IN THE SUPREME COURT OF OHIO
STATE OF OHIO ex rel.,
R.T.G., INC., et al.,
Appellees-Cross Appellants,
v.
STATE OF OHIO, et al.,
Appellants-Cross Appellees.

Case No. 01-748

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District
Court of Appeals
Case No. 98AP-1015

MERIT BRIEF OF AMICUS CURIAE THE OHIO ENVIRONMENTAL COUNCIL, IN SUPPORT OF THE STATE OF OHIO

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Environmental Council respectfully submits this brief *amicus curiae* in support of the State of Ohio. Amicus OEC, Ohio's leading environmental organization, is dedicated to informing, uniting, and empowering all Ohio citizens to protect the environment and conserve natural resources.OEC has over 13,000 individual members from across Ohio and represents the interests of over 125 Ohio environmental, conservation and community organizations, ranging from the Ohio offices of such national organizations as the Nature Conservancy and the National Audubon Society to local watershed associations and community groups.Protection of water quality in Ohio has long been a high-priority issue for OEC and, therefore, this case raises issues of major importance to OEC, its members, and its supporting organizations.

A careful review of the complex facts of this case demonstrates that, under established Ohio and federal law, the takings claims of each of the individual Relators must be rejected. Indeed, there are several independent grounds for rejecting every claim in this case. Accordingly, OEC urges the Court to affirm the judgment of the Court of Appeals insofar as it rejected the takings claims in this case. OEC urges the Court to reverse the judgment of the Court of Appeals insofar as it upheld the takings claims. **STATEMENT OF THE CASE**

Amicus OEC incorporates fully the statement of the case as represented by the Appellant-Cross Appellee, State of Ohio as set forth below. This is an appeal of right from a decision in mandamus in which the Franklin County Court of Appeals ordered the Ohio Department of Natural Resources (“ODNR”), Division of Mines and Reclamation (“Division”) to appropriate approximately 223 acres of coal lease rights in Valley Township, Guernsey County. This appeal is the second case to be brought to this Court concerning the protection needed for the public water supply of the Villages of Pleasant City and Fairview (“Villages”). In the first case, *Village of Pleasant City v. Division of Reclamation* (1993), 67 Ohio St. 3d 312, 617 N.E. 2d 1103, this Court held that in deciding what lands to designate as unsuitable for coal mining under R.C. 1513.073, the State must consider more than present usage of the aquifer that supports the Village's water supply, and consider the impacts that coal mining may have on future usage of the aquifer.Three months after the determination on remand, the mandamus case that is the subject of this appeal was first filed.A short summary of the proceedings in the earlier case is useful in understanding the issues in the present appeal.

The Lands Unsuitable Litigation

On September 21, 1988, the Village of Pleasant City filed a lands unsuitable petition with the Department of Natural Resources’ Division of Mines and Reclamation pursuant to R.C. 1513.073(A)(2)(c), requesting that the aquifer supplying water to the municipality be designated as unsuitable for coal mining.[1]Pleasant City was concerned that additional coal mining proposed by R.V.G., Inc. (“RVG”), now R.T.G., Inc., (“RTG”) would cause irreparable harm to the aquifer and the water supply that served both Pleasant City and Fairview.Pleasant City identified the aquifer and its recharge area as all areas situated in Sections 7 and 8 of Valley Township,

Guernsey County that lie below an 820 foot contour elevation. (Lands lying below the 820 foot contour are generally considered to be in the floodplain.) (Supp. 00227.)[2]The petition area consisted of approximately 833 acres, of which approximately 108 acres already had been mined by RTG.

On October 6, 1989, the Chief designated approximately 275 acres below the 820 foot contour as unsuitable for coal mining. (Supp. 00482).These acres were within a 2000 foot radius of the Village's wells, which represented the approximate size of the cone of depression created by the wells under normal pumping conditions.[3] (App. A-31, A-32; Supp. 00489). RTG and the Villages appealed the Chief's designation to the Reclamation Board of Review ("Board").

On April 10, 1991, the Board expanded the Chief's lands unsuitable designation from 2000 feet to 3200 feet on the western half*Village of Pleasant City and R.T.G., Inc. v. Division of Reclamation* (April 10, 1991), Reclamation Bd. of Review Nos. BR-4-89-190 & 191, unreported(App. A-76).This decision was appealed to the Fifth District Court of Appeals.On April 7, 1992, the appellate court reversed and instructed the Board to order designation of the entire petition area as unsuitable for mining. *Village of Pleasant City and R.T.G., Inc. v. Division of Reclamation* (April 7, 1992), Guernsey App. No. 91-CA-09, Journal Entry, unreported (App. A-69). An appeal was taken to the Ohio Supreme Court.

In *Village of Pleasant City v. Division of Reclamation, supra*, this Court found that it was error for the State to limit the analysis of the "long-range productivity" at R.C. 1513.073(A)(2)(c) to the current usage of the Village of Pleasant City."Therefore, the board must consider the effect of mining on the ability or capacity of the aquifer and aquifer recharge area to store and transmit water in the future.This effect would not be measured simply by assessing the effects of mining on the aquifer and aquifer recharge area solely as it relates to producing water to supply Pleasant City's current usage." *Pleasant City v. Ohio Dept. of Natl. Resources, supra*, at 312, 1108.This Court remanded the matter to the Reclamation Board of Review, instructing:

It is apparent that the board's findings support the conclusion that the aquifer and aquifer recharge area could be affected.Indeed, they already may have been affected.However, the board focused solely on protecting the aquifer and aquifer recharge area only to the extent necessary to maintain the village's water supply at current levels.We must repeat that R.C. 1513.073 also requires consideration of the potential effect on the aquifer and aquifer recharge area themselves, not just maintenance of the village's current water supply.

*Id.*at 319-320, 1109.

On June 16, 1994, the Board designated all lands in Sections 7 and 8, Valley Township, Guernsey County that lie below the 820 foot contour elevation as unsuitable for coal mining. *Village of Pleasant City and R.T.G., Inc. v. Division of Reclamation* (June 16, 1994), Reclamation Bd. of Review Nos. RBR-4-89-190 & 191, Order of the Board After Remand From Supreme Court, unreported (App. A-61). This covered approximately 833 acres, from which approximately 100 acres were excluded because they already had been mined by RTG.

The Mandamus Litigation

On September 21, 1994, RTG and Charles Haught and Rae Haught (the "Haughts") filed an action in mandamus in the Franklin County Court of Common Pleas against the State of Ohio, alleging that a "taking" arose from the lands unsuitable designation. The Haughts owned the surface and mineral rights on some parcels of land outside and within the designation area.Likewise, RTG claimed to own surface and mineral rights in fee on some parcels of land within the designation area and claimed to have coal leases on parcels both outside and within the designation area.

The parties filed dispositive motions that lead to a dismissal by the court of common pleas. RTG and the Haughts appealed, and on March 31, 1997, the court of appeals reversed the trial court's dismissal, stating "Because this court finds that there are too many factual issues involved in this case which cannot be resolved absent an evidentiary hearing, this court finds that the trial court erred in granting appellees' motion to dismiss."*State of Ohio, ex rel. R.T.G., Inc. and Charles and Rae Haught v. State of Ohio, et al.* (March 31, 1997), Franklin App. No. 96APE05-662, at 8. (App. A-97). The State sought discretionary review of this determination from the Ohio Supreme Court, but the State's motion was denied. *State ex rel. R.T.G., Inc., v. Ohio Dep't Natural Resources* (1997), 79 Ohio St. 3d 1482, 683 N.E.2d 787.

On remand from the court of appeals, the Franklin County Court of Common Pleas rejected Relators' attempt to narrow the scope of inquiry to Relators' alleged coal rights alone. Thereafter, Relators voluntarily dismissed their complaint on August 6, 1998. RTG and the Haughts then filed a second action in mandamus in the Court of Appeals for Franklin County in *State ex rel. R.T.G., Inc., and Charles and Rae Haught v. State of Ohio* (Aug. 6, 1998), Franklin App. No. 98APD-08-1015. The complaint named as defendants the State of Ohio, the Department of Natural Resources ("ODNR"), the Director of ODNR, the former Division of Mines and Reclamation ("Division") and the Chief of the Division (collectively "the State"). The complaint alleged that the State deprived RTG and the Haughts of their property without just compensation. Relators petitioned for a writ mandating the commencement of appropriation proceedings under R.C. Chapter 163.

