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The Petition Process for Designating Lands Unsuitable for Surface Coal Mining Operations: Extreme Solution or Unnecessary Exercise?

By Gregory R. Gorrell* and Mark C. Russell**

Introduction

The Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) was passed by the 95th Congress and signed into law on August 3, 1977, by President Carter. The Act establishes a nationwide environmental and land use program designed to protect society and the environment from the adverse effects of surface coal mining operations. The definition of “surface coal mining operations” contained in SMCRA includes the surface impacts incident to an underground mine.

The Act contemplates separate interim (or initial) and permanent regulatory programs. The interim regulatory program remains in effect in a particular state until the state's permanent regulatory program is approved by the Secretary of the Interior or until a federal program has been developed and implemented for the state. Until the Secretary approves a state program, the

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2 Id. § 1202(a).
3 Id. § 1291(28)(A).
4 Id. § 1252(e). Section 503 of SMCRA sets out the procedure by which a state permanent regulatory program can be developed and receive approval from the Secretary of the Interior. Id. at § 1253. Section 504 of SMCRA sets forth the procedure under which a federal program can be developed and implemented for a state. Id. at § 1254.
5 The Secretary of the Interior has approved the permanent regulatory programs of the following states: Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia, West Virginia.
Federal Office of Surface Mining Reclamation and Enforcement (OSM) is the regulatory authority responsible for enforcing SMCRA. Under the Kentucky permanent regulatory program, granted conditional approval by the Secretary of the Interior on May 18, 1982, the State Natural Resources and Environmental Protection Cabinet is the regulatory authority.

SMCRA contains two interrelated procedures for determining, prior to mining activity, whether particular areas are suitable for surface coal mining operations. The first is the permitting process, which involves the determination of the suitability for mining of a specific site. The second is the unsuitability designation process under section 522 of SMCRA. This Article will focus on the petition process for designating lands unsuitable for mining and, specifically, on the failure of the existing federal regulatory scheme to provide adequate due process protection to coal operators and mineral owners whose property interests are jeopardized by an unsuitability designation proceeding. By focusing upon the problem areas in the federal petition process, this Article will identify those areas in which states should adopt stronger procedural safeguards in their permanent regulatory programs.

In the two major petition cases to date, one in Montana and Wyoming. See Washington Report, Coal Week, July 26, 1982, at 2. Ohio and Tennessee have the most recently approved programs (August 10, 1982). See 47 Fed. Reg. 34,688 & 34,724 (1982).
one in West Virginia, the filing of a petition to designate lands unsuitable for mining disrupted mine permitting activity for more than a year and jeopardized development plans for several hundred thousand acres of coal lands. In both cases, the petitions were denied because the petitioners failed to present sufficient evidence to support an unsuitability designation for the lands covered by the petitions. Thus, the mere filing of an unsupported bare bones petition can place in limbo the development of enormous tracts of coal land during the administrative study period.

I. OVERVIEW OF THE UNSUITABILITY DESIGNATION PROCESS

A. Section 522 of SMCRA

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) re-

11 See Reclamation Commission of the West Virginia Dept of Natural Resources, Decision and Policy Recommendations in Response to a Petition Filed by West Virginia Rivers Coalition (Jan. 29, 1982) [hereinafter cited as The Reclamation Commission Decision].


14 Id. § 1272(e). Section 522(e) of SMCRA exempts from the per se prohibition on surface mining operations those operations deemed to have "valid existing rights." Id. Valid existing rights exist where: (1) property rights were in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes surface coal mining operations; and (2) the person proposing to conduct surface coal mining operations on such lands either: (a) had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct surface mining operations on those lands, or had made a good faith attempt to secure all necessary permits; or (b) can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977. See 30 C.F.R. § 761.5 (1981). See also In re Permanent Surface Mining Litigation, 14 Env. Ref. Cas. (BNA) 1083, 1091 (D.D.C. Feb. 28, 1980), aff'd, 617 F.2d 807 (D.C. Cir. 1980).
quires 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 land uses or where other values are found to be more important than mining.

Section 522(a) provides that for a state to assume primary regulatory authority during the permanent program, a planning process must be established to enable the state regulatory authority to reach unsuitability determinations. As part of this planning process, each state must develop a data base and inventory system of state lands to allow for proper evaluation of the capacity of different land areas to support and permit reclamation of mining operations.

Under section 522(c), any person having an interest which is or may be adversely affected is given the right to petition the regulatory authority to have an area designated as unsuitable for mining or to have an unsuitability designation terminated. Section 522(a) mandates that the regulatory authority find an area unsuitable for mining if reclamation “is not technologically and economically feasible.” In addition, the regulatory authority may, in its discretion, deem an area unsuitable for mining if it finds that mining operations will be incompatible with state or local land use plans, adversely affect fragile or historic lands, result in a substantial loss or reduction of long-range productivity of renewable resource lands, or affect natural hazard lands, thereby endangering life or property.

