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Natural Resources - To Take or Not To Take - Was That Question Really Worth 140 Million Dollars - Whitney Benefits, Inc. v. United States

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CASENOTE

NATURAL RESOURCES—To Take or Not to Take—Was That Question Really Worth 140 Million Dollars? *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied,* 112 S. Ct. 406 (1991).[1]

Whitney Benefits, Inc. is the owner in fee of a large coal reserve underlying 1,327 acres in the Powder River Basin of Sheridan County, Wyoming.[2] A substantial portion of the reserve is located beneath an alluvial valley floor (AVF) of the Tongue River.[3] AVFs are located where clay, silt, sand, gravel, and other materials carried by water are deposited beneath the streams and/or along stream meanders. AVFs are also found where ground water is close to the surface.[4] In 1974, Peter Kiewit Sons' Co. (PKS) leased the rights to mine the Whitney Benefits, Inc. reserves in exchange for advance and operating royalties.[5] In further preparation of mining, PKS conducted exploration tests and purchased land overlying the Whitney Benefits, Inc. coal reserves.[6] PKS submitted a coal mining permit application to Wyoming's Department of Environmental Quality (DEQ) in March of 1976.[7] For procedural reasons, PKS withdrew the permit application

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1. The 1991 decision of the United States Court of Appeals for the Federal Circuit is the final decision of the Whitney Benefits trilogy. The first decision is a federal circuit appeal from a 1984 unpublished decision of the United States Claims Court: Whitney Benefits, Inc. v. United States, 752 F.2d 1554 (Fed. Cir. 1985). [Hereinafter *Whitney Benefits I.*] The *Whitney Benefits I* court remanded the case back to the Claims Court where the second decision of the trilogy was decided: Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394 (1989). [Hereinafter *Whitney Benefits II.*] The third decision affirmed the Claims Court's 1989 decision: Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied,* 112 S. Ct. 406 (1991). [Hereinafter *Whitney Benefits III.*]

2. *Whitney Benefits II,* 18 Cl. Ct. 394, 396 (1989). Whitney Benefits, Inc. is a charitable trust created in 1928 from the estate of Edward A. Whitney. *Id.*

3. *Id.*

4. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 118-19 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 650-51. AVFs are critical to the agriculture of the arid and semi-arid climates because of the ability of the soils to store water during dry months. *See also* Jack C. Schmidt and David Nimick, *Overview of the Alluvial Valley Floor Regulatory Program, in* 1 COAL DEVELOPMENT: COLLECTED PAPERS: PAPERS PRESENTED AT COAL DEVELOPMENT WORKSHOPS IN GRAND JUNCTION, COLORADO AND CASPER, WYOMING 691, 693-96 (1983) (sponsored by Bureau of Land Management). The Surface Mining Control and Reclamation Act (SMCRA) defines alluvial valley floors as "the unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities . . . ." 30 U.S.C. § 1291(1) (1988).

5. *Whitney Benefits II,* 18 Cl. Ct. at 397. From 1974 until the time of trial, PKS paid Whitney Benefits $581,798.80. *Id.* at 397 n.2.

6. *Id.* at 397. PKS reportedly spent one million dollars for the preliminary tests. Additionally, by 1977 PKS owned approximately 590 acres overlying the coal. PKS planned to use the surface property to facilitate access to the underground reserves. *Id.*

7. *Id.* The State Department of Environmental Quality is Wyoming's regulatory agency responsible for issuing coal mining permits and for supervising mining opera-

in August of the same year but expressed an intent to refile.[8] However, on August 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA).[9] PKS was then required to meet SMCRA's permitting requirements, one of which precluded surface mining in areas located within or adjacent to AVFs.[10]

Congress recognized the critical function of AVFs to western agriculture[11] and enacted legislation to address the concern. Specifically, SMCRA's section 510(b) mandates denial of a permit application if the mining operation would "interrupt, discontinue, or preclude farming on alluvial valley floors . . . ."[12] But at the time SMCRA was enacted, some coal mines were already operating on AVFs and other mines were well beyond the preliminary planning stage. Acknowledging this, Congress included a grandfather provision[13] and a coal exchange program.[14]

The coal exchange program provides for the exchange of mineable federal coal leases for fee title of coal which cannot be mined due to the AVF prohibition.[15] The exchange is made pursuant to the general provisions of the Federal Land Policy and Management Act (FLPMA)[16] and to the Coal Lease and Coal Land Exchanges program.[17] PKS believed the Whitney Benefits, Inc. reserves qualified for the program. However, to be eligible, the reserves had to be declared "non-mineable" by the regulatory agency.[18] Thus, PKS submitted a

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tions. WYO. STAT. § 35-11-106 (1988).

8. *Whitney Benefits II*, 18 Cl. Ct. at 397.

9. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C.A. §§ 1201-1328 (West 1986 & Supp. 1991)). The underlying purpose of SMCRA is to protect the environment while assuring an adequate supply of coal for the nation's energy requirements. 30 U.S.C. § 1202 (1988).

10. 30 U.S.C. § 1260(b)(5) (1988). The AVF mining restriction applies to proposed operations located west of the 100th meridian west longitude. *Id.*

11. AVFs were discussed thoroughly during SMCRA's congressional hearings. *See* H.R. Rep. No. 218, 95th Cong., 1st Sess. 59-60, 116-20 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 597-98, 649-52. A 1974 National Academy of Science report emphasized the potential deleterious effects of surface mining on the hydrologic functions of AVFs in the western states. *Id.* at 118, *reprinted in* 1977 U.S.C.C.A.N. at 650.

12. 30 U.S.C. § 1260(b)(5) (1988).

13. The grandfather provision relates to mines operating on AVFs at the time of SMCRA's passage. Mining in or adjacent to AVFs is allowed to continue if (1) the operation was producing coal in commercial quantities prior to SMCRA's enactment or (2) the operation had previously obtained specific approval by the State regulatory authority. 30 U.S.C. § 1260(b)(5) (1988). As originally proposed, the grandfather clause would have also included operators who had made "substantial legal and financial commitments . . ." but who had not received a permit. *Whitney Benefits III*, 926 F.2d at 1173 (quoting 123 CONG. REC. 12,638-39).

14. The coal exchange program is available to qualified applicants if the Secretary "determines that substantial financial and legal commitments were made . . . prior to January 1, 1977 . . . ." 30 U.S.C. § 1260(b)(5) (1988).

15. 30 U.S.C. § 1260(b)(5) (1988).

16. References to the exchange provision in FLPMA provide that an AVF exchange will be of equal value. 43 U.S.C. § 1716 (1988).

17. The Coal Lease and Coal Land Exchanges regulations specifically state that "[e]xchanges shall be made on an equal value basis." 43 C.F.R. § 3436.2-3(e) (1991).

18. *Whitney Benefits II*, 18 Cl. Ct. at 398. In reponse to PKS' eligibility inquiry,

second application in October of 1978.[19] The Wyoming DEQ denied the permit application in January of 1979, partly because "a large portion of the operation was located within an alluvial valley floor which is significant to farming."[20] At that time, the Wyoming DEQ requested that the Secretary of the Interior consider the Whitney Benefits reserves for eligibility in the exchange program.[21] PKS submitted a request for an AVF exchange in July of 1981[22] and approximately one month later, the Secretary determined that the Whitney Benefits operation met the statutory requirements for a coal exchange.[23] The search for an exchange began in January of 1982.[24]

To further protect its coal mining interests, Whitney Benefits filed a takings claim against the United States in the United States Claims Court.[25] Whitney Benefits claimed that SMCRA's enactment resulted in a taking of the company's ability to mine the reserves. In a bench ruling, the Claims Court denied Whitney Benefits' just-compensation claim.[26] Whitney Benefits appealed the decision to the

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the Wyoming DEQ and the Department of Interior's Bureau of Land Management (BLM) interpreted SMCRA's exchange provision in this manner. *Id.* The actual regulations for federal fee coal exchanges were not promulgated until 1982. 47 Fed. Reg. 33,145 (1982) (codified at 43 C.F.R. § 3436.2 (1991)).