The court of appeals referred this matter to a Magistrate pursuant to Civ R. 53. Following the Magistrate's case management orders, the parties submitted an extensive evidentiary record, consisting of numerous volumes of exhibits, affidavits, deposition transcripts, maps and other documents. The parties then presented their arguments in briefs, based on the evidence submitted in the record.

On or about March 7, 2000, RTG and the Haughts moved the court for leave to amend their complaint to add new Plaintiffs-Relators James Rossiter, Phyllis Rossiter ("Rossiters") and the Myron Fishel Scholarship Trust and its three Trustees ("Trust") to this action. On March 10, 2000, the court granted this motion. The State moved for judgment on the pleadings against Rossiters and the Trust on the grounds that their claims, brought on March 7, 2000 for a cause of action that arose no later than June 16, 1994, were time-barred by a four-year statute of limitations.

Having "read every word and every page" of the evidentiary record, the Magistrate rendered her decision on October 30, 2000. The Magistrate concluded that no taking resulted from the lands unsuitable designation where the Relators owned both the surface and the mineral interests within the designation area. She concluded that the designation did result in a taking on those parcels of land where RTG or the Rossiters claimed to have only coal leases, but that the evidence clearly and convincingly proved that mining under those leases would constitute a nuisance. (App. A-57 – A-59).Therefore, the State's prohibition of mining would not be compensable. Her legal analysis expressly excluded those contiguous parcels where Relators' surface and/or mineral were outside the designation area.

Further, the Magistrate denied the State's motion for judgment on the pleadings, based on her conclusion that a twenty-one year statute of limitation applied to regulatory taking claims. A twenty-one year statute of limitations, in the Magistrate's view, allowed her to determine the merits of the Rossiters' and Trust's claims, brought nearly six years after the cause of action arose.

The parties' objections to the Magistrate's decision were heard by the court on January 23, 2001, and on March 8, 2001, the court issued its Opinion. It upheld the Magistrate's decision that no taking resulted from the lands unsuitable designation where the Relators owned both the surface and the mineral interests within the designation area.The lower court expressly stated that for the

purpose of the takings analysis, it was not error for the Magistrate to exclude those contiguous parcels outside the designation area where surface and/or mineral interests were held by the Relators.

The court also upheld the Magistrate's conclusion that the designation resulted in a taking on those parcels of land where RTG or the Rossiters claimed to have coal leases. However, the court disagreed with the Magistrate's conclusion that the evidence clearly and convincingly proved that mining under those leases would constitute a nuisance. The lower court overlooked the proximity of the coal leases to the Village's wells and concluded that a taking of approximately 223 acres of coal leases occurred.

The court determined that it was error for the Magistrate to apply a twenty-one year statute of limitations for regulatory takings claims and agreed with the State that a four-year statute of limitations applied to regulatory takings claims. Yet the court did not apply the four-year statute of limitations to bar the Rossiters from bringing their claims nearly six years after such arose.

In its March 13, 2001 Judgment Entry, the court issued a writ of mandamus ordering the State to commence appropriation proceedings as to property in which RTG and/or the Rossiters own only mining rights.On April 13, 2001, the State timely filed its Notice of Appeal from this Judgment Entry with this Court.

STATEMENT OF THE FACTS

Amicus OEC incorporates fully the statement of facts as represented by Appellant-Cross Appellee, State of Ohio as set forth below.

I. The Aquifer Is A Unique Natural Resource.

An ancient streambed was formed beneath the floodplain of Buffalo Fork, Buffalo Creek and Wills Creek, in and around Sections 7 and 8 of Valley Township, Guernsey County.The ancient streambed filled with varying thickness of permeable sands and gravel, interbedded with less permeable silts and clays, so that ultimately a mixture of coarse sands and gravel was deposited above the bedrock and buried under clay.(Supp. 00227, 00446-00449). These unconsolidated deposits of alluvial material collect, store and transmit water, thereby serving as the aquifer for the residents of this area.(Supp. 00227, 00446).The aquifer flows generally from the west to the east (through the present location of the Villages of Pleasant City and Fairview) and then in a north-northeasterly direction as it leaves Section 8. Supp. 00227, 00242, 00444).

The general dimensions of the aquifer underlying the floodplain of Buffalo Fork, Buffalo Creek and Wills Creek, and its recharge area, have been well-defined by logs, monitoring wells, pump tests, exploratory holes and other information. (App. A-39; Supp. 00037-00042, 00449). Generally, private water wells yield roughly 25-100 gallons per minute within the aquifer and less than 3 gallons per minute outside the aquifer. (App. A-40; Supp. 00227, 00454).The Village's wells pump about 100 gallons per minute. (Supp. 00196, 00227).The normal daily production of the Village's wells for public use is between 50,000 and 70,000 gallons per day. (Supp. 00210, 00422). However, during certain days in the summer, the water demands have approached 100,000 gallons per day. (App. A-41; Supp. 00439).In 1996, the Villages commenced construction of a water treatment plant that was completed in February of 1997 at an approximate cost of $720,000. (Supp. 00220, 00422). Today, the municipal wells provide a reliable source of water that meets EPA drinking water standards. (Supp. 00423).

The Villages of Pleasant City and Fairview purchased the land for their water works from Relators' predecessors-in-title. [4] (Supp. 00621). In 1913, the Villages drilled and installed their first well – City Well CW-3 – at an approximate depth of 50 feet. Approximately 300 feet away,

City Well CW-2 was installed in 1949 and drilled to a depth of 55 feet. (Supp. 00421-00451). The aquifer is the sole supply of water to the Villages. (Supp. 00422).Only one other groundwater system in either Noble or Guernsey County is capable of producing a sufficient quantity of groundwater for municipal or industrial needs. (App. A-39; Supp. 00228, 00452).

The Village's wells provide public water for approximately a thousand people, as well as the Village's Fire Department, three churches, the Post Office, three farms, a beauty shop, an ice cream shop, a bar and the Valley Township garage.During times of drought, the Village of Pleasant City supplies water to the Fire Department, which in turn supplies water to others whose private wells have gone "dry." (Supp. 00227, 00422).

The unique nature of the aquifer and its importance to the community has been recognized by the federal government. On September 10, 1987, the U.S. EPA designated the aquifer to be a "Sole Source Aquifer" for the Village of Pleasant City. 52 F.R. 32342-32344.This is a protective designation which restricts federal funding for projects that might adversely effect the aquifer. There are only four other aquifers in Ohio that have been designated as "Sole Source Aquifers."(Supp. 00444).

II. The Aquifer Is Hydraulically Connected To The Village's Wells.

Boring logs drilled for RVG/RTG showed significant sand and gravel deposits – in some instances 40 feet or more of sand – in the floodplains of Sections 7 and 8. (App. A-42; Supp. 00071-00072, 00245-00246). Because of the depositional nature of the aquifer, a hydraulic connection exists between these deposits. (App. A-42).With regard to the existence of this hydraulic connection, Truman Bennett, the State's hydrogeologist testified, "I mean, the conduct – the hydraulic transmissivity and connection of this aquifer is indisputable, in all honesty. I mean no one objectively could look at it and say that they're not connected, they just are." (Supp. 00020). [5]

Data has been collected by the Ohio Department of Natural Resources, Division of Water during the mining operations and in the succeeding decade. This data showed conclusively that the pumping at the R.T.G, Inc. mine site in Section 7 caused a five foot loss of water in MW-4 – a well located between 1100 and 1800 feet away. These actual facts, as opposed to theoretical data, show more than just a limited degree of hydraulic connection between the deposits in the western portion of the aquifer in Section 7 and the Village's wells. (Supp. 00244-00245).

Relators' expert, William Miller, agreed that some water is indeed flowing west-to-east from the water-bearing deposits in Section 7 to the Village's wells located in Section 8. (App. A-42; Supp. 00049-00050, 00052-00054). Mr. Miller further acknowledged that important deposits of sand and gravel exist around the Village's wells and to the north and the east of the Village's wells.

The aquifer material becomes coarser-grained in the area of the Pleasant City wells. Boring and well logs indicate that this sand and gravel deposits thickens and coarsens to the north in the Wills Creek buried valley.The Pleasant City wells appear to be near the southern extent of this sand and gravel deposit. (Supp. 00329).

