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**WHITNEY BENEFITS, INC. V. UNITED STATES:
“CASHING-IN” COAL LAND TAKEN UNDER SMCRA
§ 1260(b)(5)**

Scott W. Wilson

I. INTRODUCTION

Whitney Benefits, Inc. v. United States,¹ sanctions cash compensation for a coal company whose investment-backed expectations of strip mining have been regulatorily prohibited by the Surface Mining Control and Reclamation Act (SMCRA).² Section 1260(b)(5) of SMCRA not only precludes strip mining on alluvial valley floors which are suitable for farming, but also permits the exchange of federal coal land for precluded private coal land. In *Whitney*, the court interpreted section 1260(b)(5) as permitting the company to reject such an exchange and opt for cash compensation under the Tucker Act.³ Thus, the *Whitney* decision allows section 1260(b)(5) to become a potential conduit for liquidating non-productive coal assets located in western alluvial valleys.

II. CASE HISTORY

Whitney Benefits, Inc. owned two parcels of coal land in the Tongue River valley ten miles north of Sheridan, Wyoming. Whitney leased the parcels to a commercial coal company, Peter Kiewit Sons.⁴ In 1979, Whitney submitted a strip mining application to the Wyoming Department of Environmental Quality (DEQ).⁵ The DEQ rejected the application because the operation of the coal strip mine would be on alluvial valley floors, and therefore in violation of SMCRA, section 1260(b)(5), which prohibits surface coal mining on alluvial valley floors which are suitable for

1. 752 F.2d 1554 (Fed. Cir. 1985).

2. 30 U.S.C. § 1260(b)(5) (1982). First enacted in 1977, the section provides:

No permit or revision application shall be approved unless the application affirmatively demonstrates . . . that . . . (5) the proposed surface coal mining operation . . . would (A) not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated . . . [Furthermore, it] is the policy of Congress that the Secretary shall develop and carry out a coal exchange program to acquire private fee coal precluded from being mined by the restrictions of this paragraph (5) in exchange for Federal coal which is not so precluded. Such exchanges shall be made under section 1716 of Title 43.

3. 28 U.S.C. § 1491 (1982). The Tucker Act provides:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

4. *Whitney*, 752 F.2d at 1555.

5. *Id.*

farming.⁶ Section 1260(b)(5) also provides that the alluvial coal land may be exchanged for non-alluvial federal coal land.⁷ Both the United States and Whitney agree that the legislative purpose of section 1260(b)(5) reflects a special objection to strip mining on alluvial valley floors.⁸

Upon rejection by the DEQ, Whitney submitted to the Secretary of the Interior a proposed exchange of its coal for federal coal under the provisions of section 1260(b)(5).⁹ However, by 1984, the parties had not reached an agreement on the value and location of exchange tracts. Therefore, Whitney asserted that the long delay rendered the exchange provision illusory, and that Whitney should receive cash compensation under the Tucker Act.¹⁰

Whitney brought this action in the United States Court of Claims to force the Interior Department to compensate Whitney in cash for the coal Whitney owned but could not mine.¹¹ In an unpublished bench decision, the Court of Claims dismissed the suit without prejudice.¹² The Court of Claims held that the exchange provision of section 1260(b)(5) provided, on its face, for just compensation. Therefore, Whitney did not have a claim for cash compensation under the Tucker Act.¹³ The Claims Court placed the burden on plaintiff Whitney to prove unconstitutional delay or denial of the section 1260(b)(5) exchange.¹⁴ Under the facts, the Court of Claims determined that no taking had occurred up to the date of the hearing. Furthermore, the Claims Court was uncertain whether a taking would ever occur.¹⁵ Whitney appealed to the United States Court of Appeals for the Federal Circuit.¹⁶

The Federal Circuit reversed the Court of Claims and remanded,¹⁷ ruling that section 1260(b)(5)'s prohibitions on surface mining of western alluvial valleys may effectively preclude Whitney's realization of investment-backed expectations.¹⁸ Therefore, Whitney should have an opportunity to prove that section 1260(b)(5) effects a constitutional taking.¹⁹

The Federal Circuit further held that the affected owners of the

6. 30 U.S.C. § 1260(b)(5).