19. The permit application concerned Parcel II, East Whitney, of the property. Whitney Benefits, Inc. v. Hodel, No. C84-193-K, slip op. at 3 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law). The Whitney Benefits' coal reserves were divided into two parcels, West Whitney and East Whitney (Parcel I and Parcel II, respectively). *Whitney Benefits II*, 18 Cl. Ct. at 396.

20. Whitney Benefits, Inc. v. Hodel, No. C84-193-K, slip op. at 3 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law).

21. *Id. See also Whitney Benefits II*, 18 Cl. Ct. at 398.

22. *Whitney Benefits II*, 18 Cl. Ct. at 398. PKS could not officially apply for an exchange until regulations were made available for use in 1981. Trial Transcript of July 23, 1987 Hearing at 62, Whitney Benefits, Inc. v. Hodel, No. C84-0193-K (D. Wyo. 1987).

23. *Whitney Benefits II*, 18 Cl. Ct. 398. The exchange request and the Wyoming BLM State Director's subsequent approval included both Parcel I and Parcel II. Whitney Benefits, Inc. v. Hodel, No. C84-193-K, slip op. at 3-4 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law).

24. *Id.* at 4. Initially, both parcels were included in the exchange. However, eight months after the exchange process began, the District Manager of BLM determined only part of the property qualified for the exchange. *Id.* Whitney Benefits' pursuit of an exchange was delayed pending deliberations of the AVF qualifications. *Id.* at 4-6. In June of 1983, eighteen months after Whitney Benefits applied for the program, the District Manager redetermined that both parcels qualified. *Id.* at 6. The exchange process resumed at that time. Brief in Opposition for Writ of Certiorari at 6, Whitney Benefits, Inc. v. United States, 926 F.2d 1554 (Fed. Cir.) (No. 91-195), *cert. denied*, 112 S. Ct. 406 (1991). From the time of SMCRA's enactment to the resumption of the exchange program, nearly six years had elapsed. *Id.*

25. *Whitney Benefits II*, 18 Cl. Ct. at 398. The action was filed on August 3, 1983, exactly six years after the enactment of SMCRA, to protect Whitney Benefits' just-compensation claim from the six-year statute of limitations. Brief in Opposition, *supra* note 24, at 6 (citing 28 U.S.C. § 2501). The Claims Court has exclusive jurisdiction of Fifth Amendment just-compensation claims against the government. Tucker Act, 28 U.S.C. § 1491(a)(1) (1988).

26. In the unreported decision, the Claims Court determined that Whitney Benefits must pursue the coal exchange program for its compensation; a claim could not be made under the Tucker Act until the statutory remedy was exhausted. *See Whitney*

United States Court of Appeals for the Federal Circuit (*Whitney Benefits I*).[27] While Whitney Benefits' just-compensation appeal was pending in the federal circuit court, Whitney Benefits filed a second lawsuit in the United States District Court under the citizen's suit provision of SMCRA.[28] The basis of the citizen's suit was to force the government to comply with the coal exchange program.[29]

In January of 1985, the Court of Appeals for the Federal Circuit reversed the Claims Court's denial of pecuniary relief.[30] The federal circuit court remanded the case back to the Claims Court to allow Whitney Benefits to pursue its just-compensation claim.[31] Whitney Benefits also prevailed in the United States District Court. The district court ordered the Bureau of Land Management (BLM) of the Department of the Interior to comply with SMCRA's coal exchange program.[32] Negotiations for a coal exchange continued,[33] but in 1987, the United States District Court stayed the proceedings pending the outcome of the remanded just-compensation claim.[34]

The remanded claim was decided in 1989 (*Whitney Benefits II*).[35] The *Whitney Benefits II* court held that a compensable taking oc-

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Benefits I, 752 F.2d at 1556.

27. 752 F.2d 1554 (Fed. Cir. 1985). The United States Court of Appeals for the Federal Circuit retains exclusive jurisdiction of appeals from the Claims Court. 28 U.S.C. § 1295(a)(3) (1988).

28. *Whitney Benefits II*, 18 Cl. Ct. at 398. The citizen's suit provides the district court with "the authority to compel compliance with the provisions of SMCRA when the Secretary has failed to perform any nondiscretionary act or duty." Whitney Benefits, Inc. v. Hodel, No. C84-193-K, slip op. at 8 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law). *See* 30 U.S.C. § 1270 (1988) (citizen's suit provision of SMCRA).

29. *Whitney Benefits II*, 18 Cl. Ct. at 398.

30. *Whitney Benefits I*, 752 F.2d at 1560.

31. *Id.* In *Whitney Benefits I*, the Court of Appeals for the Federal Circuit stated that the exchange program was not the exclusive, mandatory remedy for the property owner. The property owner could pursue a claim for pecuniary compensation. *Id.* at 1558.

32. Whitney Benefits v. Hodel, No. C84-193-K (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law). The district court declared that the BLM "has unreasonably delayed and failed to perform the mandatory duty to exchange federal coal for [Whitney Benefits'] fee coal." *Id.* at 8. The court ordered the BLM to "tender federal coal of equal value to [Whitney Benefits'] coal [by] August 30, 1985." *Id.* at 9. *See Whitney Benefits II*, 18 Cl. Ct. at 398.

33. *Whitney Benefits II*, 18 Cl. Ct. at 398-99. In December, 1985, the federal district court again ordered the Department of the Interior to exchange coal. Whitney Benefits, Inc. v. Hodel, No. C84-193-K (D. Wyo. Dec. 3, 1985) (order ruling on motion to compel compliance).

34. Brief for Petitioners for Writ of Certiorari at 9, Whitney Benefits, Inc. v. United States, 926 F.2d 1554 (Fed. Cir.) (No. 91-195), *cert. denied*, 112 S. Ct. 406 (1991).

35. 18 Cl. Ct. 394 (1989). The *Whitney Benefits II* court evaluated three factors to determine if the regulatory restriction amounted to a compensable taking: (1) the economic impact of the restriction on the claimant's property; (2) the restriction's interference with investment-backed expectations; and (3) the character of the government's action. *Id.* at 399 (citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

curred upon the enactment of SMCRA.[36] It calculated that the government's taking amounted to $60,296,000.00.[37] The court also awarded the plaintiffs interest[38] and attorney's fees,[39] for a grand total exceeding $140 million.[40] The government appealed the Claims Court decision to the Court of Appeals for the Federal Circuit which then affirmed the lower court's decision (*Whitney Benefits III*).[41] Subsequently, the government appealed the federal circuit court's affirmation to the United States Supreme Court. On November 6, 1991, the government's petition for certiorari was denied.[42]

As is evident from the previous discussion, the facts and circumstances surrounding the Whitney Benefits litigation are far from simple. However, complex facts are generally the backbone of all takings cases. The courts have historically evaluated each case on an ad-hoc,[43] fact-dependent basis, and the Whitney Benefits' litigation is no exception in that regard. But the litigation is exceptional because the Claims Court and the Court of Appeals for the Federal Circuit carried the ad-hoc analysis beyond the takings precedent. This casenote discusses how the courts sidestepped congressional intent and takings precedent to hold that SMCRA's enactment constituted a taking of Whitney Benefits' property. It also addresses other possible reasons for the result-orientated decision. Ultimately, this casenote suggests that the real message of the Whitney Benefits trilogy of decisions is a somber one for environmental regulatory programs. If the Claims Court intends to find a compensable taking, it will use selected por-

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36. *Whitney Benefits II*, 18 Cl. Ct. at 406-07. To determine the date of taking, the Claims Court followed the mandate of the *Whitney Benefits I* court that "the time when economic development [is] effectually prevented [is] the date of the taking." *Whitney Benefits I*, 752 F.2d at 1559.

37. *Whitney Benefits II*, 18 Cl. Ct. at 416. The Claims Court followed the precedent of the United States Supreme Court that "just compensation" means the full monetary equivalent of the property taken and placing the owner in the same financial position as if there had been no taking. *Id.* at 407. To ascertain the amount, the court reviewed the proposals using the Boyd Plan as its basis. *Id.* at 400-16. The Boyd Plan is a fair market valuation method which incorporates a discounted cash flow analysis. *Id.* at 400 n.5.