Relators' expert assumed that these significant sand and gravel deposits would not be strip mined. According to Mr. Miller, "The most important factor mitigating the impact of mining on the Pleasant City wells in an emergency situation is that the wells derive the majority of their supply from the sand and gravel aquifer located to the north and east of the wells, in an area unimpacted by mining activities." (Supp. 00333-00334). Relators' expert identified the location of these important sand and gravel deposits as being located on two of the leased premises that the appellate court has ordered the State to appropriate. (Supp. 00045-00046, 000463-000464, 000467, 00642).[6]

III. Any Additional Mining East Of Coal Mining Permit D-578 Will Damage The Aquifer And The Village's Capacity To Withdraw Water From The Aquifer.

On April 24, 1986, RVG/RTG's application was approved for Permit D-0578, allowing the applicant to mine the No. 7 coal seam beneath 21.8 acres in Sections 6 and 7, Valley Township, Guernsey County. The permit was revised on June 5, 1987 to include 77.2 additional acres adjacent to the original permit area, and was again revised on February 15, 1990 to include an additional 8.4 acres, (D-0578-l) and (D-0578-2), respectively.(Hereinafter, Permit D-578 and its additional adjacent areas will be referred to as "Permit D-578".)(Supp. 00273-00274). No other coal mining application was ever submitted by RVG/RTG or James Rossiter to mine lands in Valley Township, Guernsey County. (Supp. 00274, 00276-00277).

In order to evaluate whether RTG's mining operations would impact the Village's wells, the Division required RTG to install a system of monitoring wells. Five monitoring wells were installed within the floodplain of Buffalo Fork, Buffalo Creek and Wills Creek. Data was generated on the water levels in these wells.The monitoring wells ("MWs") were:

MW-1 located 623 feet west of Village's wells (on the Haught property)

- located 3992 feet west of Village's wells (in the permitted area)
- MW-3 located 3342 feet west of Village's wells, (adjacent to permitted area)
- MW-4 located 2200 feet west of Village's wells, (about mid-way between the Village's wells and the mine site) (on the Haught property)
- city well

App. A-41–A-42; Supp. 00259-00261, 00456, 00640).[7]

RTG's operation on Permit D-578 extracted the #7 coal seam, using strip mining methods.By the end of its operations, Permit D-578 had mined approximately 100 acres and was situated approximately 6400 feet west of the municipal wells from its farthest point, and 3400 feet west of the municipal wells from its nearest point. (Supp. 00296). To access the coal within the bedrock beneath the aquifer, two construction activities were a necessary part of RTG's strip mining. First, the material above the coal seam ("overburden") had to be removed.The overburden was made up of the alluvial deposits that comprised the aquifer.During the mining, the stratified materials overlying the coal seam were removed, commingled with other overburden materials, and later dumped in the pits as mine spoil. (Supp. 00297, 00228-00229). As noted by Truman Bennett, "[T]he harm created by the physical removal of the aquifer persists; although the materials were replaced, the sorting was obliterated and the resulting deposit can no longer transmit water at a rate similar to its unadulterated state." (Supp. 00452).

Second, because the coal was well below the water table, pumping was required to dewater the pit that was formed by the excavation of the overburden. (Supp. 00297, 00452).The dewatering of the pits lowered the groundwater and created a cone of depression radiating outward from the pits. (Supp. 00230-00232).

The experts for both Relators and the State of Ohio recognized that mining has two distinct impacts on the aquifer – one in the interim and one of a permanent nature. (Supp. 00228-00231, 00241-00242, 00330-00331). The interim impact is caused by RTG's pumping of water from its pits, which will lower the ground-water level in the aquifer.The permanent impact is from strip mining the unconsolidated water bearing deposits (the aquifer) that lie above the coal seam. Strip mining will remove and destroy the existing lithology of the mined area and replace the aquifer with mine spoil. (Supp. 00228-00231, 00241-00242, 00330-00331).

The permanent impact arising from mining's destruction of the existing aquifer was evaluated by State's expert, Truman Bennett, who is a hydrogeologist with forty years of experience (fifteen of these years intermittently studying the aquifer in question). Mr. Bennett concluded: "the strip mining of RTG Inc. on Permit D-578 has already damaged this aquifer and the capacity of the Villages of Pleasant City and Fairview ("Village") to withdraw water from this aquifer. Moreover, any additional strip mining in the floodplain of Sections 7 and 8, especially to the east of Permit D-578, will further damage this aquifer and the Village's capacity to withdraw water from this aquifer." (Supp. 00226).

Relators' expert, William Miller, did not refute mining's inevitable destruction of the existing aquifer, but attempted to discount this known destruction with a discussion about the "potential permanent effect" of mining on the aquifer. Relators' hydrologist concluded, "the potential permanent effects of mining are related to the removal and replacement of the unconsolidated deposits and bedrock overlying the coal. If this activity significantly reduces the transmissivity of aquifer materials supplying the Pleasant City wells, the wells could be negatively affected."(Supp. 00330-00331).

As for the interim impact from pumping, Truman Bennett concluded that "R.T.G. Inc.'s pumping will lower the ground-water level in the aquifer surrounding the pit. If mining progressed, R.T.G., Inc.'s pumping at some point would interfere with the Village of Pleasant City's ability to pump." (Supp. 00241).Mr. Bennett's conclusion was confirmed by Relators' expert, but again this known impact was discounted by Relators' expert:

The monitoring required by the permit [for the proposed permit expansion area] would have supported a determination of the extent of possible mining allowable beyond MW-4 towards MW-1 before the Village wells experienced a significant temporary drawdown caused by the active mining operations. The absence of boring logs over the distance between MW-4 and MW-1 makes difficult an evaluation of just how close mining could have approached to MW-1. (Supp. 00333).

As will be shown below, RTG elected not to submit an application for "the proposed permit expansion area" or to install the corresponding monitoring system because of the expense and litigious nature of the proposed expansion.

IV. RTG Under Oath Made A Conscious Election To Forego Further Mining On The Properties In Question One Month Before The Initial Lands Unsuitable Designation Was Rendered.

On September 6, 1989, RTG submitted to the Division its last application to revise Coal Mining Permit D-578, adding only 8.4 acres to the permit site. (Supp. 00550).RTG now claims that it would have mined other areas in Sections 7 and 8, but for the lands unsuitable designation.However, when the opportunity arose RTG did not request to mine these other areas in Sections 7 or 8.Rather, RTG recognized that any proposal to mine closer to the municipal wells, especially those areas in the cone of depression of the Village's wells (such as the Haught property, which is the Magistrate's Tracts C, D and E), would be costly and litigious. The expenses would include the typical surveying and engineering costs for a normal application, as well as extraordinary expenses because monitoring wells and borings would be needed to be drilled and corresponding data collected and analyzed. (Supp. 00062, 00551). See also R.C. 1513.07(B)(2)(i)-(o).

Consequently, in this last application, RTG under oath stated: "R.T.G., Inc. originally had plans to mine the Charles Haught farm. This proposed 8.4 acre adjacent area application is the final and last for section 7 or 8, Valley Township, Guernsey County due to the constant litigation and cost of processing permit applications in this area." (emphasis in original text)(Supp. 00551).RTG's

election under oath to forego any further mining in Section 7 and 8, Valley Township, Guernsey County was made one month before the first lands unsuitable designation was rendered. RTG's decision not to conduct further mining was driven by the economics of the situation – "the constant litigation and cost of processing permit applications in this area." (Supp. 00551), not the lands unsuitable designation.

V. A Significant Percentage of RTG's Coal Holdings Either Were Mined or Were Outside the Lands Unsuitable Designation Area.

The properties that were the subject of the amended complaint in mandamus amounted to approximately 533 acres. (Supp. 00561-00627).Of these 533 acres, RTG mined approximately 108 acres. [8] (Supp. 00295).An additional 110 acres of these 533 acres have never been designated as unsuitable for coal mining because the 110 acres lie either above 820 feet in elevation or outside of Sections 7 and 8 (Supp. 00293-00294, 00620-00621, 00634, 00643).[9] 110 acres, but it has not.(Supp. 00276-00277).Therefore, of the 533 acres that are the subject of the instant complaint, 210 acres were mined or were outside the lands unsuitable area, consisting of approximately 40 percent of the total.