16 Id.
17 Id. § 1272(a)(3).
18 Id. § 1272(a)(4).
21 Id. § 1272(a)(2) (Supp. II 1978).
22 Id. § 1272(a)(3)(A) to (D) (Supp. II 1978).
B. Relationship to Other Planning Processes

The legislative history of SMCRA indicates that Congress intended the petition process for designating lands unsuitable for mining to complement the other planning processes mandated by the Act. The most fundamental element in these planning processes is the requirement that a permit application be filed and approved by the regulatory authority before starting mining operations. Permit applications cannot be approved unless the applicant shows that reclamation as required by the Act can be accomplished and proves that the hydrologic balance outside the mine area will not be materially damaged. During the permitting process, persons opposed to the proposed mining operation are given the opportunity to file their objections with the regulatory authority. By design, the mine permit application review process involves an exhaustive site specific analysis to determine whether the proposed operation can meet the performance requirements of the Act.

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24 The required procedures for the filing and approval of permit applications are set out in 30 U.S.C. §§ 1256-60 (Supp. 1978).
25 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. Id. §§ 1257-58 (Supp. II 1978).
26 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. Id. § 1263(a) (Supp. II 1978). 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. Id. § 1263(b). 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. Id. § 1264(c). Such a hearing is governed by the requirements of the Federal Administrative Procedures Act, 5 U.S.C. § 554 (1976). See 30 U.S.C. § 1264(c) (Supp. II 1978).
Aside from the permitting process is the SMCRA requirement that the Secretary of the Interior review all federal lands to determine whether any areas are unsuitable for all or certain types of coal mining operations. To be eligible to assume primary regulatory authority during the permanent program, each state must conduct a similar review of state lands. In contrast to the site specific nature of the permit review process, these state and federal reviews are broad and consider all factors which are traditionally part of land use and resource planning.

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.

C. The Petition Process

The administrative proceeding to designate lands unsuitable for mining is triggered by filing a petition with the regulatory authority. Once a petition is filed, the regulatory authority cannot approve a permit application if the petition covers the area proposed to be mined. On March 13, 1979, OSM promulgated final rules relating to the petition process for designating lands unsuitable for mining. See text accompanying notes 14-15 supra for a discussion relating to types of federal lands considered unsuitable for mining.

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27 Id. § 1272(b) (Supp. II 1978). See text accompanying notes 14-15 supra for a discussion relating to types of federal lands considered unsuitable for mining.
30 30 U.S.C. § 1260(b)(4) (Supp. II 1978). The federal regulations provide that any petitions received after the close of the public comment period on a permit application shall not prevent the regulatory authority from issuing a decision on that permit application. 30 C.F.R. § 764.15(a)(7) (1981). For the purposes of the federal regulations, the close of the public comment period means the close of any informal conference or, if no conference is requested, at the close of the period for filing written comments and objections. Id. For further explanation of the process by which the opportunity for public comment is provided, see note 26 supra. The corresponding Kentucky regulation sets the close of the public comments and objections regardless of whether an informal conference is requested. See 405 KY. ADMIN. REGS. 24:030E (1982). In those cases where an informal conference is not requested, the Kentucky provision allows a time period identical to the federal provision. Id.
unsuitable for mining; the rules establish the minimum procedures and standards to be included in each approved state permanent regulatory program. The federal regulations provide that "[a]ny person having an interest which is or may be adversely affected" has the right to file a petition. Rather than specifying tests to limit who has a right to petition to have an area designated unsuitable for mining, the regulations merely adopt the statutory language of section 522(c) of the Act.

The only information that a petitioner must provide in the petition is: the location and size of the area covered by the petition; allegations of facts and supporting evidence which would tend to establish that the area is unsuitable for all or certain types of surface coal mining operations; a description of how mining of the area has affected or may adversely affect people, land, air, water or other resources; the petitioner's name, address and telephone number, and identification of the petitioner's interest which is or may be adversely affected.

Upon receipt of a petition, the regulatory authority has thirty days to notify the petitioner whether or not the petition is complete. Although the regulatory authority may reject "frivolous" petitions, the federal regulations fail to provide any standards for determining whether a petition is frivolous. Once the petitioner has provided all required information, the petition must be considered and acted upon by the regulatory authority.

Within three weeks after determining that a petition is complete, the regulatory authority must circulate copies of the petition to, and request relevant information from, other interested governmental agencies, the petitioner, intervenors, persons with

35 Id. § 764.15(a)(1).
36 Id. § 764.15(a)(3). On June 10, 1982, OSM issued a proposed rule which would provide a standard for determining whether a petition is frivolous. The proposed regulation defines “frivolous” to mean that the petition or the allegations of fact supporting evidence are trivial, insignificant or unworthy of serious attention. See 47 Fed. Reg. 25,278; 25,289 & 25,301 (1982) (to be codified at 30 C.F.R. § 715(a)(3)). See notes 101-04 infra and accompanying text for a discussion of the rules proposed by the OSM.
37 30 C.F.R. § 764.15(a)(3) (1981). For a list of the information required to be provided in the petition, see text accompanying note 34 supra.
an ownership interest of record in the property and other persons known to the regulatory authority to have an interest in the property. In addition, the regulatory authority must provide notice to the general public within three weeks after determining a petition is complete to allow the public to submit comments and other relevant information. Once a completed petition has been filed, the regulatory authority is required to compile and make available for public inspection and copying a record consisting of all documents relating to the petition.