38. *Id.* at 416-17. When a claim against the United States is based on the Fifth Amendment, an award of just compensation entitles the property owner to interest from the date of the taking to the date of payment of judgment. Thus, Whitney Benefits was entitled to pre-judgment interest from August 3, 1977, the date of SMCRA's enactment. *Id.*

39. *Id.* at 417. Whitney Benefits is entitled to attorney's fees and costs. *Id.* (citing 42 U.S.C. § 4654(c) (1982)).

40. *Decision Awarding $140 Million For Taking Will Not Be Reviewed, U.S. Supreme Court Says*, 22 Env't Rep. (BNA) 1,751 (Nov. 8, 1991).

41. Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

42. United States v. Whitney Benefits, Inc., 112 S. Ct. 406 (1991). Justice White and Justice Blackmun would have granted certiorari.

43. The phrase "ad hoc" is found throughout takings decisions. "Ad hoc" means the inquiry depends "upon the particular circumstances of each case." *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1977) (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) and referring to United States v. Caltex, Inc., 344 U.S. 149, 156 (1952)).

tions of the takings doctrine to accomplish that result. Furthermore, if the Claims Court's ad hoc analysis is well presented, the Court of Appeals for the Federal Circuit will not hesitate to affirm the holding, even when the cost to the taxpayers is significant.

BACKGROUND

The Fifth Amendment to the United States Constitution precludes the government from taking personal property without just compensation.[44] The earliest takings cases involved the government's exercise of eminent domain[45] and actual physical occupation.[46] In those cases, taking by the government was readily discernable and commensurate compensation easily determined.[47] Conversely, inverse condemnation claims against governmental invasion or laws and regulations often were not successful. Even though the government foreclosed, inhibited, curtailed, or otherwise interfered with private property, the courts generally held such activity or laws and regulations to be a lawful exercise of police power.[48] The principles of the earlier regulatory takings cases continue to be critical when evaluating regulations such as SMCRA's alluvial valley floor mining preclusion.

Mugler v. Kansas[49] was one of the first United States Supreme Court cases to address compensable regulatory takings. The Court held that a regulation which was found to promote the health, safety, and welfare of the public could not constitute a taking of one's property.[50] But the Court's strict view began to change upon the advent of increasing governmental regulation and supervision, and the new leadership of Justice Holmes.[51] Justice Holmes' view was espoused in the landmark case of *Pennsylvania Coal Company v. Mahon*:[52] "[t]he

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44. U.S. CONST. amend. V.

45. The distinction between eminent domain and inverse condemnation was described in Agins v. Tiburon, 447 U.S. 255, 258 n.2 (1979): "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" (citing United States v. Clarke, 445 U.S. 253, 255-58 (1980)). Inverse condemnation can be further divided into two categories: (1) physical invasion by the government; or (2) regulatory takings. *See* E. George Rudolph, *Let's Hear it for Due Process-An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355, 363, 379 (1988).

46. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 (1964).

47. *Id.*

48. *Id.*

49. 123 U.S. 623 (1887).

50. *Id.* at 668-69. In *Mugler*, a Kansas distiller built a brewery while it was legal to manufacture and distribute liquor. The distiller unsuccessfully challenged later regulations promulgated in response to a Kansas constitutional amendment. The amendment prohibited the sale and manufacture of intoxicating liquors. *Id.* at 671.

51. Sax, *supra* note 46, at 40. Holmes' fairness approach viewed regulatory taking as varying in degree, not in kind, from physical taking and thus adopted a broader stance toward compensation. *Id.* at 40-41.

52. 260 U.S. 393 (1922). Professor Sax discussed Holmes' "fairness" view and the emphasis that Holmes placed upon "economic harm inflicted by the regulation." Sax,

general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[53]

In *Pennsylvania Coal*, the Court addressed the company's mining interests which were adversely affected by the passage of the Kohler Act. The surface owners sought the use of the Kohler Act to preclude mining beneath their land.[54] Writing for the majority, Justice Holmes conceded that the government could not continue to operate if each and every diminution in property value that resulted from a change in law required compensation. However, Holmes stated that "when [the extent of the diminution] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[55] The Court held that the Kohler Act exceeded that level of magnitude.[56] With those words, Justice Holmes set the stage for future regulatory takings cases. To determine if a regulation's impact went "too far," courts continued to analyze cases in a factually intense, ad hoc manner. If the court held that a taking occurred, just compensation was due.[57]

The economic evaluation approach to regulatory takings was further refined in *Penn Central Transportation Co. v. New York City*.[58] In *Penn Central*, the Court balanced the validity and purpose of New York City's Landmarks Preservation Law against the property owner's investment in the Grand Central Terminal.[59] Noting that no "set formula" existed for determining when compensation was due, the Court then identified three main factors which required evaluation: (1) economic impact of the regulation on the claimant; (2) the extent the regulation interferes with investment-backed expectations; and (3) the character of the governmental action.[60] After evaluating the factors, the *Penn Central* Court held that no compensable taking

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supra note 46, at 40-41.

53. *Pennsylvania Coal*, 260 U.S. at 415.

54. The state of Pennsylvania's Kohler Act was enacted to prevent subsidence damage. The Kohler Act prohibited mining beneath public structures and private dwellings. *Pennsylvania Coal*, 260 U.S. at 393-94 n.1. In *Pennsylvania Coal*, the plaintiff's surface property had been severed from the support and mineral estate prior to enactment of the Kohler Act. *Id.* at 412.

55. *Id.* at 413.

56. *Id.* at 414. Justice Brandeis dissented, stating that restrictions to protect the public health, safety or morals could not amount to a taking. Additionally, because a restriction did not deprive the owner of possession, the sovereign never "took" the property. *Id.* at 417 (Brandeis, J., dissenting).

57. *Id.* at 413-16 (Holmes, J., majority).

58. 438 U.S. 104 (1978).

59. The law required an owner of a designated landmark to obtain prior approval from the Landmarks Preservation Commission before making any exterior alterations. *Id.* at 112. The Grand Central Terminal was designated as a landmark and, as required, Penn Central submitted building plans for a multi-story office building over the terminal. The commission rejected the plans. *Id.* at 116-18. Subsequently, Penn Central filed suit, claiming that the Landmarks Law had taken its property without just compensation. *Id.* at 119.

60. *Id.* at 124.

had occurred. Penn Central's investment was not substantially impaired; the company still had reasonable use of the Grand Central Terminal and the company would be able to enhance other company properties.[61] Justice Rehnquist, writing in dissent,[62] believed the use restriction amounted to a compensable taking and the transferable development rights might not constitute full and fair compensation.[63]

The ad hoc inquiry and takings evaluation factors enunciated in *Penn Central* have carried through to other regulatory takings cases. In *Agins v. City of Tiburon*,[64] a unanimous Supreme Court held that density restrictions did not amount to a taking even though the landowners were precluded from extensive residential development.[65] Although the ordinance did limit development, there was no indication that the owner was denied economically viable use of the land.[66]

Five years later, the Supreme Court decided *Connolly v. Pension Benefit Guaranty Corp.*[67] The Court applied the *Penn Central* factors against the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act and held that no compensable taking resulted. Connolly did not show that the economic imposition was significant enough to amount to a taking and the Court found that the regulation did not substantially interfere with the employers' investment-backed expectations.[68]

In 1987, the Supreme Court evaluated the economic viability

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61. The Court evaluated the company's entire property to conclude that the investment was not substantially impaired by the regulation. *Id.* at 130-31, 136-38. The enhancement of other properties referred to the use of Penn Central's transferable development rights (TDRs). *Id.* at 129. The majority perceived the TDRs to be a means of compensation for any property value reduction caused by the Landmarks Law. *Id.* at 137. However, the Court acknowledged that a taking might be found in the future if "circumstances have so changed" to make the permitted use no longer "economically viable." *Id.* at 138 n.36.

62. *Id.* at 138-53 (Rehnquist, J., dissenting). Chief Justice Burger and Justice Stevens joined Justice Rehnquist in the dissent.

