

All That's Gold May Not Glitter

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I.

INTRODUCTION

I own some common stock in a mining company called Canyon Resources, which owns (*inter alia*) a lease on a mine in Montana which contains 9.9 million ounces of gold and 30 million ounces of silver in mineralized rock. The mine¹ development project was in the process of obtaining the required permits in November 1998 when the voters of the State of Montana passed an initiative which prohibited any use of cyanide in a new or expanded mine operation. The practical effect of this prohibition is to make it economically unfeasible to extract the gold and silver from this mine.

II.

THE CYANIDE MINING PROCESS

One of the mining methods used in the United States involves taking low-grade metal ore, “crush[ing it,] and plac[ing it] in a pile on a leach pad.”² The metallic minerals are then extracted “by sprinkling a leaching agent such as cyanide on top of the heap pile. As the leaching agent is drawn through the heap pile, it binds with the metallic ore and is ‘recovered through a system of collection channels beneath the heap.’”³ When this “solution is recovered, the metallic mineral is extracted from the solution and the leaching agent is recycled for re-use.”⁴ If there is “any

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1. With an average production of 400,000 ounces of gold per year over a 12 to 14 year mine life.

2. Matt A. Crapo, *Regulating Hardrock Mining: To What Extent Can the State Regulate Mining on Federal Lands?*, 19 J. LAND, RESOURCES, & ENV'T'L L. 249, 249 (1999).

3. *Id.*

4. *Id.*

loss or discharge of the leaching agent from the system [, it] will not only cause environmental damage but [will] also [cause] economic loss for the mining operation."⁵

This process has been widely used in mines, including several in Montana,⁶ for one hundred years or more. During the ten years prior to the 1998 initiative, Canyon Resources invested \$70 million in preparing to operate the mine, with the expectation of extracting gold and silver worth up to \$600 million.⁷

III.

INITIATIVE 137

On November 3, 1998, the anti-cyanide mining initiative (I-137) was passed by a 52-48% vote of the Montana electorate.⁸ I-137 bars the use of cyanide leaching technology at new open-pit mines. Existing cyanide operations, including any expansions, are allowed to continue.⁹ So far as I can determine, this is the first statewide ban on cyanide process mining in the United States.

Not surprisingly, at least two suits have been filed by other interested parties contesting the validity of I-137, and Canyon Resources is also considering litigation, though it first pursued possible avenues in the political process.¹⁰ The mining commu-

5. *Id.*

6. Among the Montana mines were Golden Sunshine, Zortman, Landusky, Kendall, Beal Mountain and Basin Creek. Erin P. Billings, *Miners, Activists Square Off on Cyanide Ballot Measure*, BILLINGS GAZETTE, Sept. 27, 1998, at 1A.

7. Erin P. Billings, *Operators of Proposed Gold Mine Shut Down Office, Lay Off Workers*, MISSOULIAN, June 6, 1999, at B1; Erin P. Billings, *Canyon Threatens to Sue State*, MISSOULIAN, Feb. 9, 1999 at A1.

8. Letter from Richard H. DeVoto, President, Canyon Resources Corporation, to its shareholders (Nov. 23, 1998) (on file with author).

9. I-137 provides that open-pit mining for gold or silver using heap leaching or vat leaching with cyanide ore processing reagents is prohibited, except that such a mine operating on November 3, 1998 may continue operating under its existing operating permit, including any amendments to the permit that allow its operations to be expanded.