7. *Id.*

8. *Whitney*, 752 F.2d at 1555.

9. *Id.* at 1555-56.

10. *Id.* at 1556.

11. *Id.* at 1555.

12. *Id.* at 1556.

13. *Id.*

14. *Id.*

15. *Id.* at 1555.

16. *Id.*

17. *Id.* at 1560.

18. *Id.*

19. *Id.*

mineral rights may elect to seek monetary relief through the Tucker Act, rather than through an exchange of lands under section 1260(b)(5) of SMCRA. Although the language is ambiguous, the court apparently concluded that the exchange provision of section 1260(b)(5) may be used to ascertain the amount of just compensation.²⁰

III. ANALYSIS

A. *Developments Leading to the Whitney Decision*

The *Whitney* decision announces the latest development in a series of regulatory takings cases that began over fifty years ago. *Whitney* is unique because it is the first case to focus on a regulatory taking within the coal exchange context of section 1260(b)(5) of SMCRA.²¹ The modern principles of general regulatory takings began with a 1922 United States Supreme Court case, *Pennsylvania Coal Co. v. Mahon*.²² The *Mahon* court held that a state statute which effectively deprived the plaintiff of the right to mine its coal land constituted a taking compensable under the fifth amendment. The Supreme Court stated that the property owner must be left some reasonable return on his investment.²³ Justice Holmes provided the classic statement, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁴

The "reasonable return" test of *Mahon* was later supported by *Penn Central Transportation Co. v. City of New York*.²⁵ When discussing the factors that constitute a taking, the Court stated, "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."²⁶ Importantly, the Court noted that, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property."²⁷ However, the Court cautioned that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by

20. *Id.* "Actually the exchange transaction is a method of ascertaining and paying just compensation for a taking, which may be agreed upon either before or after the taking itself, and is optional with the claimants, who may reject any exchange and pursue a money award under the Tucker Act."

21. *Supra* note 2.

22. 260 U.S. 393 (1922).

23. *Id.* at 414.

24. *Id.* at 415.

25. 438 U.S. 104 (1978).

26. *Id.* at 124.

27. *Id.* at 127.

the government. . . .”²⁸ Thus the Court admonished that regulatory takings cases can only be resolved through reason in light of common sense and experience, not by mechanical application of formulae.

Two recent cases applied *Penn Central's* ad hoc factual inquiries to government actions which had the effect of a regulatory taking of mining property. In *Yuba Goldfields, Inc. v. United States*,²⁹ the claimant asserted that the United States Corps of Engineers had denied it the opportunity to extract minerals. The United States owned the surface estate, and Yuba owned the underlying mineral estate, which it had mined since 1905.³⁰ Without citing any authority, the Corps wrote to Yuba stating that “[d]redging activity or removal of any material, including precious metals, is prohibited.”³¹ The court held that the Corp’s actions may constitute a de facto taking, because, “[w]hat the government appears to have done here was to prevent Yuba from mining minerals for about six years.”³² The court remanded for a factual determination on the taking issue.³³ The *Whitney* court analogized the Corp’s actions in *Yuba* to the effect of section 1260(b)(5), stating that “the frustration of mining operations can be a taking even though the government believes it is only protecting its legal rights.”³⁴ Similarly in *Skaw v. United States*,³⁵ a factual dispute arose over whether government prohibitions of mining activities constituted a taking. The Federal Circuit found that a regulatory taking occurred when a miner who could only mine his riverbed property by a dredge method, was prohibited from doing so by the Wild and Scenic Rivers Act.³⁶ The environmental regulations of the Wild and Scenic Rivers Act focus on the pristine nature of rivers, thereby differing from the “prime farmland” focus of section 1260(b)(5). However, in *Skaw* the Act’s regulatory taking was similar to a taking under section 1260(b)(5) because both acts deprived the owners of the beneficial use of their mineral property. The Federal Circuit held in *Skaw* that Congress did not intend to withdraw the Tucker Act remedy for recovery of just compensation for such a regulatory mineral taking.³⁷

The first case to directly address the regulatory taking effect of SMCRA was *Hodel v. Virginia Surface Mining and Reclamation*

28. *Id.* at 124.