63. *Id.* at 149-52.

64. 447 U.S. 255 (1980). Agins purchased land apparently with an intent to develop a high-density residential area. Following the purchase, the city enacted a zoning ordinance which restricted the residential densities of Agins' land. Agins filed suit, complaining that rezoning of the land "forever prevented [its] development for residential use . . . ." *Id.* at 258.

65. The *Agins* Court balanced a proper exercise of police power against the plaintiff's reasonable investment expectations. The Court found that the restriction on use did not amount to substantial economic diminution. *Id.* at 260-63.

66. *Id.* at 262. The Court found that the regulation did not prevent the best use nor extinguish a fundamental attribute of ownership. The property owners were still free to pursue their reasonable investment expectations. *Id.*

67. 475 U.S. 211 (1986). In *Connolly*, a regulation required that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. The provision was enacted to ensure that adequate funds would be available for future use. *Id.* at 216-17. Connolly maintained that "the imposition of noncontractual withdrawal liability violates the Takings Clause by requiring employers to transfer their assets for the private use of pension trusts and, . . . by requiring an uncompensated transfer." *Id.* at 221.

68. *Id.* at 225-27.

prong when it decided *Keystone Bituminous Coal Assn. v. DeBenedictis*.[69] The coal association challenged a Pennsylvania Subsidence Act[70] which limited mining in certain areas. Compliance with section four of the Act generally required coal mine operators to leave fifty percent of the mining reserves as support.[71] After limiting and distinguishing *Pennsylvania Coal*, the Court balanced the purpose of the Subsidence Act against the diminution in value and the interference with investment-backed expectations of Keystone Bituminous.[72] The Court held that Keystone Bituminous' economic impact was not significant enough to surmount a facial regulatory taking challenge.[73] Chief Justice Rehnquist wrote the dissent[74] which contested the majority's characterization of the regulated activity as "akin to a public nuisance."[75] The Chief Justice cited previous Supreme Court cases where the "nuisance" classification was instrumental to the Court's holding that no taking had resulted.[76]

The Supreme Court established the factually intensive, ad hoc inquiry of regulatory takings cases many years ago. Even though facts and circumstances change, the basic principles enunciated in *Pennsylvania Coal*, refined in *Penn Central*, and emphasized in *Agins* con-

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69. 480 U.S. 470 (1987).

70. *Id.* at 474. The full name of the Act is the Bituminous Mine Subsidence and Land Conservation Act. *Id.* (citing PA. STAT. ANN., Tit. 52, § 1406.1 *et. seq.* (Purdon Supp. 1986)).

71. *Keystone Bituminous*, 480 U.S. at 476-77.

72. *Id.* at 484-88. To distinguish *Pennsylvania Coal*, Justice Stevens described the different purposes for the legislative acts. The majority stated that the Kohler Act evaluated in *Pennsylvania Coal* balanced private interests while the act at issue in *Keystone Bituminous* weighed public interests against a private owner. *Id.* Conversely, the dissent found the purposes of the acts to be similar. *Id.* at 509-11 (Rehnquist, C.J., dissenting).

73. *Id.* at 493-96 (Stevens, J., majority). Although Keystone Bituminous did show that 27 million tons of coal would be left in place, that amount was only two percent of the mineable reserves. *Id.* at 496.

74. *Id.* at 506-21 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist was joined by Justices Powell, O'Connor, and Scalia.

75. *Id.* at 512-14.

76. *Id.* at 511-12 (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)). Another case which is often cited for the nuisance exception to a compensable taking is Miller v. Schoene, 276 U.S. 272 (1928). In *Miller*, the owners of red cedar trees were forced to cut them down because the trees harbored cedar rust. The cedar rust was deadly to the nearby cultivated apple trees. *Id.* at 277. In *Keystone Bituminous*, the dissenting Chief Justice noted that the plaintiffs in *Miller* were still "able 'to use the felled trees.' " *Keystone Bituminous*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). Thus, economic use was not totally extinguished.

Additionally, the Court disagreed on the evaluation of the independent support rights. The majority refused to separate the support estate from the other strands in the bundle of Keystone Bituminous' property rights. *Id.* at 496-98 (Stevens, J., majority). Conversely, the dissent would have characterized the independent support estate as a property right subject to a taking. *Id.* at 517-20 (Rehnquist, C.J., dissenting). For a discussion of how the "Rehnquistian" segmented view of property rights affected the Court's decision in Hodel v. Irving, 481 U.S. 704 (1987), *see* John H. Leavitt, Note, *Hodel v. Irving: The Supreme Court's Emerging Takings Analysis-A Question of How Many Pumpkin Seeds per Acre*, 18 ENVTL. L. 597 (1988).

tinue to be important. The two-prong threshold test directs that a regulatory taking may be found if "the [regulation] does not substantially advance legitimate state interests *or* denies an owner economically viable use of his [property]."[77] That same type of inquiry and those same principles are essential to the holding of *Whitney Benefits III*.

PRINCIPAL CASE

In *Whitney Benefits III*, the Court of Appeals for the Federal Circuit held that a compensable taking of Whitney Benefits' property resulted upon enactment of SMCRA.[78] At the onset, the *Whitney Benefits III* court emphasized that the constitutionality of SMCRA was not an issue nor was there any contention that the AVF mining preclusion did not substantially advance a legitimate governmental purpose.[79] Rather, the case "presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution [of the property's] value . . . ."[80]

The federal circuit court's analysis of Whitney Benefits' takings claim was divided into four major sections: (1) was a permit application denial required; (2) did SMCRA prohibit Whitney Benefits from mining the Whitney Benefits, Inc. coal; (3) did SMCRA deprive Whitney Benefits of all economic use of its property; and (4) did the Claims Court consider Congress' motivation.[81]

Mining Permit

To begin, the Court of Appeals for the Federal Circuit addressed the government's argument that until the appropriate agency determination is made, a takings claim is not ripe for review.[82] To refute the government's position, the court referred to the language of SMCRA which expressly denies permit approval if mining would be conducted on AVFs.[83] The *Whitney Benefits III* court concurred with the Claims Court that "it would be unreasonable under the particular facts of this case to hold that a taking could not have occurred until a subsequent administrative determination was made that mining of Whitney coal was prohibited."[84]

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77. *Agins*, 447 U.S. at 260 (emphasis supplied). Evaluation of the second prong, economic viability, concerns three factors: (1) economic impact; (2) interference with investment-backed expectations; and (3) character of the government's action. *See Penn Central*, 438 U.S. at 124. *See supra* text accompanying note 60.

78. *Whitney Benefits III*, 926 F.2d 1169, 1177 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 406 (1991).

79. *Id.* at 1170.

80. *Id.* at 1177 (quoting *Whitney Benefits II*, 18 Cl. Ct. 394, 406 (1989)).

81. *Whitney Benefits III*, 926 F.2d at 1171.

82. *Id.* at 1171-72.

83. *Id.* at 1171 n.3. *See* 30 U.S.C. § 1260(b) (1988).

84. *Whitney Benefits III*, 926 F.2d at 1172 (quoting *Whitney Benefits II*, 18 Cl.

SMCRA Prohibited Mining of Whitney Benefits' Coal

The government claimed that the enactment of SMCRA, on its own, did not prohibit mining of Whitney Benefits' coal.[85] However, the Claims Court reviewed the case under the assumed directive that a taking occurs "when economic development [is] effectually prevented."[86] The *Whitney Benefits III* court affirmed the Claims Court's finding that the time of taking was August 3, 1977, the date of SMCRA's enactment.[87]

To support the Claims Court's findings, the *Whitney Benefits III* court touched on three factors.[88] First, the government conceded that SMCRA's enactment precluded mining of Whitney Benefits' reserves.[89] The BLM reported that "[d]evelopment of the [Whitney] coal was halted by the passage of the Surface Mining Control and Reclamation Act of 1977. Section 510(b) of that Act prohibited all surface mining in alluvial valley floors significant to farming."[90] Secondly, physical facts presented at trial proved that the AVF prohibition applied directly to Whitney Benefits' property.[91] The AVF "was described as plain to the eye"[92] and its former use was known to be ranching and farming.[93] As a third factor, the *Whitney Benefits III* court evaluated SMCRA's legislative history. The court declared that "SMCRA's legislative history confirmed the presence of a legislative taking of the Whitney Coal property."[94]

In support of the third finding, the *Whitney Benefits III* court referred to SMCRA's congressional hearings. During the hearings, proposed Wyoming and Montana surface mining operations which would be potentially affected by SMCRA's AVF provisions were identified and reviewed.[95] The *Whitney Benefits III* court pointed out that Wyoming's Representative Roncalio specifically addressed the ef-

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Ct. at 417).