Within ten months after a complete petition is filed, the regulatory authority must hold a public hearing near the area covered by the petition. The regulations provide that the hearing must be legislative and factfinding in nature. Cross examination of persons testifying at the hearing is not permitted. Moreover, the regulations provide that no burden of proof shall be borne by the petitioner or any other party.

Following the public hearing, the regulatory authority has sixty days within which to issue a written decision on the petition. In reaching a decision on whether to designate all or part of the area covered by the petition as unsuitable for all or certain types of coal mining, the regulatory authority must consider not only the information presented during the petition process, but also the information contained in the data base and inventory system. Prior to designating lands unsuitable for mining, the regulatory authority is required to prepare a detailed statement on the potential coal resources of the area, the demand for those resources and the impact of an unsuitability designation on the environment, the economy and the supply of coal.

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38 30 C.F.R. § 764.15(b)(1) (1981). Any person may intervene in a proceeding to designate lands unsuitable for mining by filing allegations of fact, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor’s name, address and telephone number. Id. § 764.15(c).
39 Id. § 764.15(b)(2).
40 Id. § 764.15(d).
41 Id. § 764.17(a).
42 Id.
43 Id. § 764.15(a)(3).
44 Id. § 764.19(b). If no public hearing is held, the regulatory authority must issue its decision within twelve months after receipt of the complete petition. Id.
45 Id. § 764.19(a)(1).
46 Id. § 764.17(e).
of the state regulatory authority on an unsuitability petition is subject to judicial review by a court of competent jurisdiction in accordance with state law.47

D. The Exemption for Substantial Legal and Financial Commitments

Section 522(a) of SMCRA provides that the petition process does not apply to lands on which surface coal mining operations are being conducted under a permit issued pursuant to the Act or where mining operations were being conducted on the enactment date of the Act.48 Thus, Congress did not intend the petition process to be applied retroactively to existing operations. In addition, lands are not subject to the unsuitability designation process where "substantial legal and financial commitments" have been made to mining operations on those lands prior to January 4, 1977.49 Unfortunately, Congress failed to set forth a specific statutory definition under which it could be determined whether a coal company had made substantial legal and financial commitments to a particular operation.

The federal regulations adopted on March 13, 1979, define the term "substantial legal and financial commitments" to mean "significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities."50 Thus, the regulatory definition requires both investments and commitments in capital-intensive activities and a long-term coal contract. OSM stated that an example of a substantial financial and legal commitment would be an existing mine, not actually producing, but in a substantial stage of development prior to production. However, OSM specified that the costs of acquiring mineral rights in the absence of an existing mine alone would be insufficient to constitute substantial legal and financial commitment.51 By requiring a coal oper-

47 Id. § 764.19(c); see 30 U.S.C. § 1276(e) (Supp. II 1978).
49 Id.
51 Id.
ator to have a long-term coal supply contract in hand, OSM's definition prevents many coal companies that have made major commitments to particular operations (by entering into binding legal and financial obligations) from qualifying for the statutory exemption from the unsuitability designation process.

II. PROBLEM AREAS

The submission of a petition to designate lands unsuitable for mining stays the issuance of mining permits in the area covered by the petition for up to twelve months during the administrative study period. Because of costly bonding requirements, most coal companies do not have sufficient capital to obtain a single permit covering all the reserves the company intends to mine prior to commencement of mining activity. Instead, many operators obtain successive permits on relatively small tracts, and a company could run out of permitted reserves during the administrative study period on an unsuitability designation petition. Thus, the filing of a petition can have a dramatically adverse impact on development plans for the mineral estate, even in cases where the petition is eventually denied.

Because of the disruptive effect on the permitting process, the petition to designate lands unsuitable for mining has the potential for being used to further the goals of those who are philosophically opposed to all surface mining activity regardless of whether the mining operations are conducted in a responsible and environmentally sound manner. It is not surprising then that the West Virginia and Montana cases both involved environmental groups supporting the petition and coal companies and mineral owners who intervened to oppose it.

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52 See notes 30 & 44 supra for discussion of the procedures which the regulatory authority must follow upon receipt of a petition to designate lands unsuitable for mining.
53 After a surface mining permit application has been approved, but before the permit is issued, the applicant must file with the regulatory authority a performance bond covering the area of land covered by the permit. 30 U.S.C. § 1259 (Supp. II 1978). The amount of the bond must be sufficient to assure completion of the reclamation work by the regulatory authority in the event that the permittee fails to complete the approved reclamation plan. Id. The minimum bond for the area under one permit is $10,000. Id.; see 30 C.F.R. pts. 800-07 (1981).
54 In Montana, the Northern Plains Resource Council, Tongue River Agricultural
The primary legal issues which have arisen in connection with the unsuitability petition process relate to the failure of the regulatory scheme to safeguard adequately the substantial property interests associated with ownership and development of coal resources. The determination that lands are suitable or unsuitable for mining affects property rights which are protected by the due process guarantees of the fifth and fourteenth amendments to the United States Constitution. The magnitude of the ownership interests affected by the petition process is even greater as a result of the restrictive definition of "substantial legal and financial commitments."55 Because the petition process can result in the deprivation of property, it is essential that procedural safeguards be provided to ensure fairness in the proceedings before the regulatory authority.