VI.The Coal Rights Claimed by Relators Generally Were Acquired, If At All, After Chapter 1513 Was Enacted.

Ohio's coal mining laws first were enacted on June 14, 1947 as H.B. No. 314.After the United States enacted the federal Surface Mining and Control Reclamation Act of 1977 ("SMCRA"), Ohio modified its coal mining statutes to make them consistent with the federal program.The lands unsuitable statute, R.C. 1513.073 took effect on September 1, 1981, with Am.Sub.H.B. No. 1051. All surface and coal rights claimed by RVG/RTG, the Rossiters and the Trust were acquired after that date.Only the Haughts acquired any interests before September 1, 1981. As the Magistrate noted in her Report and Recommendation, "The deposition testimony of Charles Haught indicates that the Haughts acquired their interests in the property they own for relatively small amounts of money."App. A-45.

VII. Relators' Investment In The Coal Rights They Acquired Was Minimal.

There are many complexities concerning RTG and Rossiters' claims of title and ownership to their coal interests. RVG/RTG, through the Rossiters, initiated several foreclosure and quiet title actions beginning in 1982 concerning title to the interests. A thorough examination of the deeds, leases, foreclosure orders, and opinions of title rendered on behalf of RVG/RTG shows that their claims of ownership are flawed.[10] However, if all of the defects in title and ownership are overlooked, it is beyond dispute that the investment made by the Haughts, RVG/RTG and the Rossiters in acquiring coal rights was minimal.

The Magistrate identified the properties of interest as "Tracts A-H" and the "MIKES" Tract in a map attached to her Report and Recommendation. App. A-60. She found that "… RTG acquired their interests in the property for a relatively modest sum, as indicated in Finding of Fact 50." App. A-46 (emphasis added). Indeed, none of the Relators spent significant sums in acquiring property interests. For example, the Haughts spent approximately $6,800 and through gift or bequest, acquired surface rights and all or some of the coal interest in 317 acres.(App. A-45; Supp.00154-00156, 00620-00623).They sold some of these properties for $65,000.00 in 1993. (Transcript of Docket "T.d." 127, Tab 2, at 61). The Haughts have not made any investment in coal mining; they merely have property which happens to include coal.

Similarly, the Trust made no investment in coal or in coal mining. The Trust owns only a one-half interest in coal on 247 acres.The Trust made no investment whatsoever in the properties, but acquired its interests strictly through devise or bequest.(Supp. 00624-00627).

Rossiters (whose claims are time-barred) acquired some surface and coal interests in fee.They bought surface rights in 131 acres for $38,500.00 in 1982, then sold such at the same price to RTG in 1988.(App. A-34-A-37, A-45).However, no substantial investment was involved in acquiring the coal interests, several of which were bought at foreclosure. For example, Rossiters purchased the coal rights under these 131 acres at foreclosure for not more than $1,200.00 in 1985. (T.d. 129, Tab 3). Also, RTG bought the surface and fee for 53 acres for $75,000.00, but as the Magistrate found, the coal in such parcel "… was valued at $600.00."App. A-45. In most instances, when RVG/RTG acquired any coal rights through lease from the Haughts or otherwise, it was on the basis that royalties would be paid if coal was mined. (Supp. 00605-00609).RTG paid negligible sums to keep such leases in effect for several years.

While RTG had some ambition to mine coal, and in fact did mine coal, its investment in the properties for which compensation is sought was "modest." The total appraised value for the coal under Tracts A, B, F and H was $1,800.00. The appraised value of the coal under Tracts C and E was "no value."(App. A-45; Supp. 00631-00633).The surface and whatever coal interest the Haughts had in Tract D were acquired for $6,800.00 and later sold for $65,000.00.Tract G and the MIKES Tract were acquired by RTG for $12,500.00 and $12,000.00 respectively, have little or no coal, and were subject to significant restrictions on mining, not at issue in this (App. A-45; Supp. 00084-00085; T.d. 131, Tab 6). Little actual investment was made by Relators in this case, and as concerns RVG/RTG and Rossiters, such "modest" investment was made after the federal mining restrictions embodied in SMCRA had become the law of Ohio in Chapter 1513.

SUMMARY OF ARGUMENT

The Relators rely upon an expansive, novel theory of regulatory takings. The Relators contend, first, that the relevant unit of property for the purpose of analyzing these claims consists of each Relator individual coal mining interest in each of the different tracts of property (identified as Tracts A through H on the map attached to the Magistrate decision) designated as unsuitable for mining by the State of Ohio.

Second, after defining the relevant property in this narrow fashion, Relators contend that the regulations resulted in takings of their mining interests, without regard to their actual investment expectations concerning these properties or the actual economic effects of the restrictions on them. Finally, Relators contend that the State could rebut a finding of a taking only if the regulatory restrictions parallel background principles of Ohio nuisance law, and that the State failed to make the necessary showing that the proposed mining would result in a nuisance.

Under Relators' view of the law, it would be essentially impossible for the State of Ohio to regulate the development of surface mining in order to protect public health and the environment.Indeed, acceptance of this view would fundamentally undermine a wide variety of traditional zoning, land use and environmental regulations. Fortunately, as discussed below, established law does not support a finding of a taking based on this novel theory.

First, even before getting to the takings claims, some or all of the claims fail at the threshold based on procedural problems. The claims of Mr. and Mrs. Rossiter and the Myron Fishel Scholarship Trust and its trustees (collectively the Trust) are barred by the applicable four-year statute of limitations.

Second, none of the Relators' claims are ripe. In order to present a ripe claim, a takings claimant must first obtain a final and definitive decision from the government entity that has allegedly taken the property.This means that the owner must exhaust available administrative procedures for seeking a variance from, or a waiver of, a regulatory restriction before filing a taking claim in court. Because the Relators had the opportunity to file administrative petitions to lift the unsuitable for mining designation, but failed to do so, the claimsare not ripe.

Third, turning to the merits of the case, Relators takings claims must be rejected because the Relators failed to demonstrate that the restrictions effected a denial of economically viable use of their properties. As the U.S. Supreme Court has repeatedly observed, a taking claim must be analyzed, not in relation to any specific property interest in the owner bundle of rights, but in relation to the owner property as a whole. The Relators attempt to define the relevant property as their individual mining interests in each individual tract contradicts the property as a whole rule in *four* separate respects.

Relators RTG, Inc. and the Haughts, who own both surface rights and subsurface mining rights, improperly seek to ignore the property as a whole rule in the vertical dimension by contending that the relevant property consists of only their subsurface mining rights.The Court of Appeals correctly recognized that, under the property as a whole rule, surface and subsurface rights must be considered as part of a single unit for the purpose of takings analysis.

Relators also contradict the property as a whole rule by seeking to treat each individual tract as a separate property in the horizontal dimension. To the extent that Relators own fee title and/or partial interests in two or more contiguous tracts (RTG, Inc., the Haughts, the Rossiters), these tracts must be considered as parts of single units of property for the purpose of takings analysis. The Court of Appeals erred in treating these tracts as separate properties and ignoring the unities of ownership and management which bind these different tracts together.

Relators also contradict the property as a whole rule by seeking to exclude from consideration Relators fee or partial interests in parcels, which are outside the area designated as unsuitable for mining, but, which are adjacent to Relators parcels inside the designated area. The Court of Appeals incorrectly ignored the fact that Relators RTG, Inc. and the Rossiters hold parcels outside the area designated as unsuitable for mining, which should be included as part of their properties.

Even if takings analysis could properly focus solely on mining interests in the individual tracts, the Relators are wrong in contending that some of the Tracts (C, D and E) can be subdivided because portions are designated unsuitable for mining (because they are below elevation 820 feet), while other portions are not so designated (because they are above elevation 820 feet). Under the most extreme definition of the relevant property, a Relator interests in each of the individual tracts must be considered as a whole. Accordingly, the Court of Appeals erred by analyzing the taking claims by focusing on the restricted coal interests below elevation 820 feet while ignoring the unrestricted coal interests above that elevation.

Correcting for these mistakes in the definition of the relevant property, and assuming the Relators claims are otherwise viable, it is apparent that none of the Relators can demonstrate that they have been denied economically viable use of their property as a whole.Accordingly, each Relator takings claims must be rejected based on the property as a whole rule.