10. *Canyon Resources Obtains \$35 Million Financing for McDonald Prospect from Franco-Nevada and Restructures Phelps Dodge Purchase Agreement*, PR NEWSWIRE, Sept. 29, 1999, at A1. Canyon Resources met with members of the state legislature to attempt to convince them that implementation of I-137 would be detrimental to the best interests of the state and its citizens, and therefore I-137 should be repealed or at least mines in the permit application stage should be grandfathered. Canyon Resources pointed out that the operation of this mine would generate an estimated \$70 Million in royalties to Montana Tech and the state school trust, \$225 million in local wages, \$550 million in purchases of goods and services, and more than \$100 million in county, state and federal taxes. These arguments

nity feels strongly that the effect of I-137 constitutes a taking of private property for public use without just compensation,¹¹ in violation of the Fifth and Fourteenth Amendments.¹²

As the Supreme Court stated in the early case of *Pennsylvania Coal Company v. Mahon*,¹³ “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁴ “Some values incident to property” are subject to “an implied limitation and must yield to the police power [, but that] implied limitation must have its limits”¹⁵ When the diminution of values in property “reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation”¹⁶

IV.

THE GRANDFATHER¹⁷ CLAUSE IN I-137

I-137 provides that any mine using heap leaching or vat leaching with cyanide ore processing reagents which was operating on November 3, 1998 could continue operating under its existing operating permit, presumably until the mine was exhausted. For Canyon Resources this would have been an expected 12-14 years. Any mines already operating on that crucial date might continue their operations for much longer. Opponents of I-137 argued that cyanide had been used safely in mining in Montana and elsewhere for over one hundred years, with no harm to people, and little if any evidence of injury to flora or fauna. Strong support for this position is the fact that the proponents of I-137 included the grandfather clause. If there was any serious danger of harm to people, animals, or the environment, surely the correct action would be to stop the harmful activity immediately. Wise social policy doesn't say: “It's not a good idea for children under 18 to

failed to persuade the legislature to act. Telephone Conversation with Richard H. DeVoto, President, Canyon Resources Corporation (Dec. 21, 1999).

11. Letter from Richard H. DeVoto, *supra* note 8.

12. U.S. CONST. amends. V, XIV.

13. 260 U.S. 393 (1922).

14. *Id.* at 415

15. *Id.* at 413

16. Much like the present situation in Montana, a Pennsylvania statute had made it commercially impracticable to mine certain coal deposits. The Court said that as a practical matter, “the right to coal consists in the right to mine it’ [and] what makes the right to mine coal valuable is that it can be exercised with profit.” *Id.* at 414. Thus, the Pennsylvania statute had “the same effect for constitutional purposes as appropriating or destroying it.” *Id.*

17. To be “politically correct,” should one now say “grandparent?!”

work in coal mines, but any children who are now working in coal mines may continue to work as long as they wish." If the danger is real and serious, the only proper answer is to stop it now. Thus, it seems clearly ingenuous for supporters of I-137 to argue that there is great danger from cyanide while at the same time allowing its use to continue far into the future.¹⁸

Ray Lazuk, Superintendent of Environmental and Public Affairs for the Golden Sunlight Mine, the only large-scale cyanide process mine which would have the grandfather privilege to continue, pointed out that "[c]yanide is no different than other industrial chemicals that are out there right now in Montana. Hundreds, maybe thousands, of nonmining operations use industrial chemicals."¹⁹ In using cyanide or any other industrial chemical, "there are guidelines and operating practices that all businesses must follow to assure they don't have a release of these things."²⁰ Few would question the need for strong regulations governing the use of cyanide in mining, to "protect the water, air, fish, wildlife, people – the entire environment."²¹ Many such "laws are already on the books."²² And in addition to the incentive provided by strong regulations to avoid any release of cyanide, the mining companies also have a strong self-interest to do so. The leaching agent is re-cycled for re-use, so "any loss or discharge of the leaching agent from the system . . . [will cause] economic loss for the mining operation."²³

V.

CONSTITUTIONAL ISSUES

A. *The Fifth and Fourteenth Amendments*

The Fifth Amendment provides that "private property [shall not] be taken for public use . . . without just compensation."²⁴

18. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 (1987). ("Congress expressly permitted, in the grandfather clause [of the Surface Mining Control and Reclamation Act], . . . continued mining beneath [alluvial valley floors] of all the grandfathered mines, . . . hardly the action of one out to abate a 'nuisance' or anything 'injurious to the health, morals, or safety of the community.'")