A. Filing Requirements

The existing regulatory procedures extend the right to file a petition to any person "having an interest which is or may be adversely affected."56 This extremely broad criterion allows persons whose interests are relatively insignificant, when considered alongside those of property owners, to prevent mining activity.57

55 The restrictive definition of "substantial legal and financial commitments" is discussed in text accompanying notes 50-51 supra.

56 30 C.F.R. § 764.13(a) (1981). See Sierra Club v. Morton, 405 U.S. 727 (1972), where the Supreme Court interpreted the meaning of "adversely affected" or "aggrieved" for purposes of the standing requirements of § 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (1976). In Sierra Club, the Court held that a party has standing under the APA when the party can prove that he or she has suffered or will suffer injury, economic or otherwise. 405 U.S. at 738. However, the Court also ruled that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the interest is in evaluating the problem, is not sufficient by itself to render the [party] 'adversely affected' or 'aggrieved' within the meaning of the APA." Id. at 739.

Under present regulations, persons who assert that their aesthetic or recreational interests may be adversely affected by future mining activity are permitted, by the mere filing of a petition, to disrupt the development plans of mine operators and mineral owners who have tangible property interests that often extend over thousands of acres. Because the mere filing of a petition places the ability of property owners to proceed with planned coal development in limbo during the administrative study period and because an unsuitability designation may render the mineral estate worthless, the regulations should require that persons filing a petition have an interest which is commensurate with those who will be adversely affected by the petition. By restricting the right to file a petition to persons who have property interests which are or may be adversely affected, the interests of petitioners would more closely correspond to those of mine operators or mineral owners.58

Under the present regulatory scheme, the information which petitioners must provide in a petition is relatively minimal. Petitioners are merely required to include allegations of fact and supporting evidence which would "tend to establish" that the area covered by the petition is unsuitable for all or certain types of surface coal mining operations and a description of how mining of the area has affected or may adversely affect people, land, air, water or other resources.59

In two cases involving petitions to designate lands unsuitable for mining, the petitioners failed to provide sufficient evidence to support an unsuitability designation for all lands covered by the petition.60 In 1981, the West Virginia Rivers Coalition (WVRC) filed a petition to prohibit coal mining over a three-county area encompassing 300,000 acres of coal lands.61 In support of its petition, the WVRC relied upon data which related to past instances

58 See id. On June 10, 1982, OSM issued proposed regulations that would restrict the right to file a petition to "any person having a property interest in land or mineral resources which is or may be adversely affected." Id. at 25,300. See notes 101-02 infra and accompanying text for further discussion of the proposed regulations.


60 See THE RECLAMATION COMMISSION DECISION, supra note 11; UNITED STATES DEPT OF THE INTERIOR DECISION, supra note 10.

61 THE RECLAMATION COMMISSION DECISION, supra note 11, at 2.
of acid mine drainage at a few specific sites within the enormous area covered by the petition.\textsuperscript{62} The petitioners in that case asserted that the information collected at a limited number of sites could be extrapolated to the larger area covered by the petition.

Although the West Virginia Department of Natural Resources, the state regulatory authority, deemed the WVRC petition "complete" and not frivolous, the information provided by the petitioners was insufficient to support an unsuitability designation.\textsuperscript{63} Despite the fact that previous mining activity had resulted in acid mine drainage and resultant environmental damage at certain sites within the petition area, the regulatory authority determined that such evidence was insufficient to support a finding that reclamation of the entire petition area was not technologically and economically feasible.\textsuperscript{64} In its decision, the West Virginia Department of Natural Resources emphasized that the large geographic area encompassed by the petition and the diversity of its terrain, geology, geochemistry and hydrology made general area-wide conclusions about suitability or unsuitability impossible.\textsuperscript{65} The regulatory authority also noted that, although past mining practices had resulted in negative effects on the hydrologic balance, the petitioners had failed to demonstrate that reclamation was not technologically and economically feasible under contemporary mining practices.\textsuperscript{66}

In the Montana case,\textsuperscript{67} the Northern Plains Resource Council, the Tongue River Agricultural Protective Association, the Tri-County Ranchers Association and the Rosebud Protective Association petitioned the Montana Department of State Lands and OSM to designate approximately 200,000 acres of state and federal lands in a two-county area unsuitable for surface coal mining operations.\textsuperscript{68} The petitioners alleged that the petition area