85. *Whitney Benefits II*, 18 Cl. Ct. at 407. The government asserted that a taking could not result until the permit application was denied. *Id.*

86. *Id.* at 406 (quoting *Whitney Benefits I*, 752 F.2d 1554, 1559 (Fed. Cir. 1985)).

87. *Whitney Benefits III*, 926 F.2d at 1172. The federal circuit court agreed that SMCRA's enactment deprived the company of "all economically viable use" of its property. *Id.*

88. *Id.* at 1173-74.

89. *Id.* at 1173. The BLM published a Notice of Realty Action in the *Federal Register* following the Wyoming District Court order which compelled the government to tender federal coal pursuant to the AVF exchange provision. 51 Fed. Reg. 3124 (1986) (referring to Whitney Benefits, Inc. v. Hodel, No. C84-193-K (D. Wyo. May 23, 1985)).

90. 51 Fed. Reg. 3125 (1986).

91. *Whitney Benefits III*, 926 F.2d at 1173.

92. *Id.*

93. *Id.*

94. *Id.* at 1173-74.

95. *Whitney Benefits III*, 926 F.2d at 1173 n.6 (citing *Surface Mining Control & Reclamation Act of 1977: Hearings Before the Subcomm. on Energy & the Environment of the House Comm. on Interior & Insular Affairs*, 95th Cong., 1st Sess., Part II, 219-36 (1977)).

fect of the proposed grandfather clause[96] on the "Whitney Benefits mines on the Tongue River in Sheridan County in Northern Wyoming."[97] As originally proposed, the grandfather clause would have allowed operators, such as Whitney Benefits, who had made "substantial legal and financial commitments," but who had not received a permit, to be excluded from AVF mining preclusion.[98] Representative Roncalio was concerned that the protective umbrella of the proposed grandfather clause would extend over the Whitney Benefits reserves and urged that the provision be modified.[99] Subsequently, the grandfather clause was modified. The government attempted to minimize the effect of Representative Roncalio's remarks, but the Court of Appeals for the Federal Circuit was not convinced.[100]

SMCRA Deprived Whitney Benefits of All Economic Use

The government claimed that Whitney Benefits still retained valuable rights in the ability to farm the surface and to participate in SMCRA's coal exchange program.[101] However, the *Whitney Benefits III* court was not persuaded that valuable rights existed in either option. Noting that Whitney Benefits' takings claim concerned coal mining, the court believed that the government's reliance on the value of the surface estate was misplaced.[102] The court pointed out that Wyoming state law recognizes severable surface and mineral rights and thus, Whitney Benefits' claim could be based on the independent mineral property right.[103]

Moreover, the *Whitney Benefits III* court did not agree that the coal exchange program gave Whitney Benefits "something of significant value."[104] The court believed the comparison between the rights retained by the company in *Penn Central* and Whitney Benefits' rights in SMCRA's coal exchange program was inaccurate. The court stated "the government apparently failed to notice that in *Penn Central* the owners retained the railroad station and that in this case the

96. *See supra* note 13 and accompanying text (describing the grandfather clause).

97. *Whitney Benefits III*, 926 F.2d at 1173 (citing 123 CONG. REC. 12,638-39 (1977)).

98. *Id.*

99. *Id.* Representative Roncalio also recommended an amendment that would ensure the grandfather clause would *not* apply to Whitney Benefits' coal. *Id.* at 1174 (citing 123 CONG. REC. 12,638-39 (1977)). The court then stated that "[t]here never was any doubt that adoption of his amendment would insure that the AVF prohibition would apply full force to the Whitney coal property." *Id.* at 1174.

100. *Whitney Benefits III*, 926 F.2d at 1174.

101. *Id. See supra* note 14 and text accompanying notes 14-17 (describing the coal exchange program).

102. *Whitney Benefits III*, 926 F.2d at 1174.

103. *Id.* (citing Williams v. Watt, 668 P.2d 620, 624-25 (Wyo. 1983) (severable property rights are recognized in Wyoming) and Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984) (compensable takings may be found for mineral rights)).

104. *Whitney Benefits III*, 926 F.2d at 1175-76.

Claims Court found a total destruction of [Whitney] Benefits' coal property right."[105] Additionally, the *Whitney Benefits III* court interpreted the statutory language of the coal exchange program as allowing the government to acquire and exchange coal, not as giving the operator something of value.[106]

Congress' Motivation

Finally, the government argued that Congress enacted SMCRA's AVF mining preclusion with the intent of abating a nuisance,[107] and thus, no compensable taking could result.[108] The government relied primarily on the first prong of regulatory takings analysis: no taking can be found if the regulation substantially advances legitimate state interests.[109] To counter the government's "nuisance" position, the *Whitney Benefits III* court referred to the purpose of SMCRA and emphasized that abating a nuisance was not included.[110] Additionally, the court noted that SMCRA expressly provided for limited AVF mining and that an allowance would "hardly [be] the action of one out to abate a 'nuisance' or anything 'injurious to the health, morals, or safety of the community.' "[111]

Also, the federal circuit court pointed out that the two prongs were independent of one another.[112] The Claims Court used the second prong in its analysis to determine that the diminution of Whitney Benefits' property value was absolute.[113] The *Whitney Benefits III* court stated, "[t]hus Benefits is in the same position occupied by the citizens in [*Pennsylvania Coal*], who were denied all economically viable use of their coal, and in a fundamentally different position from that of the citizens in *Keystone*, who were not."[114]

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105. *Id.* at 1175. In *Penn Central*, the company could continue to use the station providing the restrictions were not violated. Also, the company possessed transferrable development rights which could be used to develop other, nonrestricted property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

106. *Whitney Benefits III*, 926 F.2d at 1176. The language of the coal exchange program reads: "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 [AVF restrictions] in exchange for Federal coal which is not so precluded." 30 U.S.C. § 1260(b)(5) (1988).

107. *Whitney Benefits III*, 926 F.2d at 1176-77.

108. *See supra* note 76 and accompanying text (referring to nuisance exception for takings claims).

109. *Whitney Benefits III*, 926 F.2d at 1176.

110. *Id.* at 1177.

111. *Id.* (quoting *Keystone Bituminous*, 480 U.S. at 489).

112. *Id.* at 1176. "[T]hese are 'entirely separate question[s].' " *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979)).

113. *Id.* at 1176-77.

114. *Id.* at 1176.

ANALYSIS

An initial review of the Whitney Benefits litigation suggests that the trilogy correctly followed the takings doctrine. Conversely, a more critical review indicates that the analysis was flawed, particularly in three aspects. First, the diminution of Whitney Benefits' property was not total. Whitney Benefits did retain "something" of value both in the coal exchange program and the use of the surface property. Second, the pecuniary award may not have been the proper remedy. The courts did not consider the value of the coal exchange program as a means of compensation. Moreover, the Claims Court went beyond its own precedent in calculating the pecuniary award. Rather than limiting the award to the original permit application, the compensation was based on the entire reserve. Third, pointed references to the government's actions suggest that other reasons may have influenced the courts' result-orientated decisions. Perhaps the courts sought to fashion an equitable remedy of sorts to compensate for the government's procrastination.