19. Billings, *supra*, note 6.

20. *Id.*

21. *Id.*

22. *Id.*; see also Letter from Richard H. DeVoto, *supra* note 8.

23. Crapo, *supra* note 2, at 249.

24. U.S. CONST. amend. V. As to the Constitutional issues involved, there would seem to be no difference between the position of one who has outright ownership of the mine and one who will operate the mine as a lessee of the owner.

This prohibition has been held to apply to the states through the Fourteenth Amendment.²⁵ The Constitution does not, however, define what constitutes a “taking” which will require compensation for the injured property owner.

Property rights, particularly rights in land, have always been fundamental and basic in the preservation of liberty and personal freedom in the United States.²⁶ At the time when the Fifth Amendment was adopted, the United States was largely an agrarian society, and concepts of property ownership were fairly simple and straightforward. A person owned a tract of land, which meant that he²⁷ could exclude other people from that land, and that he could use his land in pretty much any way he wished. In those early days, when environmental and zoning regulations had probably not yet been even imagined, a governmental body “took” property only when it occupied the property and excluded the owner therefrom. Not until the 1920s, in cases involving zoning,²⁸ did the United States Supreme Court first consider the question of the “taking” of property by the effect of government regulations. By the 1970s, as land development and the accompanying zoning restrictions and requirements grew rapidly, and as environmental protection became an important priority at all levels of government, issues related to regulatory “taking” became more controversial and difficult to resolve.

Few would dispute the basic principle of fairness underlying the Fifth Amendment requirement, which was well stated by Justice Black in *Armstrong v. United States*:²⁹ “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³⁰

25. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

26. *See generally*, Carol M. Rose, *Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

27. When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward “he or she” and the grammatically incorrect “they.” I trust that female authors will balance the scales on the other side.

28. *See, e.g.*, *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

29. 364 U.S. 40 (1960).

30. *Id.* at 49.

This concept of fairness was further developed by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*:³¹

When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large. Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, it is axiomatic that the public receives a benefit while the offending regulation is in effect.³²

B. *What Constitutes a "Taking"?*

"The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty [The Supreme Court] has been unable to develop any 'set formula' for determining when" compensation is required.³³ This is especially true where the alleged "taking" is not total and complete, as it would be in a traditional eminent domain proceeding or a physical invasion and takeover. Disputes arise in the case of governmental regulations which substantially interfere with the use of property, but may not render the property totally useless for any purpose and totally without value.

The rule finally developed was first applied by the Court in *Lucas v. South Carolina Coastal Council*:³⁴ if a regulation removes all productive and economically beneficial use from a parcel of land it is a "taking" requiring compensation under the Fifth Amendment.³⁵ This does not mean that the land must be made totally valueless and useless.³⁶ But it does mean that when a government regulates under its police power in order to confer

31. 450 U.S. 621 (1981).

32. *Id.* at 656-57 (Brennan, J., dissenting).

33. *Pa. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (citations omitted).

34. 505 U.S. 1003 (1992).

35. *Id.* at 1016-19; *see also* *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991) (holding that the regulation deprived the landowner of "all economically viable use" of its property and destroyed its value); *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1559 (1985) (noting that a taking occurs "when economic development [is] effectually prevented").

36. Zoning regulations which restricted the use of owner's tidal marshland to wooden walkways, wharves, duck blinds, public boat landings and public ditches were unreasonable and confiscatory, and amounted to a taking of property for public use. *Bartlett v. Zoning Comm'n*, 282 A.2d 907, 910 (Conn. 1971).

a benefit on the public, the public should pay for it rather than the landowner upon whom the burden would otherwise fall.³⁷

From a landowner's point of view, the deprivation of all beneficial use of his property is the equivalent of a physical appropriation.³⁸ A government cannot, "under the guise of regulation . . . [,] take from a property owner the core value of the property, leaving the owner with only a hollow deed."³⁹ There must be, however, "more than a mere diminution in value, because [g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."⁴⁰