\textsuperscript{62} Id. at 5, 6 & 11.
\textsuperscript{63} Id. at 12.
\textsuperscript{64} Id. at 11.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 12.
\textsuperscript{67} MONTANA DEPT OF STATE LANDS DECISION, supra note 10.
\textsuperscript{68} MONTANA DEPT OF STATE LANDS AND UNITED STATES DEPT OF THE INTERIOR OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, TONGUE RIVER, MONTANA, PETITION EVALUATION DOCUMENT at iii (Feb. 1982) [hereinafter cited as TONGUE RIVER PETITION EVALUATION DOCUMENT].
contained highly sodic and salty soils and that insufficient salt-free topsoil was available to bury the sodic and salty material, thereby rendering reclamation infeasible.\textsuperscript{69} In denying the petition to designate the lands unsuitable, both OSM and the Montana Department of State Lands stated that because the thicknesses of suitable salt-free topsoil varied greatly across the petition area, area-wide conclusions about the feasibility of reclamation were not possible.\textsuperscript{70} Both agencies concluded that the problem of saline and sodic overburden could best be addressed in site specific evaluations of permit applications.\textsuperscript{71}

To restrict the filing of frivolous petitions and the resulting burdens upon property owners and state regulatory authorities, the procedural regulations should be revised to require a more specific presentation of facts and evidence by petitioners. To clarify the key issues and concerns to be considered by the regulatory authority during the administrative study, the petitioner should be required to provide evidence for all lands covered by a petition. In this manner, the areas covered by a petition would be limited to those lands for which there is supporting evidence, thereby minimizing duplication of effort between the petition and permitting processes.

Although requiring a more specific presentation of allegations and supporting evidence would accomplish much toward restricting frivolous petitions, the West Virginia and Montana cases suggest that the underlying assumption of the petition process, that large homogeneous land areas exist, may be wrong. In both cases, evidence did not exist to support an unsuitability designation for the large areas covered by the petitions.\textsuperscript{72} While this may have been due to the petitioners' failure to limit the scope of the lands covered by the petitions, it also may indicate that large land areas exhibiting common area-wide characteris-

\textsuperscript{69} See United States Dept of the Interior Decision, supra note 10, at 5; Tongue River Petition Evaluation Document, supra note 68, at v.

\textsuperscript{70} United States Dept of the Interior Decision, supra note 10, at i-ii; Montana Dept of State Lands Decision, supra note 10, at 2.

\textsuperscript{71} United States Dept of the Interior Decision, supra note 10, at 15-16; Montana Dept of State Lands Decision, supra note 10, at 3, 6.

\textsuperscript{72} See The Reclamation Commission Decision, supra note 11, at 12; United States Dept of the Interior Decision, supra note 10, at ii; Montana Dept of State Lands Decision, supra note 10, at 2.
tics do not in fact exist. If this is the case, the petition process would appear unnecessary because the determination of whether smaller tracts within a larger area are suitable for mining is best dealt with through the site specific review of the permitting process.

B. Burden of Proof

OSM's procedural regulations for the review of petitions to designate lands unsuitable for mining specify that "no party shall bear any burden of proof" during the designation process. OSM chose not to assign to the petitioner the burden of proving that an area should be designated unsuitable despite the fact that the sole legislative history concerning the burden of proof assigns the burden to petitioners. During the congressional debates on House Rule 11500, a predecessor to SMCRA which contained language identical to section 522(c), Congressman Teno Roncalio explained the designation process and stated that "the burden of proof for unsuitability is on the petitioner not the regulatory authority." In explaining its rationale for not assigning a burden of proof on any party, OSM stated that Congress included section 522 in the Act to ensure that the planning process would be used to determine whether mining would be compatible with other values. OSM explained that planning decisions are not made in an adversary proceeding but are the result of professional opinion, public participation and the weighing of resource values. Viewing the unsuitability designation process as part of a planning procedure rather than an adversary proceeding, OSM concluded that it would be inappropriate to impose a burden of proof on any party.

Although characterizing the unsuitability designation process as a "planning procedure" may be accurate insofar as the broad state and federal land review mandated by SMCRA is concerned,

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76 Id.
77 Id.
the characterization appears incorrect in relation to the petition process. Because the petition process has been used by those opposed to surface mining, the administrative proceedings more closely resemble an adversary court proceeding in which the petition allegations are contested by those whose property rights will be directly affected by the decision of the regulatory authority. Therefore, the decision not to impose a burden of proof on the petitioner appears to be based upon an incorrect perception of the petition process.

The decision not to impose a burden of proof upon petitioners also is contrary to the well established principle that the moving party before an administrative agency has the burden of proof. This principle is incorporated in the federal Administrative Procedures Act, which provides that, except where otherwise provided by statute, the proponent of an agency rule or order has the burden of proof. Since section 522 of SMCRA is silent concerning the burden of proof issue, the petitioner, as the proponent of an unsuitability designation, should be required to carry the burden of proving the allegations contained in the petition.

C. The Need for an Adjudicatory Hearing

The federal regulations require that a legislative hearing be held after receipt of a complete petition. The decision not to provide for a formal adjudicatory hearing again appears to have been due to OSM's failure to recognize the adversarial nature of the petition proceeding. Viewing the hearing simply as part of the planning process, OSM reasoned that cross examination could be used to discredit and intimidate witnesses, thereby preventing valuable information from getting into the administrative record. In addition, OSM stated that since section 522 did not specifically require an adjudicatory hearing, an informal

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hearing met the requirements of the Act.\textsuperscript{82}

The reasons given by OSM in support of the decision not to provide for an adjudicatory hearing appear to be after-the-fact justifications. The agency made no reference to any empirical data to support its contention that cross examination would be used to prevent valuable information from being included in the administrative record. On the contrary, cross examination of witnesses could elicit more information than would be obtained through mere presentations, thereby developing a more complete record during the hearing.

