. 4 \textit{COAL LAW AND REGULATION}, \textit{supra} note 84, § 83:02(2), at 83-8, 9. \textit{See also} Radke v. Union Pacific R.R., 343 P.2d 1077, 1086-87 (Colo. 1959) (a mineral lessee acquires a possessory interest in the property, a licensee has no such interest).

\textsuperscript{91} "A profit a prendre is a right to enter the land of another and take products of the soil." McGinley & Vish, \textit{supra} note 84, § 83:03(5), at 83-1. A "profit" is a non-possessory right of entry and right of profit, as opposed to a license which is a mere privilege. Although it is granted more judicial protection than a license, it is not comparable to a lease. \textit{Id.} at § 83:03(5). \textit{See also} Trimble v. Kentucky River Coal Corp., 31 S.W.2d 367, 368-69 (Ky. 1930) (defining a profit a prendre).

\textsuperscript{92} \textit{See note 85 supra} for a discussion of a mineral lease as a property interest in the coal in place.

\textsuperscript{93} Neither the district court in \textit{Utah International} nor this Comment addresses the issue of due process protections for fee owners of coal. Yet the court's position that a lack of mining permits somehow lessens a lessee's property rights indicates that perhaps a fee owner without mining permits would also be denied due process considerations by the court.

\textsuperscript{94} 553 F Supp. at 879.

\textsuperscript{95} A coal seam that is too thin, too near the surface, or which is overlain by unstable material could not be effectively mined by underground methods. \textit{See generally} Crickmer & Zeger, \textit{ELEMENTS OF PRACTICAL COAL MINING} (2d ed. 1981) (discussing the logistics of surface mining).


\textsuperscript{97} The question of an unconstitutional "taking" has been only prospectively litigated. The Supreme Court has found that § 1272 is not unconstitutional on its face:
B. Nature of the Action

The Alton coal fields designation adversely affected only two companies. As the court pointed out, individual effect does not automatically trigger adjudication. What should automatically trigger a full adjudication is the effect of a designation proceeding on UII and NEICO's property rights. In fact, the number of mineral property interests affected should not be a consideration. If one hundred mineral lessees held property interests in the petition area, each should be entitled to adjudicatory proceedings. The agency's efficiency interest will be affected, but can perhaps be met by characterizing the adjudication as a class action. The interests of accuracy and acceptability are much too great to forego due process protection when property interests are at stake.

Although the mandatory provisions of section 1272 are also used to remove coal property from development, they are consistently applied to every mining interest in the country. The peti-

Although we conclude that a "mere enactment" of the Act did not effect a taking of private property, this holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the Act and the Secretary's regulations effect a taking. Even then, such an alleged taking is not unconstitutional unless just compensation is unavailable.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 298 n.40 (1981). "The 'taking' issue remains available to, and may be litigated by, any owner or lessee whose property interest is adversely affected by the enforcement of the Act." Id. at 306 (Powell, J., concurring).

New regulations promulgated by the Office of Surface Mining (OSM) have specifically drawn the "taking" issue into the lands unsuitable designation process. 48 Fed. Reg. 41,312 (1983). Section 761.5 Definitions now defines valid existing rights as existing where: [T]he prohibition caused by § 522(e) of the Act, if applied to the property interest that exists on the date the protection comes into existence, would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution.


Although the taking issue is outside the scope of this Comment, this definitional change may remove the types of property interests of UII and NEICO from the lands unsuitable process.

98 Utah Int'l v. Watt, 535 F Supp. at 880. See also Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) (discussing the individual effect within context of toxic substance discharge proceeding); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) (discussing the individual effect within context of sulfur oxide emissions proceeding).

tion process uses discretionary criteria to individually and selectively affect mineral property without due process for those whose property has been affected.\textsuperscript{100} The criteria for a finding of unsuitability are remarkably similar to the various criteria considered in the permit review process.\textsuperscript{101} The permit review process, however, is applied consistently to all mineral developers, leading to the conclusion that the discretionary lands unsuitable petition process is unnecessary and superfluous, as well as a violation of due process.

In addition to its effect on property rights, the Alton coal fields designation decision relied heavily on unique and specific information derived from past, present and prospective activities of UII and NEICO.\textsuperscript{102} The court in \textit{Utah International} labeled this information as specific legislative facts\textsuperscript{103} and therefore appropriate for legislative hearings.\textsuperscript{104} Yet, the court failed to examine what really happens in this type of action. In the \textit{Utah International} proceedings, an agency used facts concerning coal lessees as part of the designation process to effectively cancel the mineral leases and, therefore, property rights\textsuperscript{105} without giving the barest protections of due process to those whose property was affected.

\section*{IV Protection of Interests}

Some interests and concerns of the broad based policy type admittedly demand legislative hearing.\textsuperscript{106} Environmentally related questions are frequently determined by subjective analysis influenced by a constantly changing national policy. The use and disposition of federal lands concern the entire nation.\textsuperscript{107} The importance of each of these interests mandates that some type of

\begin{footnotes}
\item[100] See 30 U.S.C. § 1272(a)(3). See note 10 supra for the text of this section.
\item[101] See note 110 infra for the permit application requirements.
\item[102] 553 F Supp. at 880-81.
\item[103] Id. at 880.
\item[104] See \textit{DAVIS}, supra note 41 at 402-10.
\item[105] Federal mining leases may generally only be cancelled or forfeited by suit in federal district court. See 30 U.S.C. § 188 (Supp. V 1981).
\item[106] See note 70 supra discussing the need for legislative hearings.
\item[107] "[T]he decision affects the national interest in the park and each individual who visits the park." \textit{Utah Int'l v. Watt}, 553 F Supp. 872, 880 (D. Utah 1982).
\end{footnotes}
forum be provided for the expression of ideas, suggestions and grievances in the execution of a fair decision.