29. 723 F.2d 884 (Fed. Cir. 1983).

30. *Id.* at 885.

31. *Id.* at 886.

32. *Id.* at 890.

33. *Id.* at 891.

34. *Whitney*, 752 F.2d at 1560.

35. 740 F.2d 932 (Fed. Cir. 1984).

36. *Id.* at 938.

37. *Id.* at 939.

Association.³⁸ The Supreme Court held that the provision of SMCRA which prohibited mining in certain locations did not, on its face, deny the owner the economically viable use of his coal-bearing lands.³⁹ The Court in *Virginia Surface Mining* reemphasized the *Penn Central* standard which considered the “economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.”⁴⁰ The Court reiterated the test for a regulatory taking: “a statute regulating the uses of property effects a taking if it ‘denies an owner economically viable use of his land’”⁴¹

While *Virginia Surface Mining* focused on the “steep-slopes” and “approximate original contours” provisions of SMCRA,⁴² *Hodel v. Indiana*,⁴³ which immediately followed *Virginia Surface Mining*, focused on the “prime farmland” sections of SMCRA. The Court in *Hodel v. Indiana* repeated the eminent domain reasoning, “Our review of the questions presented by this case leads us to the same conclusion that we reached in *Virginia Surface Mining*. The Surface Mining Act is not vulnerable to appellee’s pre-enforcement challenge.”⁴⁴ The Court therefore held that the “prime farmland” provisions “do not, on their face, deprive a property owner of the economically beneficial use of his property.”⁴⁵

Although it did not cite *Hodel v. Indiana*, the Federal Circuit court in *Whitney* did invoke *Virginia Surface Mining* by stating, “we deal solely and only with alluvial farm land located west of the 100th parallel. The important teaching of [*Virginia Surface Mining*] is that because of the ad hoc nature of the inquiry, a sweeping fifth amendment attack is not possible.”⁴⁶ The *Whitney* decision thereby echoes *Penn Central*’s ad hoc factual inquiry approach for determining whether a taking had occurred. In addition, the court legally distinguished the method of compensation for section 1260(b)(5) takings and *Virginia Surface Mining* takings: “Here the language to be construed provides more than mere regulations. It specifically visualizes government acquisition of interest in land.”⁴⁷

Thus, the chain of cases from *Mahon* through *Virginia Surface Mining* set the stage for the reasoning in the *Whitney* decision, by

38. 452 U.S. 264 (1981).

39. *Id.* at 296.

40. *Id.* at 295.

41. *Id.* at 296.

42. *Id.* at 284.

43. 452 U.S. 314 (1981).

44. *Id.* at 336.

45. *Id.* at 335.

46. *Whitney*, 752 F.2d at 1558-59.

47. *Id.*

progressively refining the principle that excessive mineral regulation may constitute a taking. Having established this base, the court in *Whitney* then turned to a determination of the method of compensation allowable under section 1260(b)(5).