The conclusion that an adjudicatory hearing is not required to consider the issues raised by a petition fails to recognize that significant property interests are involved and that an unsuitability designation may result in a taking without just compensation.\textsuperscript{83} 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.\textsuperscript{84} The substantial property interests of coal operators and mineral owners would certainly appear to require stronger and more meaningful procedural safeguards than those contained in the existing hearing requirements.

The nature of the particular proceeding must be considered in determining whether statutory language specifying that a public hearing be held requires an adjudicatory hearing.\textsuperscript{85} Where

\textsuperscript{82} Id. Although OSM correctly stated that § 522 does not specifically require an adjudicatory hearing, a counter argument can be made that nothing in § 522 supports OSM's decision to require a legislative rather than adjudicatory hearing.

\textsuperscript{83} For a detailed analysis of the taking issue, see notes 105-25 infra and accompanying text.


\textsuperscript{85} See Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977). In Marathon Oil Company, the Ninth Circuit held that setting effluent limitations under the Federal Water Pollution Control Act required an adjudicatory hearing. The court reasoned that, although the Federal Water Pollution Control Act required only an "opportunity for public hearing," the process was clearly "adjudicatory" because the factual issues relating to whether particular effluent limitations are practicable for individual point sources would frequently be sharply disputed. 564 F.2d at 1262. See United States v. Florida E. Coast Ry., 410 U.S. 224, 251 (1973) (Douglas, J., dissenting); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972).
complex factual issues are involved which are sharply disputed by the parties, questions can best be decided through a judicial-type procedure with sworn testimony, cross examination of witnesses and a hearing on the record. Since the allegations contained in a petition to designate lands unsuitable are invariably contested by those whose property rights are at stake, only a trial-type adjudicatory hearing will ensure reasoned decision-making and provide a meaningful administrative record upon which judicial review can be based.

D. The Kentucky Program

Because the federal regulatory scheme establishes minimum procedures and standards to be included in each approved state program, a state has the authority to provide stronger and more meaningful procedural safeguards than the minimum procedures provided for in OSM's regulations. In the past, OSM has demonstrated an unwillingness to allow states the flexibility to adopt more stringent procedural requirements than those contained in the federal regulations. For example, when the federal regulations were first proposed, OSM received numerous comments concerning the degree of formality required for the hearing. In rejecting the suggestion that the state be given greater flexibility to allow cross examination of witnesses and an adjudicatory hearing, OSM stated that the requirement for a legislative hearing was necessary to provide for nationwide consistency.

As the result of a court challenge to the federal permanent regulatory scheme, OSM has recently acknowledged that a state

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88 See In re Permanent Surface Mining Regulation Litigation, 14 Env. Rep. Cas. (BNA) at 1093 n.14. Adoption of more specific information requirements for petitions than those contained in the federal regulations may actually increase the level of environmental protection by placing a greater burden on petitioners to identify with specificity areas where mining is incompatible with other values.
90 See In re Permanent Surface Mining Regulation Litigation, 14 Env. Rep. Cas. (BNA) at 1083.
may provide additional procedural safeguards beyond those contained in the federal regulations. 91 In addition, OSM has shown a greater willingness to approve state regulations which differ from their federal counterparts so long as they are no less effective than the federal requirements. 92

Although the recently approved Kentucky permanent regulatory program parallels the federal requirements in most areas, the Kentucky regulations differ in certain noteworthy respects. For example, the Kentucky definition of "substantial legal and financial commitments" omits the federal requirement that investments be made on the basis of a long-term coal contract. 93 However, the Kentucky regulations still specify that acquiring the coal or the right to mine will not alone constitute substantial legal and financial commitments. 94 The Secretary of the Interior's May 18, 1982, approval of the Kentucky program acknowledges that a long-term coal contract is only one way of many to show substantial commitments. 95

The Kentucky regulations approved by OSM provide that the decision of the regulatory authority on a petition to designate lands unsuitable for mining may be appealed to an independent hearing officer and that such a proceeding will be conducted as a de novo formal hearing according to rules applicable to adjudicatory hearings. 96 The adjudicatory hearing provided in the approved Kentucky program is in addition to, rather than a substitute for, the legislative-type hearing from which the appeal is taken. The administrative appeal does not stay the effect of the decision made by the state Natural Resources and Environmental Protection Cabinet following the legislative-type hearing. The adjudicatory hearing provided in the approved Kentucky pro-

92 The OSM's willingness to approve state regulations which differ from their federal counterparts is evidenced by the OSM approval of the Kentucky definition of "substantial legal and financial commitments." See text accompanying notes 93-95 infra for an explanation of the way in which the Kentucky definition differs from the federal definition.
96 405 KY. ADMIN. REGS. 24:030E, § 8(7) (repealed). For a discussion of the repeal of the provision for a de novo formal hearing, see text accompanying note 100 infra.
gram would permit the introduction of new information not properly considered at the legislative hearing but which may nonetheless be relevant.