To reach a "fair decision," the agency must strike a balance by providing a means of general input by a variety of interests while still providing protection for those whose property rights are affected. The permitting process attempts just such a balance. The permitting process operates on a site-by-site basis and applies a rigorous review which examines, among other things, the types of concerns that would typically be the cause of a petition for designation. In the process, all interested parties have adequate opportunity for input into the decision. When an application for a mining permit is approved or denied, SMCRA provides an opportunity for an adjudicatory hearing.

Among the permit application requirements are: (1) technological assurance that the affected land will be restored to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses; (2) assurance that the operator will minimize disturbances of the prevailing hydrologic balance at the mine site and associated off-site areas; (3) assurance that the operator will minimize disturbances of the quality and quantity of water in surface and ground water systems, both during and after surface coal mining operations and during reclamation; (4) assurance that the operator will contain or dispose of all toxic wastes, other mine wastes, tailings and coal processing wastes; (5) assurance that all reclamation efforts will proceed in an environmentally sound manner, and (6) assurance that the operator will restore original contours except as otherwise authorized, eliminate steep slopes and otherwise eliminate all site specific impacts of the mine operation. Gorrell & Russell, supra note 7, at 6 n.25 (citing 30 U.S.C. §§ 1257-58).
110 SMCRA mandates that public notice and an opportunity for public comment be provided in connection with the submission of an application for a surface coal mining and reclamation permit. Any person having an interest which is or may be adversely affected by the proposed mining operation has the right to file written objections with the regulatory authority and to request that an informal conference be held on the permit application. Following the approval or disapproval of the permit application the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination. Such a hearing is governed by the requirements of the Federal Administrative Procedures Act, 5 U.S.C. § 554.

111 See 30 U.S.C. § 1264(e). Several commentators have suggested that the lands unsuitable process is superfluous in light of the permitting process. E.g., Gorrell & Russell, supra note 7, at 82. Cf. Buskirk & Dragoo, supra note 7, at 339.
CONCLUSION

The *Utah International* decision serves to highlight problems inherent in the Designation of Lands Unsuitable for Surface Coal Mining petition process. SMCRA and the corresponding regulations do not adequately protect property interests of mineral owners and mineral lessees. The interests affected could be better served by the use of an adjudicatory proceeding at least with regard to property interests.

Recently, there has been action reflecting the dissatisfaction with legislative hearings in this type of proceeding. New regulations promulgated by the Office of Surface Mining reflect significant changes in the hearing requirements. These changes, which include discretionary use of subpoena power and limited cross-examination in the hearing process, are a step in the right direction.


113 48 Fed. Reg. 41,353 (1983) (to be codified at 30 C.F.R. § 764.17) (state process hearing requirements) provides in part: "The regulatory authority may subpoena witnesses as necessary. The hearing may be conducted with cross-examination of expert witnesses only. A record of the hearing shall be made and preserved according to State law. No person shall bear the burden of proof or persuasion."

The federal process hearing requirements found at 41,356 30 C.F.R. § 769.17(a) state in part: "OSM may subpoena witnesses as necessary. The hearing may be conducted with cross-examination of expert witnesses only. A record of the hearing shall be made and preserved. No person shall bear the burden of proof or persuasion."

OSM has responded to the dissatisfaction with the designation hearing process by instituting limited, discretionary procedural protections. However, its commitment to a legislative hearing process is evident in its criteria for decision, outlined in 48 Fed. Reg. 41,356 (1983) (to be codified at 30 C.F.R. § 769.18) (state process) which requires that:

"(a) In reaching its decision, the regulatory authority, shall use—(1) The information contained in the data base and inventory system; (2) Information provided by other governmental agencies; (3) The detailed statement when it is prepared under § 764.17(3); and (4) Any other relevant information submitted during the comment period. 48 Fed Reg. 41,354.

The corresponding federal process regulations, 48 Fed. Reg. 41,356 (1983) (to be codified at 30 C.F.R. § 769.18) are substantially the same.

Additionally, a federal district court in Virginia recently upheld a state regulation which authorizes the "hearing officer in some instances to permit cross examination at designation hearings." *Virginia Citizens for Better Reclamation, Inc. v. Watt*, No. 82-0077-R, slip op. at 10 (E.D. Va. Apr. 1, 1983). The court noted that "the availability
Dispensing with the discretionary lands unsuitable petition process altogether and relying on the more stringent and fairer permitting process might well be the best option. But regardless of the method, some action must be taken to address the problem of the use of a legislative hearing in the designation petition process.

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of cross examination is of significant utility in the accurate finding of fact.” *Id.*, slip op. at 11.

Illinois has gone one step further and set out specific procedural requirements for designation hearings including cross examination, power of subpoena and standards of evidence. *See* Ill. Admin. Reg. § 1764.17(a). Except for the Illinois regulation, these changes do not fully address the problem of using a legislative hearing in the designation petition process.