C. *Exercise of Police Power to Control Nuisances*

As the Supreme Court pointed out in *Lucas v. South Carolina Coastal Council*,⁴¹ a landowner does not have a property right entitling him to commit or create nuisances, because "the proscribed use interests were not part of his title to begin with."⁴² In this sense, a regulatory measure which restricts or prohibits nuisances does not take property. But the *Lucas* Court made clear that this exception to the general rules of "taking" applied only to activities which constituted nuisances at common law. As to common law nuisances, a government may regulate without any regard for diminution in the value of the land, even down to nothing.⁴³ But regulations aimed at uses that are not common law nuisances are governed by the diminution-in-value test for "taking."

37. 505 U.S. at 1024.

38. *Bowles v. United States*, 31 Fed. Cl. 37, 44 (1994).

39. *Id.* at 45.

40. *Fla. Rock Indus. Inc. v. United States*, 21 Cl. Ct. 161, 175 (1990) (citation omitted). There is a "gray area" as to when the effect of a regulation passes the line from being a "mere diminution of value" and becomes a "removal of all economically beneficial use." In *Dooley v. Town Planning & Zoning Commission of Town of Fairfield*, 197 A.2d 770 (Conn. 1964), the court found that a depreciation in value of 75% or more was sufficient. A zoning classification restricted use of the property to parks, playgrounds, marinas, boat houses, landings and docks (the land was half a mile from the nearest body of water), clubhouses, wildlife sanctuaries, etc. *Id.* at 772-73.

41. 505 U.S. 1003 (1992).

42. *Id.* at 1027.

43. *Id.* at 1029-31.

D. *Is Compensation Required?*

On its face, the Fifth Amendment would seem to clearly require that, if there is a "taking," compensation must be paid to the injured landowner. The obvious and generally recognized purpose of the "takings clause" is to assure that one owner of property does not have to shoulder the entire burden for the benefit of the public generally.⁴⁴ The issue is not whether a government can lawfully exercise its police power to preserve and protect the public interest. It can, of course. But when that regulation results in the destruction (or nearly so) of the economic value of land, it is only fair that the cost "be shared by the community at large," rather than having it "fall solely upon the affected property owner."⁴⁵

As early as the *Penn Central* case in 1978 the Supreme Court recognized that an important factor to be considered in "takings" cases was "the extent to which the regulation has interfered with distinct investment-backed expectations."⁴⁶ Of course, such expectations will be considered only if they are reasonable. Investment-backed expectations of landowners can only reasonably arise at the time the land is purchased, based on information known to them at that time.⁴⁷ If one enters a property market knowing that a regulatory program exists, or may be adopted later, his reasonable expectation as to the future value of his property will take this into account, and any subsequent diminution in the value of his land will not be deemed to be an unfair "taking."⁴⁸

Canyon Resources' invested \$70 million over ten years in its McDonald Mine in Montana, with the expectation of revenues of up to \$600 million. It had no reason to expect that, after one hundred years or more of the use of cyanide in mining, the process would suddenly be prohibited.⁴⁹ This expectation was reinforced by the fact that the land is actually owned by the State of

44. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.")

45. *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1175 (Fed. Cir. 1994).

46. *Pa. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (citation omitted).

47. Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 *URB. LAW.*, 215, 235-36 (1995).

48. *Id.* at 434.

49. *Billings*, *supra* note 7.

Montana and leased to Canyon Resources.⁵⁰ In making this large investment, Canyon Resources relied on its "knowledge that the lowcost and environmentally secure cyanide heap-leach technology was appropriate for use in Montana, having been used by many other gold-mining operations in the State and elsewhere in the United States for over one hundred years."⁵¹ Indeed, Canyon Resources currently produces gold and silver at a mine in California using the same technology and process planned for its mine in Montana.