Fourth, assuming for the sake of argument that the claims are not barred on procedural grounds and that they are not barred under the property as a whole rule, the claims of all or most of the Relators are barred because they acquired their interests after the Ohio coal mining law was already in place. Contrary to the Relators view, an owner who purchases property subject to known regulatory constraints cannot subsequently challenge the restrictions as a taking. Because all of the Relators (with the apparent exception of the Haughts) acquired the interests at issue in the case after the enactment of the Ohio coal mining law, the interests they acquired are subject to the limitations imposed by that law and their takings claims are barred.

Finally, in addition to and apart from the grounds outlined above, the Relators takings claims with respect to Tracts C, D, and E also fail because the record shows that the prohibition on surface mining in these areas, at least, parallels the Ohio common law of nuisance.Under the common

law rule, an owner of property has no inherent right to use his property in a fashion that would unreasonably affect a neighbor ground water supplies. The record supports the Magistrate conclusion that the prohibition against mining in the parcels closest to the Village's well field was justified in order to prevent unreasonable harm to the Village's drinking water supplies.

ARGUMENT

Proposition of Law No. I:Rule 15(C) of the Ohio Rules of Civil Procedure Does Not Permit the Addition of Plaintiffs to a Case When the Claims of Such Plaintiffs are Time-Barred by the Applicable Statute of Limitations.

The Court can and should resolve a major part of this case on the straightforward basis that the claims of certain Relators - the Rossiters, and the Myron Fishel Scholarship Trust and its trustees (collectively the Trust) - are barred by the applicable statute of limitations. As explained below, the taking claims of each of these Relators should be rejected for several additional reasons. However, resolving the claims of these Relators based on the statute of limitations would eliminate the need for the Court to address the issues raised by these other grounds for rejecting these Relators claims.

The Court of Appeals ruled that a four-year statute of limitations applied because the case involves an alleged injury to the rights of the plaintiff within the meaning of R.C. 2305.09(D). That ruling was plainly correct because this provision represents the most directly analogous statute of limitations.

The Court of Appeals erred, however, in failing to observe that the logical consequence of its conclusion that a four-year limitations period applies is that the claims asserted by the Rossiters and the Trust are time-barred. The designation of the area adjacent to the Village as unsuitable for mining occurred on June 16, 1994. The Relators, pursuant to an order of the Magistrate, filed an amended complaint adding the Rossiters and the Trust as Relators on March 7, 2000, nearly six years after the designation which gave rise to these taking claims.

The general rule is that additional parties cannot properly be added to an ongoing litigation when adding the parties would circumvent the limitations period that would otherwise apply. *See Littleton v. Good Samaritan Hosp.* (1988), 39 Ohio St 3d 86, 100-102, 529 N.E. 2d 449, 461-462*; see also Picciuto v Lucas County Board of Commissioner* (1990), 69 Ohio App. 3d 789, 591 N.E. 2d 1287, 1293. Under this general rule, the claims of these additional Relators are time-barred.

In addition, the Rossiters and the Trust are not within the narrow class of parties who are permitted to assert claims that "relate back" under Rule 15(C) of the Ohio Rule of Civil Procedure. *See* also 28 U.S.C.A. Federal Rules of Civil Procedure, Staff Notes on Rule 15 (observing that Rule 15 speaks in terms of adding defendants to an ongoing action, but stating that the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs). In (1984), Ohio St. 3d 627,635 N.E.2d 323, 326, the Court concluded that Civ.R. 15 can be utilized only for the substitution of a proper party for one previously misidentified in the original complaint.

This construction of Rule 15 is supported, the Court reasoned, by the fact that the rule was designed to address the situation where a litigant made a mistake regarding the identity of the proper party in the original pleading. *Id*. at 326. Because neither the Rossiters nor the Trust was added to the suit as a substitute for any of the Relators named in the initial complaint, and there is no argument that the original Relators were somehow misidentified, Rule 15 simply does not apply in this case.[11]

Accordingly, the claims of the Rossiters and the Trust should be dismissed as time-barred.

Proposition of Law No. II:Takings Claims are Not Ripe for Judicial Review When the Property Owners Have Failed to Exhaust All Administrative Remedies.

In addition, the claims of all of the Relators fail at the threshold because none of the Relators has presented a ripe claim.

Under well established U.S. Supreme Court precedent, a claim that the application of government regulation effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Williamson County Reg l Planning Comm n v. Hamilton Bank* (1985), 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126.In this case, none of the Relators has presented a challenge to a final decision.

Accordingly, the claims should have been dismissed on ripeness grounds.

In order to obtain a final decision for takings purposes, a land owner must exhaust available administrative procedures for obtaining a variance or a waiver from the regulations that restrict the owner use of the property. *See Id*. at 188 (taking claim was premature when owner filed an unsuccessful application for development, but did not then seek variances that would have allowed it to develop the property according to its proposed plat). In a case similar to this one, *Hodel v. Virginia Surface Mining & Reclamation Assn.* (1981), 452 U.S. 264, 297, 101 S. Ct. 2352, 69 L. Ed. 2d 1, the U.S. Supreme Court ruled that an as-applied challenge to the federal Surface Mining Control and Reclamation Act was not ripe where the plaintiffs had not availed themselves of the opportunity to seek either a variance or a waiver from the Act restrictions.

In this case, the Relators failed to avail themselves of the opportunity to seek termination of the designation of their coal interests as unsuitable for mining.Under R.C. 1513.073(B), [a] person having an interest that is or may be adversely affected may petition the chief to have... a designation terminated. This provision then provides that [t]he petition shall contain allegations of fact with supporting evidence that would tend to establish the allegations. In addition, R.C. 1513.073 (C) provides that, prior to terminating prior designation of an area as unsuitable for mining, the Chief of the Division of Mineral Resources Management shall prepare a detailed statement on, among other things, the impact on the economy.

The Relators could have but did not file petitions seeking termination of the unsuitable for mining designation for all or part of their coal interests. Because they did not avail themselves of this opportunity, they do not present ripe claims.

The Relators will likely contend that pursuit of this administrative remedy would have been futile because the Chief of the Division made the decision to designate the area as unsuitable for mining within the last decade and would not likely reverse a decision so recently taken.Therefore, Relators may argue that their claims are ripe notwithstanding their failure to seek termination of the designation. For several different reasons, this potential argument should be rejected.

First, the designation of the area as unsuitable for mining in response to the Village petition does not logically affect the Relators obligation to seek termination of the designation in order to ripen their taking claim.The requirement that a variance or waiver opportunity be pursued is always imposed in the face of a prior governmental decision denying an owner permission to proceed. The final decision rule would be eviscerated if a litigant could point to an initial governmental denial of permission as proof that a variance will not be granted. *See Williamson County*, 473 U.S. at 188 (denial of approval is not the equivalent to a denial of a variance). The Ohio legislature established procedures both for the designation of areas unsuitable for mining and for the termination of such designations because it believed the Division could and should lift the unsuitability designation in some cases. The Ohio legislature provided Relators a clear

administrative procedure for lifting the unsuitable for mining designation and they were required to avail themselves of that process in order to ripen their takings claims.

Second, the conclusion that filing a petition to lift the designation would not be futile is reinforced by the fact that the proceeding on the petition for termination would have a very different scope and purpose than the proceeding on the petition to designate. The Village, as the moving party in the designation proceeding, filed a petition containing allegations of fact and supporting evidence to support their position. By contrast, the petition seeking termination of designation would be filed by Relators and would obviously contain quite different allegations and supporting evidence relating to the interests of the coal owners. Thus, the proceeding on the petition to terminate would not, in fact, duplicate the proceeding on the petition to designate.

Accordingly, Relators takings claims should be rejected on ripeness grounds.

Proposition of Law No. III. A Property Owner's *Whole*Ownership Interest Must Be Analyzed in Determining Whether a Takings Claim Exists.

Turning to the merits of the takings claims, the Relators contend that the relevant property consists of the Relators individual coal mining interests in each of the individual tracts within the area designated as unsuitable for mining, as identified in the map attached to the Magistrate decision. This definition of the relevant unit of property for the purpose of takings analysis contradicts the so-called property as a whole rule and should be rejected. As discussed in argument section IV, once the property as a whole rule is properly applied to the facts of this case,it becomes apparent that none of the Relators has demonstrated a taking.