B. *The Court's Reasoning*

In its first holding, the Federal Circuit court stated that prohibitions on surface mining in section 1260(b)(5) of SMCRA might be a taking, if Whitney could demonstrate that its investment-backed expectations had been effectively precluded.⁴⁸ The court reasoned that the aggrieved owners of specific tracts must show that they have taken all reasonable advantage of hardship exceptions and regulation remedies before bringing the fifth amendment suit.⁴⁹ The court cited the *Kaiser Aetna v. United States* decision, which insisted that takings cases must not be resolved by mechanical application of formulae but through reason in light of common sense and experience.⁵⁰ In *Whitney*, the court noted that Congress recognized it might owe money to certain persons as a result of its legislation, and authorized appropriations for this purpose.⁵¹ In addition, the Federal Circuit reasoned that there may be no other economically viable uses for Whitney's property. By applying the economic impact standard enunciated in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*,⁵² the court reasoned that there may have been a regulatory taking, and that Whitney may be entitled to compensation.⁵³ Citing *Penn Central Transportation Co. v. New York City*, the court then addressed the question of whether a regulation is so onerous as to effect a taking by imputation, with no provision for money compensation.⁵⁴ The court reasoned that if the regulation *requires* a landowner to accept a substitute, instead of money, he is in a worse position than if the regulation allows the *option* of a substitute.⁵⁵ Therefore, the court reasoned, "Congress did not mean to force an exchange upon a claimant not so minded."⁵⁶ This reasoning led to the second holding.

The second holding by the Federal Circuit stated that the pursuit of a

48. *Id.* at 1560.

49. *Id.* at 1559.

50. *Id.* at 1558 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1975)). The *Kaiser* Court also stated that "confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Kaiser Aetna*, 444 U.S. at 174 n. 8 (citing *Chicago, Rock Island & Pacific Railway v. United States*, 284 U.S. 80, 96 (1931)).

51. *Id.* at 1559.

52. *Id.*

53. *Id.* at 1560.

54. *Id.* at 1557.

55. *Id.*

56. *Id.* at 1556.

substitution or exchange transaction under section 1260(b)(5) is not mandatory, but optional with the landowner.⁵⁷ The court noted the reference in section 1260(b)(5) to the land exchange provision of the Federal Land Policy and Management Act (FLPMA),⁵⁸ where exchanges under FLPMA are not authorized without the private parties' consent.⁵⁹ Therefore, the court reasoned that the landowner retains the additional option to sue for money in the Court of Claims, if the landowner does not consent to the exchange.⁶⁰ This option is compatible with a claim for a regulatory taking and may be exercised after the plaintiff has shown a taking occurred.⁶¹ Furthermore, the court appeared to hold that the exchange provision of section 1260(b)(5) is a method of ascertaining the amount of cash compensation under the Tucker Act.⁶² Reasoning that the Tucker Act cash settlement remained a viable option, the court emphasized that "statutory supersession of the Tucker Act is not to be lightly implied."⁶³ The court also noted that the Supreme Court views the Tucker Act as a safety net to assure compliance with just compensation requirements.⁶⁴

After establishing that cash compensation under the Tucker Act is a viable option, the next issue was the establishment of the date of taking, which in effect, would establish the value of compensation for the taking. Plaintiff Whitney alleged that section 1260(b)(5) effectively halted economic development of its land on the date of passage. The court analogized Whitney's position to the corporate developer's position in *Drakes Bay Land Co. v. United States*.⁶⁵ In *Drakes*, a real estate development corporation alleged that the National Park Service had denied it an access easement to its property, thereby effecting a taking. The court in *Drakes* stated that the taking occurred on the date when the corporation's economic development was effectively precluded by the Park Service's refusal to purchase the now inaccessible property.⁶⁶

The Park Service's refusal to purchase the property may be analogous to the Department of Interior's reluctance to offer an acceptable exchange of property in *Whitney*, thus creating a factual dispute over the date of the taking. Therefore the court in *Whitney* remanded the case, reasoning that

57. *Id.* at 1558.

58. 43 U.S.C. § 1716 (1982).

59. *Whitney*, 752 F.2d. at 1557.

60. *Id.* at 1558.

61. *Id.*

62. *Id.* at 1560.

63. *Id.* at 1556.

64. *Id.* at 1558.

65. 424 F.2d 574, 191 Ct. Cl. 389 (1970).

66. *Id.* at 588, 191 Ct. Cl. at 414.