The Diminution of Whitney Benefits' Property Was Not Total

Because the Whitney Benefits trilogy of decisions did not adequately assess the value of the coal exchange program, the courts were able to find a total diminution of Whitney Benefits' property. The *Whitney Benefits I* court characterized SMCRA's coal exchange provision as analogous to the transferrable development rights (TDRs) of *Penn Central*.[115] In *Penn Central*, the property owners were precluded from full-scale development of the Grand Central Station but were able to develop other, nonrestricted property through the use of TDRs.[116] Because of the value of the terminal and the TDRs, the Supreme Court determined no taking had resulted.[117] In *Whitney Benefits III*, the court was unwilling to find that the coal exchange program represented "something of significant value." The court distinguished *Penn Central*[118] and added that "in *Penn Central* the owners retained the railroad station" while Whitney Benefits' coal property right was totally destroyed.[119] But the trilogy's perception of the coal exchange program was incorrect. The legislative history demonstrates that the coal exchange program is akin to the Grand Central Terminal itself, not merely transferable development rights.

115. *Whitney Benefits I*, 752 F.2d 1554, 1557-58 (Fed. Cir. 1985).

116. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). *See supra* text accompanying notes 58-63.

117. *See supra* note 61 and accompanying text.

118. *Whitney Benefits III*, 926 F.2d 1169, 1175 (Fed. Cir. 1991). As construed by the *Whitney Benefits III* court, the first decision of the trilogy distinguished *Penn Central* because New York City's "regulation [was] not meant to take an interest in land." *Id.* (quoting *Whitney Benefits I*, 752 F.2d at 1557).

119. *Whitney Benefits III*, 926 F.2d at 1175.

Indeed, the sole function of the coal exchange program was to give AVF-precluded operators something of value, the right to mine coal. Congress specifically adopted the program to compensate coal operators who had made legal and financial commitments toward mining of AVF reserves but who were not protected by the grandfather clause.[120] Discussions of the coal exchange program began when members of the House of Representatives spoke of the Secretary's willingness to "swap leases" and "[t]hus, [the coal operators' investment] damage, if any, would be minimized."[121] The discourse surrounding the program readily demonstrates Congress' intent to compensate ousted operators by replacing the AVF coal with other, valuable coal reserves.[122] The unwillingness of the *Whitney Benefits III* court to attribute value to the coal exchange program[123] is simply inconsistent with Congress' intent.

In *Whitney Benefits I*, dissenting Chief Judge Markey touched on Congress' intent in enacting the program,[124] but for whatever reason, the inquiry stopped there.[125] Interestingly, although both the *Whitney Benefits II* and *Whitney Benefits III* courts used selected portions of SMCRA's legislative history to emphasize that Congress

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120. As originally proposed, the grandfather clause would have allowed legally and financially committed operators to pursue AVF mining. *See supra* notes 13, 14 and accompanying text (describing the grandfather clause and enacted coal exchange program).

121. 123 CONG. REC. 12,862 (1977).

122. In fact, Montana's Representative Baucus declared, "[i]n no way is this amendment intended to exclude production permits." 123 CONG. REC. 12,862 (1977).

123. The federal circuit court pointed out that the government failed to provide evidence of the program's value. *Whitney Benefits III*, 926 F.2d at 1175. However, the court did not need to look far to find the evidence. On June 23, 1989, (prior to the Claims Court's decision) the Ash Creek Mining Company filed a suit in the Tenth Circuit challenging the Interior Department's decision to exchange the Ash Creek coal tract for the Whitney Benefits tract. Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 242 (10th Cir. 1991). The owners of the surface property had intended to bid on the lease. *Id.* at 241. The mere fact that a mining company would expend the time and effort to protect the opportunity to bid on a coal lease plainly supports the program's value.

124. *Whitney Benefits I* at 1564 (Markey, C.J., dissenting). The Chief Judge stated "[t]hat one denied the right to strip mine in a first location may choose to compel the Secretary to grant the right to mine at a second location, and that the Secretary shall receive in exchange the right to mine in the first location, does not constitute a land acquisition or a program designed to acquire mining rights." *Id.* (referring to 123 CONG. REC. 15,755 (1977)).

125. To determine Congress' intent, the Chief Judge of the United States Court of Appeals for the District of Columbia discussed the importance of using legislative history. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990). "[T]he nearly universal view among federal judges is that when we are called upon to interpret statutes, it is our primary responsibility, within constitutional limits, to subordinate our wishes to the will of Congress because the legislators' collective intention, however discerned, trumps the will of the court." *Id.* at 281. However, Justice Scalia promotes an opposing view. Often joined by Justice Kennedy, Justice Scalia believes the "textual interpretation" of statutes should prevail. The Justice believes judicial review should be limited to the "plain meaning" of words and if necessary, the general context of the statute should be reviewed, not legislative history. *Id.* at 281-86.

intended to preclude mining of AVF reserves,[126] neither court used the history to discern Congress' intent in establishing a coal exchange program. Instead, the *Whitney Benefits I* court looked to other federal court cases to interpret the statutory language. Specifically, the court pointed to *Drakes Bay Land Co. v. United States*[127] and *Skaw v. United States*[128] to determine the meaning of the word "acquire."[129]

The governing statutes of those two cases provided that the government would "acquire" land affected by the legislation. In both of those statutes, funds were intentionally appropriated to accomplish the acquisition. The *Whitney Benefits I* court reviewed this use of the word "acquire" and then labeled SMCRA's coal exchange program as "a method of ascertaining and *paying* just compensation for a taking . . . ."[130] But notably, Congress did not allocate any funding to *purchase* AVF-precluded fee coal.[131] Once again, the court's failure to review the legislative history skewed the analysis. The coal exchange program was intended to replace the AVF-precluded reserves,[132] not

126. *See supra* note 99 and text accompanying notes 95-99 (discussing the legislative history discourse of *Whitney Benefits III*). *See also Whitney Benefits II*, 18 Cl. Ct. 394, 406-07 (1989). In *Whitney Benefits III*, the court placed considerable emphasis on the fact that the Congress knew which coal reserves would be impacted by the AVF provision. *Whitney Benefits III*, 926 F.2d at 1173. This degree of emphasis is puzzling because the very purpose of congressional hearings is to assimilate and discuss information relating to proposed statutes. It is hardly surprising that Whitney Benefits' reserves were specifically mentioned. For a general discussion of the purpose of congressional hearings, *see* MORRIS L. COHEN ET AL., FINDING THE LAW 223 (1989).

127. 424 F.2d 574 (Cl. Ct. 1970).

128. 740 F.2d 932 (Fed. Cir. 1984).

129. *Whitney Benefits I*, 752 F.2d at 1559-60.

130. *Whitney Benefits I*, 752 F.2d at 1560 (emphasis supplied) (approved in *Whitney Benefits III*, 926 F.2d at 1175-76).

131. In fact, a review of the Congressional Record demonstrates that Congress was concerned about the cost of land acquisition *but not for the coal exchange program.* The Senate thoroughly debated the financial ramifications of surface owner consent relative to federally-owned coal. If Congress was discussing the potential purchase of surface properties and the effect of the AVF mining preclusion during the same time period, surely the "intent" to *purchase* AVF coal would have been at least mentioned. However, the record is devoid of this. *See generally* 123 CONG. REC. 15,561-66, 15,567-76, 15,731-38, 15,763-69, 23,971-76, 23,979-86 (Senate debates concerning privately-owned surface but federally-owned coal and surface owner consent); 123 CONG. REC. 15,603-05, 15,611-13, 15,692-93, 15,695-97, 15,699-700, 15,751-53, 15,762-63 (Senate debates regarding AVF mining preclusion and coal exchange program); 123 CONG. REC. 12,638-39, 12,861-68, 24,420 (House of Representatives debate concerning AVF mining preclusion and coal exchange program).

132. The constitutional impact of the AVF mining preclusion on leaseholders was addressed in the Senate on May 20, 1977. During a colloquy concerning the "legal and financial commitment" exclusion from the grandfather clause, Senators Burdick, Hart, and Metcalf specifically discussed the constitutionality of the AVF prohibition. Senator Metcalf believed the AVF mining prohibition was well within the constitutional bounds of zoning restrictions and the exercise of police power. However, Senator Burdick was not convinced that, without more, the prohibition was constitutional. Senator Hart then discussed the coal exchange program to which Senator Burdick stated "[i]f this could be exchanged for land of equal value, I think the constitutional test might be met." 123 CONG. REC. 15,696 (1977). *See generally* 123 CONG. REC. 15,691-92, 15,695-96 (1977).

to determine pecuniary compensation.