The Court of Appeals correctly observed that the basic standard applied by this Court and the U.S. Supreme Court in evaluating a regulatory taking claim is whether the regulation denies the owner economically viable use of his or her land. *Goldberg Companies, Inc. v. Council of the City of Richmond Heights* (1998), 81 Ohio St. 3d 207, 210690 N.E.2d 510, 512; *see also BSW Development Group v. City of Dayton* (1998), 83 Ohio St. 3d 338, 342699 N.E.2d 1271, 1275 (in general, owner can establish a taking by demonstrating a denial of all economically viable use of the property); *Lucas v. South Carolina Coastal Council* (1992), 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798; *Agins v. City of Tiburon* (1980), 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106.Of course, this standard begs a basic question: denial of all economically viable use of *what*? Relators seek to establish a taking by defining the relevant property as narrowly as possible. This effort is barred by settled law concerning the definition of the relevant property for the purpose of takings analysis.

It is a bedrock principle of takings law that an alleged regulatory taking must be analyzed, not in relation to the specific property area or interest being regulated, but in relation to the owner property as a whole.*See Penn Central Transportation Co. v. City of New York* (1978), 438 U.S. 104, 130-31, 98 S. Ct. 2646, 57 L. Ed. 2d 631, (rejecting the argument that a prohibition against development of airspace above Grand Central Terminal could be analyzed without considering development that had already occurred on the rest of the property); *Andrus v. Allard* (1979), 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210, (rejecting claim that a prohibition on the sale of property, by itself, effected a taking; "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety").

In *Keystone Bituminous Coal Association v. DeBenedictis* (1987), 480 U.S. 470, 498-500, 107 S. Ct. 1232, 94 L. Ed. 2d 472, the Supreme Court rejected takings claims based on restrictions on coal mining similar to the claims in this case. The Court ruled that the companies' takings claims could not properly be analyzed by focusing exclusively on the coal the companies were prohibited from exploiting. The Court said:

- Taking jurisprudence does not divide a single parcel into
- discrete segments and attempt to determine whether rights in
- a particular segment have been entirely abrogated. In deciding
- whether a particular governmental action has effected a taking,
- this Court focuses rather both on the character of the action
- and on the nature of the interference with rights in the parcel as a whole.

480 U.S. at 496, quoting *Penn Central*, 438 U.S. at 130-31 (emphasis added). *See also Hodel*, 452 U.S. at 296, (rejecting taking challenge to federal restrictions on surface coal mining, observing that there were alternative uses to which coal-bearing lands may be put).

The property as a whole rule serves the important practical function of preventing takings claimants from converting virtually every regulatory restriction into a taking.As the Supreme Court said in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust* (1993), 508 U.S. 602, 644, 113 S. Ct. 2264, 124 L. Ed. 2d 539, "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety." However, specifically to avoid this mistaken conclusion, the Court declared that "the relevant question [must be] whether the property taken is all, or only a portion of, the parcel in question." *Id*.

More fundamentally, the property as a whole rule is essential to a reading of the Takings Clause that respects the legitimate roles of the other branches of government in enacting and implementing laws designed to protect the public welfare. As Justice Holmes famously remarked, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."*Pennsylvania Coal Co. v. Mahon* (1922), 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322. The property as a whole rule permits government to take action that affects the value of private property without constantly triggering the need to pay compensation under the Fifth Amendment.

The property as a whole rule also is consistent with the general presumption in favor of the constitutionality of legislative action and the correlative principle that judgments regarding social and economic policy should generally be resolved by the legislative branch. *See Eastern Enterprises v. Apfel* (1998), 524 U.S. 498, 524, 118 S. Ct. 2131, 141 L. Ed. 2d 451, (plurality opinion) (quoting *Usery v. Turner Elkhorn Mining Co.* (1976), 428 U.S. 1, 16-17, 96 S. Ct. 2882, 49 L. Ed. 2d 752, ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.") In the absence of the property as a whole rule, takings cases would threaten to routinely interfere with legislative policy judgments.

Finally, the property as whole rule helps ensure that the regulatory takings doctrine does not veer too far from the original understanding of the Takings Clause. It is generally accepted that the drafters of the Bill of Rights did not intend for the Takings Clause to apply to regulations at all, and that the regulatory takings doctrine can only be justified on the theory that certain severely restrictive regulations are equivalent to direct physical appropriations. *See Lucas*, 505 U.S. at 1028 n. 15 (Scalia, J.) (observing that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all); *See generally*, John F. Hart, Land Use Law in the Early Republic and the Original Meaning of the Takings Clause (2000), 94 Nw. U. L. Rev. 1099 (explaining historical evidence relating to original understanding of the Takings Clause). The property as a whole rule helps enforce the original understanding of the Takings Clause by confining regulatory takings doctrine to extreme circumstances.

United States v. Riverside Bayview Homes, Inc. (1985), 474 U.S. 121, 126, 106 S. Ct. 455, 88 L. Ed. 2d 419. [12]

The Relators have contended that they should be permitted to segment their properties and assert a taking of their mining interests on the ground that the right to mine coal is a separate,

identifiable legal interest in real property under Ohio law. However, the U.S. Supreme Court has explicitly ruled that this argument cannot be relied upon to circumvent the property as a whole rule. In *Keystone*, the plaintiffs made exactly the same argument as the Relators in this case, arguing that they had suffered a taking of their "support estate" under Pennsylvania law. The Court rejected the effort to segment the property, stating that "our takings jurisprudence forecloses reliance on such legalistic distinctions." 480 U.S. at 498. Similarly, in *Penn Central*, the plaintiffs sought to establish a taking by alleging that New York law "deprivedthem of their 'air rights' above the terminal and that, irrespective of the value of the remainder of their parcel, the city has 'taken' their right to this superadjacent airspace, thus entitling them to 'just compensation' measured by the fair market value of these air rights." 438 U.S. at 130. Again, the Court rejected this legalistic argument, stating that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id*.

The Relators have pointed to footnote language in *Lucas*, *see* 505 U.S. at 1016 n. 7, which they read as supporting the view that a taking claimant can subdivide a property into legalistic sticks. However, *Lucas* did not, in fact, reject or alter the property as whole rule. The *Lucas* case involved an alleged taking of two contiguous building lots which the owner held in fee; there was no dispute in that case that the two lots represented the relevant property for the purpose of takings analysis. Furthermore, in several cases following *Lucas*, the Court has reaffirmed the property as a whole rule, contradicting the idea that *Lucas* altered this rule. In *Dolan v. City of Tigard* (1994), 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304, the Court addressed whether a regulation limiting development along a stream corridor would effect a taking of the owner's property. Applying the property as a whole rule, the Court rejected the claim because the regulation did not limit the owner's ability to maintain a commercial business on another portion of the property. *Dolan*, 512 U.S. at 385 n. 6. Similarly, in *Concrete Pipe*, another post-*Lucas* case, the Supreme Court relied on the property as a whole rule in a unanimous decision rejecting the argument that a federal law increasing a firm's pension liability effected a taking.508 U.S. at 644.

The Relators also have cited several lower federal and state court decisions to support the theory that their legal interests in coal represent the relevant property unit for the purpose of takings analysis. Upon careful analysis, none of these cases provides meaningful support for Relators theory.

First, the decision in *Whitney Benefits Inc. v United States* (Fed. Cir. 1991), 926 F.2d 1169, *cert. denied*, 502 U.S. 952 (1991), does not support the Relators attempt at segmentation.One of the two plaintiffs in that case possessed only a mining interest and therefore its mining interest self evidently represented its property as a whole. The other plaintiff had purchased a limited amount of the surface estate in fee in order to facilitate its planned mining operations.Under these unique facts, the court said that the government defendant could not redefine the relevant property by pointing to the owner surface ownership.In these circumstances, the court said, the purchase of the parcel to facilitate mining was clearly a part of the investment backing for [the claimant] expectations, not unlike a purchase of mining equipment.

Nor does the decision in *Bellville Mining Co., Inc v. United States* (S.D. Ohio 1991), 763 F.Supp 1411, 1419-20 *aff d in part, rev d in part*, 999 F.2d 989 (6th Cir. 1993), provide any support for Relators position on the relevant property issue.That decision simply holds that where an owner possesses only a mineral interest that interest represents the relevant unit of property for the purpose of takings analysis.The plaintiffs in that case held no properties other than a mineral interest. Therefore, the decision simply does not deal with the question of whether mineral interests can be artificially segmented off from the owner other interests in the property.