In approving the Kentucky program, OSM viewed the appellate procedures as providing permissible additional procedural safeguards.97 OSM reasoned that the Kentucky regulation was not intended to weaken or alter the petition process.98 To the contrary, OSM concluded that the appellate procedure for an adjudicatory hearing strengthened and ensured the validity of the petition process.99

Although the adjudicatory hearing provided in the approved Kentucky program does increase the level of due process protection afforded coal operators and property owners, the two-tiered approach is cumbersome and has the potential of being used to further disrupt the permitting process. For example, although the regulations provide that the administrative appeal does not stay the initial decision of the regulatory authority, an appeal by the petitioner from the denial of a petition may have the practical effect of continuing the stay on permit issuance until the hearing officer reaches a decision following the adjudicatory hearing. It is likely that the Natural Resources and Environmental Protection Cabinet will be hesitant to issue mining permits where the decision not to issue an unsuitability designation is subject to administrative review.

In recognition of the practical problems surrounding the two-tiered approach, Kentucky recently revised its approved regulatory program to delete the second tier adjudicatory hearing. The deletion of the adjudicatory hearing provision was submitted to OSM for approval as an amendment to the approved Kentucky program on May 26, 1982.100 Since the Kentucky hearing regulations are now identical to the federal regulations, it is highly unlikely that OSM will refuse approval of the amendment.

98 Id.
99 Id. Under the Kentucky petition procedure, the provisions for an adjudicatory hearing are triggered only if a party chooses to appeal the initial determination by the regulatory authority. See 405 Ky. ADMIN. REGS. 24:030E § 8(7) (repealed). Thus, under the Kentucky regulation, the unsuccessful party has a second opportunity to obtain administrative relief. See 47 Fed. Reg. 21,404; 21,422-23 (1982).
E. Federal Regulatory Reform

On June 10, 1982, OSM proposed rules which would amend the existing permanent program regulations relating to designating lands unsuitable for mining and terminating unsuitability designations. The proposed regulations would give the states greater flexibility in adopting increased procedural safeguards to ensure that the petition process comports with the due process requirements of the fifth and fourteenth amendments to the United States Constitution. Specifically, the proposed rules limit who may file a petition and require more information to be provided in the petition document. In addition, the proposed rules would permit the burden of proof to be assigned to the petitioner. Finally, the proposed rules would permit cross examination of witnesses testifying at the hearing.

III. The "Taking" Issue

The increased willingness of OSM to permit states to adopt greater procedural safeguards than those contained in the federal regulations will enable states to address many of the problem areas in the existing federal regulations. In addition, the recently proposed rules, if adopted as final regulations, would substantially increase the protections afforded coal operators and mineral owners whose property interests will be adversely affected by an unsuitability designation. However, even with increased procedural safeguards, the significant legal question remains as to whether an unsuitability designation might result in an unconstitutional taking without just compensation prohibited by the fifth and fourteenth amendments. This final issue, especial-

101 Id. at 25,278 (1982).
102 Id. at 25,287-88. OSM's proposed rules set forth two options under which a state would be given greater discretion to require a more specific presentation of allegations as they relate to the petitioner's described interests and to the criteria specified in SMCRA, thereby clarifying key issues and concerns to be addressed by the state regulatory authority.
103 Id. at 25,291-92.
104 Id. The proposed regulations contain two options relating to cross examination of witnesses. The first would permit cross examination of persons testifying as expert witnesses. The second would allow cross examination of any person testifying at the hearing. See id.
105 The guarantee that private property shall not be taken for public use without just
ly under the existing regulatory scheme, demands both a careful analysis of the potential impact of the petition process on private property interests and an evaluation of whether the unsuitability designation procedure is reasonably necessary to the effectuation of a substantial public purpose.

The United States Supreme Court has been unable to develop any set formula for determining when private economic injuries caused by public action amount to a taking for which compensation is required. However, certain principles that have emerged from the Court's decisions are particularly significant. In the 1922 case of Pennsylvania Coal Company v. Mahon, the Supreme Court held that a state statute that substantially furthers important public policies "may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" In the Pennsylvania Coal Company case, the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. The Supreme Court found that the statute made it commercially impracticable to mine the coal and, thus, had nearly the same effect as the complete destruction of rights the claimant had reserved from the purchasers of the surface land. The Court reasoned that "[f]or practical purposes, the right to coal consists in the right to mine it" and that "[w]hat makes the right to mine coal valuable is that it can be exercised with profit." Consequently, the Courts held that the statute was invalid in effecting a taking without just compensation.

compensation is applicable to the states through the fourteenth amendment. See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897).