Thus, the finding that the value of Whitney Benefits' property was totally destroyed was erroneous. A review of the legislative history demonstrates that Congress' true intent in enacting the program was to replace fully the AVF-precluded coal. Because Whitney Benefits retained the ability to mine coal, albeit a different reserve, Whitney Benefits' "Grand Central Station" was never taken. Additionally, the plaintiffs still held "TDRs," the AVF overlying the coal reserves. But because the Whitney Benefits trilogy overlooked the legislative history and facts, the courts failed to address the value of the AVF. The evaluation of the AVF may have been further flawed because the value of the surface property was severed from that of the mineral estate, despite the fact that Whitney Benefits, Inc. and the coal operator, PKS, joint plaintiffs in the action, together owned nearly the entire fee estate.[133]

Congress expressly acknowledged the essential value of AVFs to farming and ranching in the arid West[134] when it enacted the AVF mining preclusion.[135] The *Whitney Benefits III* court noted that the AVF overlying the Whitney Benefits reserves had been studied by Congress[136] and that the Whitney Benefits AVF had been used for farming and ranching.[137] Yet, the federal circuit court spurned the government's argument that the plaintiffs' property retained some value after SMCRA's enactment because the AVF could be farmed. The *Whitney Benefits III* court stated the purchase of the surface was only to facilitate mining, and because the takings claim concerned the rights to mine, the surface value was limited to the investment-backed expectations of the plaintiffs.[138]

To limit its takings evaluation to the mineral property, the *Whitney Benefits III* court referred to Wyoming state law which recognizes separate mineral and surface ownership.[139] However, in the Whitney Benefits litigation, the ownership of the surface and mineral

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133. PKS owned nearly half of the surface property overlying the Whitney Benefits, Inc. reserves. *Whitney Benefits III*, 926 F.2d at 1174.

134. Congress specifically mentioned the valuable AVFs of the Yellowstone Valley, Tongue River Valley, Powder River Valley, and Rosebud Creek Valley and the commensurate need to protect them. As stated by Montana's Representative Senator Melcher, "those thin ribbons of irrigated land, surface or subirrigated, are extremely important to the miles upon miles and millions upon millions of acres of western land that flow out from either side of those narrow stream beds." 123 CONG. REC. 15,697 (1977).

135. *See supra* note 12 and accompanying text (referring to SMCRA's AVF protection provision).

136. *Whitney Benefits III*, 926 F.2d at 1173 and n.6.

137. *Id.* at 1173. "The AVF overlying most of the Whitney coal was described as plain to the eye, and farming and ranching had long operated on the surface above the Whitney coal." *Id.*

138. *Id.* at 1174.

139. *Id.* (citing Williams v. Watt, 668 P.2d 620, 624-25 (Wyo. 1983)). In *Williams*, the dispute concerned solely the conveyance of mineral rights which were subject to a reservation in the grantor. *Williams*, 668 P.2d. at 622.

rights was not totally severed. By the time of trial, PKS owned nearly half of the land overlying the coal reserves.[140] The dual ownership was needed because in strip-mining procedures, the use of the surface property is intrinsically tied to excavation of coal. In light of this dual ownership, the court's analysis of the surface value would have been more thorough if the court would have looked to other factually similar cases. Other state courts have evaluated a takings claim where the plaintiff owned both properties.

For example, in *Brecciaroli v. Connecticut Commission of Environmental Protection*,[141] the plaintiffs were denied a permit to fill a wetland.[142] The court found that other uses for the land existed and thus no taking had resulted.[143] Similarly, in *Consolidated Rock Products Co. v. City of Los Angeles*,[144] a zoning ordinance prohibited the proposed and continued mining of sand and gravel.[145] The court noted that the plaintiff could use the property for other uses, although those uses were not as lucrative as mining.[146] In spite of the diminution of value, the court did not find a taking.[147] If the Whitney Benefits courts had addressed fully the value of the AVF and the dual ownership, the courts would have acknowledged that Whitney Benefits' economic diminution was not total.[148]

But in their fervor to find a compensable taking, the trilogy failed to address adequately the other items of value that Whitney Benefits retained: the right to mine coal and the ability to make other uses of the surface property. That intent to find a taking also influenced the courts' remedy in other regards.

Whitney Benefits' Pecuniary Award May Not Have Been the Proper Remedy

Because the Whitney Benefits trilogy misinterpreted the function of the coal exchange program, the courts limited the remedy to pecuniary compensation. In *Whitney Benefits I*, the court referred to the *Regional Rail Reorganization Act Cases*[149] and noted that situations may exist where the sovereign power "can manage the property of cit-

140. *Whitney Benefits III*, 926 F.2d at 1174.
141. 362 A.2d 948 (1975).
142. *Id.* at 949-50.
143. *Id.* at 952-53.
144. 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).
145. *Id.* at 344.
146. *Id.* at 351.
147. The Supreme Court of California affirmed the lower court's decision that the zoning regulation was not unconstitutional as applied to the plaintiffs. *Id.* at 344, 354.
148. The Supreme Court has refused to find a taking in cases where the diminution of value was nearly total. *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915); Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926); Goldblatt v. Town of Hempsted, 369 U.S. 590 (1962).
149. *Whitney Benefits I*, 752 F.2d at 1557 (citing Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)).

izens, transforming it by sale or exchange from one kind of property to another, without necessarily effecting a taking, at least as long as it is not acting in entire disregard of the owner's interest."[150] In the *Regional Rail Cases*, the Supreme Court noted that the judiciary is responsible for ensuring constitutional compliance with the amount of compensation but that Congress can dictate the mode.[151]

Nonwithstanding the lack of analyses by the Whitney Benefits' decisions, the coal exchange program was plainly intended as the mode of compensation. Instead of recognizing this fact, the courts, having found a taking, blazed forward with a pecuniary compensation. Perhaps this determination is the basis for the Claims Court's decision to award Whitney Benefits compensation for the entire reserve, rather than limiting the amount to the permit application.

Although the Claims Court conducted a thorough review of the Boyd Plan[152] and other measures of compensation, the fact remains that the calculation contains assumptions and predictions.[153] Perhaps the most uncertain assumption is that a willing buyer would have paid for the entire reserves. As reflected by the record, the Whitney Benefits, Inc. reserves were leased, not purchased, and the payment plan concerned "advance and operating royalties."[154] It stands to reason that the compensation should have been made on similar incremental bases. In this manner, adjustments could be made for true market conditions and the possibility that the AVF could be mined in the future. The award would more accurately reflect Whitney Benefits' claim that the enactment of SMCRA precluded the company from mining.

Additionally, providing incremental awards would have been consistent with the Claims Court's own precedent. In *Florida Rock Industries, Inc. v. United States*,[155] the Claims Court found a taking but

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150. *Id.* The court minimized this point because "[t]he government makes no contention that it is entitled to take over and manage the property of [Whitney Benefits] . . . on the above grounds, or any others of the same nature." *Id.* Apparently, because the government did not present the analogy, the court was unwilling to discuss it: "[t]herefore, cases such as [Regional Rail Reorganization Act Cases] . . . have no bearing on the right of the government to impose a substitution here." *Id.* at 1557-58.

151. *Regional Rail Reorganization Cases*, 419 U.S. at 151 n.39. The Supreme Court stated that the clear implication of its decisions was that pecuniary compensation was not the only method of payment for Fifth Amendment claims. *Id.* at 151.

152. *See supra* note 37.

153. In *Whitney Benefits II*, the Claims Court discussed the economic impact on the basis of potential contracts. *Whitney Benefits II*, 18 Cl. Ct. at 400-02. In its valuation section, the court necessarily relied on the potential contracts to ascertain the value of the reserves. *Id.* at 407-16.

154. *Id.* at 397.