Finally, amicus OEC acknowledges that the ruling of the Pennsylvania Commonwealth Court in *Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania* (Pa. Commw. Ct. 1998), 719 A.2d 19, appeal pending, supports the Relators position on the property issue. However, the

Commonwealth of Pennsylvania has filed an appeal from that ruling in the Pennsylvania Supreme Court. The Commonwealth is arguing that the trial court erroneously disregarded the property as a whole rule. Thus, the *Machipongo* trial court decision hardly represents meaningful authority in support of Relators position.

Upon reflection, it is hardly remarkable that Relators would seek to rely on an extreme and unsupportable definition of the relevant property for the purpose of takings analysis. Their obvious litigation objective, after defining the relevant unit of property narrowly, is to establish that they have been denied all use of their property interests.By proceeding in this fashion, Relators hope to establish the State liability for a taking without actually demonstrating that the mining interests at stake have significant market value or that the designation of the area as unsuitable for mining has had any discernible, much less a substantial, economic impact on them.The Relators previous filings in this case make clear that they hope to establish a taking regardless of the weakness of their case on economic injury. *See, e.g*., Plaintiff-Relators Reply Brief (filed September 25, 2000), at 43 (Regardless of the value [of the coal interests] ultimately determined by a jury, Relators right to compensation is clear.).

Fortunately, a proper application of the property as a whole rule bars Relators from attempting to establish a taking based on such a thin showing.

Proposition of Law No. IV.When an "Unsuitable for Mining" Designation Only Affects a Small Portion of a Property Owner's Land, a Taking Has Not Occurred Under the "Property as a Whole" Rule.

Applying the property as a whole rule correctly to the facts of this case demonstrates that the "unsuitable for mining" designation affected only a small portion of the property of each of the Relators. Therefore, the Relators have failed to establish a taking of their property. **A. Where Relators Own Both Mining and Surface Interests, Both Interests Have to Be Considered As Part of One Unit of Property For the Purpose of Determining Whether a Taking has Occurred.**

The Court of Appeals correctly applied the property as a whole rule insofar as it concluded that, where the Relators hold both surface rights and subsurface mining rights, these rights have to be considered parts of one unit of property.As the Court said, [w]here an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking because the aggregate must be viewed in its entirety. *State of Ohio ex rel., R.T.G., Inc. v. State of Ohio* (App. A-16), citing *Keystone* and *Andrus*. Many decisions support this ruling. In particular, in *Hodel*, 452 U.S. at 296, the Supreme Court said the alternative uses to which coal-bearing lands may be put precluded the conclusion that federal restrictions on coal mining deprived owners of economically viable use of their property. *See also, Goldblatt v. Hempstead* (1960), 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, (prohibition on use of property for sand and gravel operation not a taking in the absence of showing that regulation reduced, much less destroyed, the value of the property for other purposes); *Daddario v. Cape Cod Commission* (1997), 425 Mass. 411, 681 N.E.2d 833, *cert.denied*, 522 U.S. 1036 (1997) (rejecting a takings challenge to a regulatory prohibition on mining a 70-acre property, given that the record shows that the property has substantial value for alternative uses").

The Court of Appeals correctly recognized that this application of the property as whole rule leads to the conclusion that the Haughts (with respect to all their properties at issue in this case) and RTG, Inc. (RTG) (at least with respect to certain of its properties, apparently including Tracts A, B, F, G, H,) have not suffered a taking. As the Court of Appeals said, As for the property to which the Haughts own surface rights, such property consists of pastureland and woodlands.The Haughts have their residence on such land as well as oil and gas wells. The Haughts have raised cows, cut timber and grown hay on their land. *State ex rel., R.T.G., Inc.,* (App. A-18). As for RTG, in addition to having mined over 100 acres of the property in which they possess both surface

and subsurface rights, it retains at least two home sites, a house and a barn, woodland, pastureland and tillable land.

Id. Accordingly, based on the property as a whole rule, the takings claims of these Relators must be rejected.

B. Contiguous Mining Property Interests Represent Pieces of a Single Property for the Purpose of Takings Analysis.

On the other hand, the Court of Appeals misapplied the property as a whole rule by assuming, without discussion or analysis, that each individual tract of property included in the area designated as unsuitable for mining represented a distinct property for the purpose of takings analysis. The legal labels attached to particular interests or individual parcels included within a single property are not dispositive for takings purposes. Therefore, the real question, with respect to each individual Relator with interests in more than one tract in the area, is whether these holdings represent distinct properties or whether they represent parts of a single property.

The recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *District Intown Properties Limited Partnership v. District of Columbia* (D.C. Cir. 1999), 198 F.3d 874, *cert. denied*, 121 S.Ct. 34 (2000), offers a useful analytic framework for addressing the property issue in the horizontal dimension. The case involved a takings challenge to the historic landmark designation of an apartment complex fronting on one of Washington, D.C. s most famous avenues.A key question in the case was whether the relevant property included both the site of the apartment building itself and the owner contiguous but legally distinct parcels slated for townhouse development. To support the conclusion that the case involved a single property, the court relied upon three key factors: the degree of contiguity of the different parcels, the dates of acquisition of the different parcels, and the extent to which the property had been treated as a single unit. *See Id*. at 880.

Application of these three factors demonstrates that all of the different property interests held by Relator RTG in the area designated as unsuitable for mining represent parts of a single property for the purpose of takings analysis. These include Tracts A, B, C, F, G, and H on the map attached to the Magistrate decision.

First, the contiguity factor obviously weighs in favor of treating all of these tracts as part of a single unit in the horizontal dimension. All of RTG mining and fee interests in each of these different tracts form a single contiguous unit. RTG obviously assembled all these differenttracts into a single unit in order to carry out a single comprehensive mining operation.Second, the dates of acquisition of the tracts also support treating them as a unit. RTG acquired all of the tracts over a period of about six years in order to create a single property on which it could carry out its mining operation. The fact that the parcels were not acquired on precisely the same date does not alter the fact that the acquisitions were part of a coordinated program designed to create a single property. *See Forest Properties, Inc v. United States* (Fed. Cir. 1999), 177 F.3d 1360, *cert. denied*, 528 U.S. 951 (1999) (treating portions of a 62-acre property acquired at different times as part of single property where the purchaser acquired the portions in order to conduct a single development project). Finally, it is apparent that the owner treatment of the property weighs in favor of defining these tracts as a single property, given that RTG has consistently managed all of the tracts as a unit for the single purpose of conducting mining.

Applying the property as a whole rule in the horizontal dimension (as well as in the vertical dimension), itbecomes doubly obvious thatRTG has not been denied all economically viable use of its property. RTG already has made substantial economic use of property. It has already extracted 440,000 tons of coal from the property.And, as discussed in the preceding section, RTG retains the option to engage in numerous surface uses on the property.[13]

The same approach to the definition of the relevant property in the horizontal dimension applies to the contiguous holdings of the Haughts and the Rossiters (Tracts C, D, and E).In the case of the Haughts, at least, this definition of the relevant parcel reinforces the conclusion that there has been no taking of their property. As discussed above, the Court of Appeals concluded that the availability of surface uses precluded a finding of a taking with respect to each tract held by the Haughts. Treating the three tracts held by the Haughts as a single unit, as required by the property as a whole rule, reinforces the conclusion that the Haughts have not been denied all economically viable use of their property.[14]

C. Mining Interests That Are Contiguous to, yet *Outside*, Other Areas Designated as Unsuitable For Mining Must Be Considered When Determining Whether a "Complete" Taking Has Occurred.

The Court of Appeals also erred in another respect in defining the relevant property for the purpose of takings analysis. The Court apparently assumed, in line with the Relators allegations, that only property interests included within the area designated as unsuitable for mining should be considered in evaluating the takings claims. But just as Relators are not permitted to artificially segment contiguous parcels *within* the area designated as unsuitable for mining, they also are not permitted to segment contiguous parcels simply because they happen to be *outside* the designated area. *Cf. Concrete Pipe*, 508 U.S. at 643 (aclaimant's parcel of property [cannot] first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable).