107 260 U.S. 393 (1922).
108 438 U.S. at 126 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. at 393).
109 260 U.S. at 412.
110 Id. at 412-13.
111 Id. at 414.
112 Id.
113 Id.
An unsuitability designation under section 522 of SMCRA could result in an injury to real property interests similar to that in the Pennsylvania Coal Company case. Because of its restrictive regulatory definition, the exemption for substantial legal and financial commitments might not be available to the owner of undeveloped coal rights where the coal rights have been severed from the surface estate. Where a property owner holds both the coal and surface rights, it is arguable that there is some reasonable remaining use of the surface even if the property owner is prevented from developing the mineral estate. However, where only the coal is owned, an unsuitability designation would eliminate all profitable uses of the property. The West Virginia legislature has recognized this fact by providing that coal underlying any land which has been designated unsuitable for mining “has no value [for tax purposes] for the duration of such designation.” Although the unsuitability designation can be terminated through the petition process, the unsuitability designation may operate as a “red flag” to potential coal developers, thereby effectively rendering the property worthless. Thus, an unsuitability designation “may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”

In the recent case of Penn Central Transportation Company v. New York City, the United States Supreme Court reviewed its decisions relating to the prohibition on takings without just compensation. Although the Court specifically reaffirmed its holding in the Pennsylvania Coal Company case, the Court also discussed certain principles that had emerged in subsequent cases. The Court noted that it had upheld land use regulations that destroyed or adversely affected recognized real property interests where the use restriction was reasonably necessary to promote “the health, safety, morals or general welfare.” Thus, an

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114 See text accompanying notes 50-51 supra for a discussion of the restrictive definition of “substantial legal and financial commitments.”
116 438 U.S. at 127.
117 Id. at 104.
118 Id.
119 Id. at 125. See Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926). The Supreme Court also has upheld land use re-
unsuitability designation does not necessarily amount to a taking for which compensation is required if the designation is reasonably necessary to the effectuation of a substantial public purpose.

To determine whether the unsuitability designation process is reasonably necessary to the effectuation of a substantial public purpose, both the general purpose of SMCRA and the specific congressional intent behind the unsuitability designation process must be considered. The primary purpose of SMCRA is to protect society and the environment from the adverse effects of surface coal mining operations. However, the role of the unsuitability designation process in furthering this goal of environmental protection is less than crystal clear.

There is no possibility of environmental harm occurring as a result of surface mining operations until surface mining activity begins. Before surface mining operations are commenced, a permit application must be filed and approved by the regulatory authority. Permit applications cannot be approved without a showing by the applicant based upon site specific data that the reclamation requirements of SMCRA can be met and proof that environmental degradation will not occur. The fact that a petition for unsuitability designation has not been granted does not constitute a determination that a particular area is suitable for mining. Thus, even where an unsuitability petition is denied, a mining permit application must first be approved by the state regulatory authority. During the site specific permit review process, the state regulatory authority will consider information contained in the data base and inventory system which section 522 requires each state to develop.

The designation of lands as unsuitable for all or certain types of surface coal mining operations does not necessarily mean that surface mining operations will never be conducted on those lands. Following an unsuitability designation, a coal operator or

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121 See notes 24-26 supra and accompanying text for a detailed discussion of the permitting process.
mineral owner can file a petition to terminate the unsuitability designation. If the termination petition is granted, coal operators can then submit permit applications to the regulatory authority for approval. Once again, if the permit applicant can demonstrate that the reclamation requirements of the Act can be met and can prove that damage to the environment will not occur, the applicant can obtain a permit to conduct surface mining operations.

Environmental protection is guaranteed by the permitting requirements of SMCRA and neither the granting nor the denial of an unsuitability designation petition will prevent mining operations on lands covered by a petition if an operator can satisfy the requirements for approval of a mining permit. Therefore, it is unclear how the unsuitability designation process results in any greater degree of environmental protection than is provided by the permitting process.

When the asserted congressional goals behind the unsuitability designation process are considered, the substantial public purpose which is effectuated by the petition process is not readily apparent. Congress stated that it hoped to help the coal industry avoid unproductive investment by identifying lands as unsuitable earlier than would occur through the permitting process or the broader state and federal reviews. By preventing unproductive investment, Congress hoped to minimize land use conflicts which often surround coal mining operations.

It is noteworthy that the goals asserted by Congress are not in any way related to the goal of environmental protection. Those reasons given by Congress appear to be justifications after-the-fact rather than legitimate reasons for adoption of the procedure. The asserted goal of helping the coal industry hardly seems related to any substantial public purpose. In fact, the diversion of investments away from lands which are declared unsuitable may actually be contrary to the public interest since changes in reclamation technology and economics may permit those same lands to be mined in a profitable and environmentally sound manner.

at some future date. The congressional desire to minimize land use conflicts by the unsuitability designation process has certainly not been realized. On the contrary, the petition process has been used as a vehicle for creating land use conflicts rather than resolving them.

CONCLUSION

A consideration of both the need for environmental protection and the asserted congressional goals in enacting the unsuitability designation process fails to illuminate any substantial public purpose to be furthered by the petition process. At worst, an unsuitability designation may result in a taking without just compensation. At best, the unsuitability designation process establishes an unnecessary procedure which fails to provide any greater level of environmental protection than is presently afforded by the permitting process. Moreover, the West Virginia and Montana cases suggest that the underlying assumption of the petition process, that large homogeneous land areas exist, may be incorrect. Although recent efforts to provide increased procedural safeguards should be applauded, the significant constitutional question presented by the taking issue and the apparent redundancy of the petition process with the permitting process suggest that congressional action to repeal the petition process may be more appropriate than regulatory reform.