155. 791 F.2d 893 (Fed. Cir. 1986), *cert. denied* 4779 U.S. 1053 (1987). In *Florida Rock*, the plaintiffs bought a tract of land to mine limestone. Later promulgation of wetlands protection measures prohibited Florida Rock from mining. The Claims Court determined a regulatory taking had resulted but restricted the compensation to the three year permit term. The plaintiffs recovered for 98 acres of the total 1,560 acres proposed for mining. *Id.*

limited the award to the scope of mining sought in the plaintiff's permit. Concerning Whitney Benefits, the first mining permit application involved only part of the reserves.[156] The entire reserves were not considered until Whitney Benefits entered the coal exchange program. Apparently, the Claims Court used the full-replacement intent of the coal exchange program to measure compensation.[157]

The varied and inconsistent treatment of the coal exchange program suggests that the courts were willing to circumvent the facts to provide a pecuniary compensation to Whitney Benefits. Perhaps the government's varied and inconsistent treatment of Whitney Benefits influenced the courts' decisions as well.

Other Possible Reasons for the Result-Orientated Decision

The *Whitney Benefits III* court capsulated the trilogy's attitude that the government mishandled Whitney Benefits' coal exchange pursuit. The federal circuit court declared that the government has "carried its attempt to deny the impact of SMCRA on Whitney coal to unreasonable lengths in an apparent hope of postponing the day of reckoning into eternity. In this case, it has taken that tactic too far."[158] A review of the facts readily demonstrates the problems that plagued Whitney Benefits' coal exchange.[159] But however egregious the governmental agency's actions may have been, that should not provide the Claims Court and the Court of Appeals for the Federal Circuit with the license to circumvent the takings doctrine.

Because the Claims Court has exclusive jurisdiction of Fifth Amendment governmental takings claims,[160] the Claims Court and the Court of Appeals for the Federal Circuit[161] are in a unique position to further shape the takings doctrine. As noted by one commentator, the exclusive jurisdiction "[i]nsures that the Claims Court will have the last word on the factually intensive inquiry into whether the government's regulatory action gives rise to a just compensation claim."[162] In

156. The 1976 permit application to the Wyoming DEQ proposed to mine only the East Whitney area. *Whitney Benefits II*, 18 Cl. Ct. at 397.

157. *See generally Whitney Benefits II*, 18 Cl. Ct. at 407-16 (valuation section).

158. *Whitney Benefits III*, 926 F.2d at 1173.

159. The trial transcript and other information from the district court provide a broad, and not very flattering, view into the government's handling of the coal exchange attempt. *See supra* notes 18, 22 (noting the government's delay of beginning the exchange program). Not only was Whitney Benefits' entrance into the program delayed, but the BLM was unwilling to ascribe value to the coal at the time of SMCRA's passage. Instead, the BLM assigned a lesser value that correlated with the district court's 1985 demand of compliance. Whitney Benefits, Inc. v. Hodel, No. C84-193-K, slip op. at 3-4 (D. Wyo. Dec. 3, 1985) (Order Ruling on Motion to Compel Compliance). The district court was not swayed by the Secretary's timing interpretation of the coal exchange program. *Id.* at 7-8.

160. Tucker Act, 28 U.S.C. § 1491(a)(1) (1988).

161. The Court of Appeals for the Federal Circuit retains exclusive jurisdiction of appeals from the Claims Court. 28 U.S.C. § 1295(a)(3) (1988).

162. Roger J. Marzulla & Nancie G. Marzulla, *United States Claims Court Sym-*

fact, it is often the Court of Appeals for the Federal Circuit which has the "last laugh" since the Supreme Court has consistently denied petitions for writ of certiorari from that court.[163] Given their power, it is critical that both the Claims Court and the Court of Appeals for the Federal Circuit adhere staunchly to the established takings doctrine.[164] However, the Whitney Benefits trilogy was reluctant to do so. The trilogy ignored the economic elements of *Penn Central* and instead, fashioned an equitable remedy to compensate for the government's procrastination.[165]

CONCLUSION

No one would disagree that $140 million is a substantial amount of money, and for that reason, *Whitney Benefits III* may be called a landmark decision. However, *Whitney Benefits III* is a *landmine* decision for the takings doctrine. The Whitney Benefits trilogy blazed new territory for Claims Court decisions by sidestepping the economic factor test of *Penn Central*. The latter two members of the trilogy did not recognize the "things of value" that Whitney Benefits did retain: the right to mine coal and the ability to use the surface property. Furthermore, the courts ignored Congress' intent in enacting the coal exchange program and instead, fashioned their own pecuniary compensation remedy. To add another layer of inconsistency, the *Whitney Benefits II* court expanded its own limits of compensation.

Perhaps the Whitney Benefits trilogy decided to analyze the takings claims on its own terms to convey a warning signal for regulatory programs as a whole. The message seems to be that if governmental agency (in)actions appear to treat property owners inequitably, the

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posium: Article: Regulatory Takings in the United States Claims Court: Adjusting the Burdens that in Fairness and Equity Ought to be Borne by Society as a Whole, 40 CATH. U. L. REV. 549, 549 (1991).

163. Marzulla & Marzulla, *supra* note 162 at 549-50 and n.5.

164. This does not always appear to be the case. In its appeal to the *Whitney Benefits III* court, the government used the holdings of earlier Supreme Court cases to emphasize the exercise of police power. The court cavalierly dismissed a discussion of the government's argument in a footnote: "The government's true complaint is that the Claims Court relied on modern Supreme Court cases . . . Amicus' brief presents a thorough review of the metamorphosis of takings jurisprudence . . . ." *Whitney Benefits III*, 926 F.2d at 1177 n.10. If the court was confident that the government's citations to *Mugler* and *Miller* were wrong, the court should have discussed this; the deference to the amicus brief does little for the court's takings analysis.

165. Also, the Claims Court may have been influenced by Executive Order 12,630, Government Actions and Interference with Constitutionally Protected Property Rights, which was issued prior to the decisions of both the Claims Court and the second federal circuit court. Exec. Order No. 12,630, *reprinted in* 5 U.S.C. § 601 (1988). The Executive Order notes specifically that "undue delays in decision making . . . carry a risk of being held to be takings." *Id.* § 3(d). The Order further discusses the permitting process and the need to avoid delays. *Id.* § 4(c). For general discussions of the Executive Order, see Marzulla & Marzulla, *supra* note 162, at 566-69; Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation-Collision or Cooperation?*, 18 ENVT'L. L. REP. 10,254 (1988).

court will maneuver the takings doctrine and selectively use congressional intent to find a taking. In the Whitney Benefits litigation, the question was not "to take or not to take" but rather "how *much* will it take" for the agencies to listen.

Postscript

The parties of the Whitney Benefits litigation obviously agree that the Whitney Benefits award is a substantial amount of money. Promptly after the United States Supreme Court denied certiorari of the case, PKS filed a motion in the Claims Court to request apportionment of the award.[166] In April 1992, the plaintiffs settled their dispute, and agreed that Whitney Benefits, Inc. would receive 32.5 percent and PKS would acquire 67.5 percent.[167] However, the plaintiffs will not receive their respective proportions in the very near future. In March 1992, the federal government filed a motion for a new trial in the Claims Court, seeking a reevaluation of the $60.3 million takings award.[168] On April 7, 1992, the Claims Court directed the plaintiffs to respond to the government's motion for a new trial.[169]

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166. Whitney Benefits, Inc. v. United States, No. 499-83L, 1992 U.S. Cl. Ct. Lexis 41, at #1 (Cl. Ct. Feb. 18, 1992).

167. *Whitney, Kiewit divvy up judgment*, CASPER STAR-TRIB. (Wyo.), Apr. 7, 1992, at B1. The final award may exceed $200 million, depending on the interest calculation. *Id.*

168. *Government wants judgment reviewed*, CASPER STAR-TRIB. (Wyo.), Mar. 29, 1992, at B1. The Claims Court awarded $60,296,000 for the mineral reserves. *See supra* text accompanying note 37.

169. Whitney Benefits, Inc. v. United States, No. 83-499L (Cl. Ct. Apr. 7, 1992) (order requiring responses to defendant's motion for new trial on valuation).