Canyon Resources' position is very much the same as that of a limestone mine owner in *Florida Rock Industries, Inc. v. United States*.⁵² In that case, the landowner, some years after purchasing the property, applied to the Corps of Engineers for a permit to begin mining operations. The Corps, applying the provisions of an amendment to the Clean Air Act which had been enacted the year before the landowner's permit application, denied the permit.⁵³ The court concluded that, since it was undisputed that the property was purchased "for the sole purpose of limestone mining [, and] there [was] virtually no other business by which [to] 'recoup its investment or better, subject to the regulation [,] . . . the denial of . . . [the] permit application effected a taking of . . . [the] property."⁵⁴

Such is the unfortunate position of Canyon Resources. It owns a lease on a potentially very profitable gold and silver mine in Montana, but it is effectively prohibited from extracting the metal. Its once valuable interest in land has been rendered void of any economically beneficial use.

VI. CONCLUSION

Proper application of the Fifth Amendment should

50. Telephone conversation with Richard DeVoto, President of Canyon Resources Corporation (Dec. 21, 1999).

51. *Canyon Resources Considers Filing a "Takings" Lawsuit Against State of Montana*, PR NEWswire, Feb. 8, 1999. (Indeed, Canyon Resources did file a lawsuit against the State of Montana on Apr. 11, 2000, alleging violations of its rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, and similar rights under the Montana Constitution. See: *Canyon Resources Files Lawsuit in Montana to Overturn Anti-Mining Initiative Or Obtain Takings Damage Award*, PR NEWswire, Apr. 11, 2000.)

52. 21 Cl. Ct. 161 (1990).

53. *Id.* at 164.

54. *Id.* at 176.

prevent [] the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.⁵⁵

This principle is well exemplified by (then) Justice Rehnquist's dissent in *Penn Central Transportation Co. v. New York City*:⁵⁶

The benefits that [the city] believe[s] will flow from preservation of the Grand Central Terminal [as a landmark] will accrue to all the citizens of New York City If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year – a minor cost [the city] would surely concede for the benefit accrued. Instead, however, [the city] would impose the entire cost . . . on Penn Central [, which] . . . is precisely . . . [what] the Fifth Amendment prohibits.⁵⁷

Too often, those who seek to regulate for the benefit of the public generally “expect someone else to pay an inordinate part of the price [of the expected public benefit] rather than spreading the cost over the entire benefited populace.”⁵⁸ And to strengthen their position, these regulators frequently try “to paint protesting property owners as malcontents who are concerned only with their own economic interests, who would sacrifice the health and safety of everyone to protect these interests.”⁵⁹

Few, if any, would question the power of the state to control “all the earth and air within its domain. [The state] has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”⁶⁰ Yet, while this final power always remains in the state, the *quid pro quo* is that the state should compensate injured individuals when it utters that “last word.”⁶¹ Compensation should be due whenever a regulation places an “inordinate burden” on a landowner's use of his property. A property owner is “inordinately burdened” if he is “permanently unable to attain . . . [a] reasonable, investment-

55. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

56. 438 U.S. 104 (1978).

57. *Id.* at 148-49 (Rehnquist, J., dissenting).

58. Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches – A Response to “Taking Stock of the Takings Debate”*, 38 SANTA CLARA L. REV. 837 (1998).

59. *Id.*

60. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

61. *Id.*

backed expectation,”⁶² leaving the property owner with only such unreasonable or unprofitable uses that he will “bear [] permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.”⁶³

It may well be that the prohibition of the use of cyanide in mining will prove beneficial to the people of the State of Montana. Since all of the people of the state will receive this expected benefit, all of the people of the state should share in paying for it. The burden should not fall solely on Canyon Resources and perhaps a few other mine owners. The mere ownership of a lease on the McDonald Mine tract of land, as such, has virtually no economic value. The value lies in the right to extract gold and silver therefrom profitably. As a practical matter, when it is made economically impossible to extract these metals profitably, the effect is the same, for Constitutional purposes, as would be appropriating or destroying it.⁶⁴ That is just what I-137 has done.

62. Prop. Rights Prot. Act, FLA. STAT. ANN. §70.001(3)(e) (West 1996).

63. *Id.*

64. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