Whitney "may be able to prove that a constitutional taking has occurred as of the date of legislation . . . or some subsequent date that has already occurred."⁶⁷ The court remained hopeful that an exchange could be transacted.⁶⁸

The Chief Justice of the Federal Circuit, Justice Markey, strongly dissented. He argued that a restriction on the right to extract minerals in a particular manner may not be a taking if there are alternative methods to profitably mine the property.⁶⁹ The Chief Justice basically felt that section 1260(b)(5) had not crossed the critical threshold from acceptable regulation into onerous taking. "Because I consider Congress' removal of the freedom to strip mine as not in itself constituting a judicially recognizable taking, and because [Whitney] has not alleged facts indicating that strip mining is the only economically viable use, I would dismiss the complaint"⁷⁰ Justice Markey reasoned that Whitney's narrow economic interest in strip mining had not blossomed into a full "property right" justifying compensation.⁷¹ The Chief Justice concluded that Whitney's relief should be limited to an exchange.⁷²

C. Implications

The *Whitney* decision gives coal companies a new compensation tool through section 1260(b)(5). The coal companies may now make section 1260(b)(5) taking claims and demand either exchange or compensation for environmental restrictions which have effectively frozen their investment expectations. The statute permits an exchange of private coal, which has been regulatorily precluded from being mined, for federal coal which has not been so precluded. Alternatively, the value of the federal land offered for exchange can be used to ascertain the cash compensation value under the Tucker Act. Thus, *Whitney* may allow section 1260(b)(5) to become a conduit for "cashing-in" an undeveloped coal asset. *Whitney* is the first judicial test of section 1260(b)(5). On remand, the questions facing the lower court are straightforward. Does the denial of the permit to strip mine constitute a frustration of mining operation?⁷³ Does this frustration constitute a denial of reasonable beneficial use, thereby creating a taking?⁷⁴

Plaintiff Whitney is a private land owner who purchased coal land

67. *Whitney*, 752 F.2d at 1560.

68. *Id.*

69. *Id.* at 1562 (Markey, C.J., dissenting).

70. *Id.* at 1563.

71. *Id.* at 1563-64 (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945)).

72. *Whitney*, 752 F.2d at 1564.

73. *Id.* at 1560.

74. *Id.*

prior to the enactment of SMCRA. Whitney's property was cut short of commercial development. The "reasonable return" criterion of *Penn Central* is fair and equitable, but only when the landowner pays value for the property knowing of the risk of government regulation, because the market price will reflect the risk. The issue of fairness becomes particularly important when the price the owner pays does not reflect that risk, because the possibility of government action has not yet reared its head. Essentially, Whitney purchased the property at a premium commercial price, and is now saddled with a non-productive asset.

If the Department of Interior offers an exchange that plaintiff Whitney considers reasonable, Whitney may use the value of the offered exchange land to ascertain its cash compensation under the Tucker Act. Although Whitney may accept the land exchange, the depressed price of coal in 1986 makes acceptance unlikely. Sound business practice requires that an asset be transferred into a form that maximizes return on investment. In the current depressed coal market, Whitney would probably want to liquidate its coal land asset, and therefore pursue the Tucker Act cash compensation.

If the Department of Interior offers an exchange that Whitney considers unreasonable, Whitney faces a double burden. First, Whitney must prove to the court that the federal offer is unreasonable, leaving Whitney with no viable section 1260(b)(5) exchange. Second, Whitney must prove that the lack of a viable exchange, combined with the regulatory restrictions of section 1260(b)(5), leaves Whitney with no reasonable beneficial use of its property. When deciding this issue, the court must focus on the commercial return on the "permitted uses" available to Whitney.⁷⁵ Whitney must argue that the United States has so seriously interfered with its right to use and enjoy its property as to render the property economically useless. Ultimately, Whitney must prove that any method of mining, other than strip mining, is commercially infeasible.

As Justice Holmes said, "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."⁷⁶ Furthermore, permissible governmental regulatory action does not constitute a compensable taking merely because the result may diminish the value of the property or prevent its most beneficial use.⁷⁷ Thus, the taking is an open issue.

On remand, if the lower court does find a taking, the property owner

75. *Id.* at 1557.

76. *Pennsylvania Coal*, 260 U.S. at 414.

77. *Skaw*, 740 F.2d at 939.

must normally be paid the fair market value of the property.⁷⁸ The date of the taking may have occurred when economic development was effectively prevented.⁷⁹ Any subsequent enhancement or diminution in value, resulting from the acquisition itself, must be excluded from constitutional just compensation.⁸⁰ Also, mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership which cannot be considered a taking in the constitutional sense.⁸¹

The *Whitney* case is ripe for a dispute over the fair market value of Whitney's coal land, and therefore the value of the federal land offered in exchange. When was the economic development prevented? Should the fair market value be determined on the date of SMCRA's passage in 1977, which precluded the realization of plaintiffs' investment-backed expectations, or should the fair market value reflect current market conditions? This question is critical to the determination of just compensation, because the fair market value of coal fluctuates.⁸² Just compensation in federal taking cases is not determined by any one formula of valuation but by methods of assessment that vary according to the circumstances.⁸³ If direct market evidence of fair market value is unavailable, the fair market value of comparable land with comparable restrictions or potential may be used in valuation.⁸⁴ Recently, the General Accounting Office reasoned that the word "fair" does not refer to the justness of the amount received, but to the method by which the amount is determined.⁸⁵ If the Department of Interior offers federal coal land in exchange, and if the coal land reasonably falls within the general guidelines of fair market value, then Whitney has no choice but to accept the exchange land or alternatively accept the cash value of the land under the Tucker Act. Ultimately, if the Department of

78. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 517 (1979).

79. *Drakes Bay*, 424 F.2d at 588.

80. *Id.* at 584.

81. *Agins v. Tiburon*, 447 U.S. at 255, 263 n.9 (1980).

82. The Federal Coal Leasing Amendments Act, 43 C.F.R. 3400.0-5(n) (1985) provides:

"Fair market value" means that amount in cash, or on terms reasonably equivalent to cash, for which in all probability the coal deposit would be sold or leased by a knowledgeable owner willing but not obligated to sell or lease to a knowledgeable purchaser who desires but is not obligated to buy or lease.

83. Thurston, *Achieving "Fair Market Value"*, 9 COLUMBIA J. OF ENVTL. LAW, 237, 249 (1984).

84. *United States v. 100 Acres of Land*, 468 F.2d 1261, 1265 (9th Cir. 1972).

85. Thurston, *supra* note 83 at 239 (citing COMPTROLLER GENERAL OF THE UNITED STATES, Pub. No. GAO/RCED-83-119, ANALYSIS OF THE POWDER RIVER BASIN FEDERAL COAL LEASE SALE: ECONOMIC VALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED 45 (1983): "The 'fair' element of the term 'fair market value' applies to the *method* of determining market value. The market value of the coal does not necessarily have to be 'fair.' Rather it has to reflect the lease's value at the time and place of the sale — *fairly determined.*") (emphasis in the original).

Interior offers a reasonable exchange, it can determine the amount of compensation Whitney will receive.

IV. CONCLUSION

The *Whitney* court found that section 1260(b)(5) of SMCRA's "prime farmland" restrictions on strip mining may be a regulatory taking of private coal land situated in western alluvial valleys, by prohibiting the owner's investment-backed expectations.

In a case of first impression, the *Whitney* decision bestows federal court approval on the section 1260(b)(5) exchange provision, which permits the exchange of federal coal land for private coal land which has been regulatorily precluded from development. Secondly, *Whitney* permits the precluded coal owner to opt for cash compensation under the Tucker Act, where the offered federal exchange land sets the value of the cash compensation.⁸⁶

Thus, *Whitney* has effectively allowed cash compensation for regulatory restrictions on strip mining. More subtly, *Whitney* enables the owner of precluded coal land to liquidate a non-productive asset. However, if the private owner rejects the offered exchange land, the owner bears the dual burden of proving both the taking and the date of the taking. Ultimately, the *Whitney* decision may allow section 1260(b)(5) to become a conduit for "cashing-in" coal assets in western alluvial valleys.

86. *Whitney*, 752 F.2d at 1560.