There are apparently three instances in which Relators hold mining interests in properties which are outside the area designated as unsuitable for mining but which are contiguous to one or more of the properties which Relators claim have been taken.First, RTG holds the so-called 100-acre Gilmore tract immediately to the west of the designated area. Second,RTG has leased an area for coal mining immediately to the north of the designated area. Third, a significant portion of Tract D held by the Rossiters is in section 5 (not sections 7 or 8) and therefore is outside the designated area. These facts reinforce, once again, the conclusion that RTG cannot demonstrate that it has suffered a taking because RTG has not been denied all economic use of its property. In the case of the Rossiters, the fact that a portion of their interests are outside of the designated area, combined with the fact that a portion of their interests are above elevation 820 feet (as discussed below), demonstrates that they too have not established a taking.

Because the Whole Property Must Be Considered Under a Takings Analysis, When a Portion of a Property Owner's Land is Not Subject to an "Unsuitable for Mining" Designation Because of its Elevation, a Taking has Not Occurred.

Finally, the Court of Appeals erred in its analysis of how these takings claims are affected by the fact that the designation as unsuitable for mining only affects lands below elevation 820 feet.In its brief filed in the Court of Appeals, the State contended that the alleged taking of the Haughts and the Rossiters property interests did not affect the entirety of their properties because a portion their properties were above elevation 820. The Court of Appeals responded to this argument by stating that the Magistrate taking determination applied only to the land designated as unsuitable for mining that land lying below the eight hundred twenty foot contour elevation. The Magistrate did not find a taking as to the property above that elevation. *State of Ohio ex. rel., R.T.G., Inc.,* (App. A-15). This analysis missed the point of the State argument and is plainly erroneous.

Under any conceivable interpretation of the property as a whole rule, the Court was required, at a minimum, to consider each Relator mining interests in each tract as a single property. Otherwise, these Relators would be permitted to do exactly what the Supreme Court has said takings claimants may not do: divide what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. *Concrete Pipe*, 508 U.S. at 643.The Court of Appeals error apparently affects its takings analysis with respect to the mining interests held by the Rossiters and the Trust in Tracts C, D, E. About 94 acres out of a total of

317 acres in these tracts are above elevation 820 feet and therefore are available to be mined.For this additional and independent reason, these Relators cannot establish a total denial of the economic use of their property interests and therefore cannot establish a taking.

Proposition of Law No. V.

When, At the Time of Purchase, a Property Owner is Aware of Possible Restrictions That May Be Placed on the Land, the Subsequent Implementation of Such Restrictions Does Not Create an Unexpected and Unfair Economic Burden on the Property Owner.

In addition, the claims of most of the Relators must be rejected because they lack the kind of investment-backed expectations necessary to support a valid taking claim. All of the Relators (with the exception of the Haughts) purchased their properties *after* the Ohio coal mining law was already in place. Therefore, they had actual or at least constructive notice, at the time they purchased the properties, of the Ohio law barring coal mining in areas designated as unsuitable for mining. Because these Relators purchased their properties with their eyes wide open, they cannot contend that this preexisting law imposed an unexpected and unfair economic burden rising to the level of a constitutional taking.

It is well established that a lack of investment-backed expectations bars a regulatory taking claim. As this Court recognized in *Community Concerned Citizens, Inc. v. Union Township Board of Zoning Appeals* (1993), 66 Ohio St. 3d 452, 457, 613 N.E. 2d 580, 585, a regulatory restriction does not effect a taking if the new restriction simply clarifies an existing regulation. This holding is consistent with numerous U.S. Supreme Court decisions recognizing the importance of the expectations factor in takings analysis. *See*, *Ruckelshaus v, Monsanto* (1984), 467 U.S. 986, 1005, 104 S. Ct. 2862, 81 L. Ed. 2d 815; *Penn Central*, 438 U.S. 104. Numerous state and lower federal courts have rejected regulatory takings claims based on a lack of investment-backed expectations. *See, e.g.*, *M & J Coal Co. v. United States* (Fed. Cir. 1995), 47 F.3d 1148, 1154, *cert. denied*, 516 U.S. 808 (1995); *Gazza v. Department of Environmental Conservation* (1997), 89 N.Y. 2d 603, 679 N.E. 2d 1035, *cert. denied*, 522 U.S. 813 (1997); *State of Florida v. Burgess* (Fla. Dist. Ct. App. 1st Dist. 2000), 772 So. 2d 540.

The significance of investment expectations in takings analysis is demonstrated by the landmark case of *Lucas*, 505 U.S. 1003.Mr. Lucas purchased two coastal lots for development for approximately $1,000,000. Two years *after* Mr. Lucas purchased the property, the State of South Carolina enacted new coastal legislation restricting development along the ocean shore. This new law, according to the findings of the trial court, had the effect of making Mr. Lucas property valueless. In these circumstances, the Supreme Court ruled, Mr. Lucas made out a prima facie case that he suffered a constitutional taking.

A taking claim obviously appears in a completely different light if the taking claimant purchased the property *after* the regulations were in place and with *prior* knowledge of how the regulations would limit possible uses of the property. As the U.S. Court of Appeals for the Federal Circuit stated in *Loveladies Harbor, Inc. v. United States* (Fed. Cir. 1994), 28 F.3d 1171: In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of the economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it. *Id*. at 1171. *See also Id*. (a taking claim is barred as a matter of law when the owners cannot carry the burden of demonstrat[ing] that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime). It would be unfair to the public to require that tax dollars be used to compensate an owner for an alleged loss in property already reflected in the discounted price the owner paid for the property. On the other hand, there is no unfairness in denying compensation to a claimant who purchased property with notice.

Rejection of the Relators taking claims based on a lack of investment-backed expectations is particularly appropriate given the facts of this case. First, Relators purchased these property interests, not for some generalized investment purpose, but for the specific purpose of conducting coal mining.In some cases the Relators acquired leases granting only coal mining rights. Because the Relators made these investments for the specific purpose of conducting coal mining, they had special reason to know about existing regulatory restrictions on coal mining.

Second, the Relators investments in some of the properties at issue in this case were extremely modest.Rather than acquiring fee or partial interests outright, in some instances the Relators entered into lease arrangements under which most of the lease payments were dependent upon whether the Relators actually mined coal from the property in the future. In this fashion, the Relators assumed only a small portion of the risk that mining would not be permitted on the properties.

Finally, rejection of these takings claims based on a lack of investment-backed expectations is particularly appropriate because the Relators had special reason to understand that the exploitation of these property interests would be subject to regulatory restrictions.Coal mining has long been recognized as an activity subject to extensive regulation. *See*, *United States v. Blue Diamond Coal Co.* (6th Cir. 1981), 667 F.2d 510, 512, *cert. denied*, 456 U.S. 1007 (1982). Thus, Relators, who acquired these property interests for the specific purpose of conducting coal mining, are hardly in a position to claim unfair surprise at the fact that they have been subjected to regulatory restrictions. *Cf.*, *Concrete Pipe*, 508 U.S. at 645 (observing that those who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end).

Proposition of Law No. VI.When the Proposed Use of Property Would Unreasonably Cause Harm to Groundwater Used by Neighboring Property Owners, the Restriction of Such Use is Not a Taking as it Simply Parallels the Restrictions Imposed By the Background Principles of State Nuisance Law.

Finally, assuming for the sake of argument that any of Relators takings claims could overcome the procedural and substantive bars outlined above, at least certain of the Relators claims are precluded under background principles of Ohio nuisance law.

In *Lucas*, the U.S. Supreme Court ruled that, regardless of whether a claimant might otherwise be able to establish a taking on some theory, the claim must be rejected if the property interest which was allegedly taken was not part of the owner title to begin with. 505 U.S. 1029. In other words, the Court ruled that a property owner cannot successfully assert a taking claim if the challenged regulatory restriction simply parallels the restrictions already imposed on the owner under background principles of state property or nuisance law.

In *Cline v. American Aggregates Corporation* (1984), 15 Ohio St. 3d 384, 474 N.E. 2d 324, this Court adopted the reasonable use doctrine outlined in Restatement of the Law, 2d, Torts, Section 858, in order to resolve conflicts over percolating ground water. The Court ruled that a property owner has no right to exploit or otherwise affect the percolating groundwater beneath his property if such action unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure. *Id*. at 327, 15 Ohio St. at 387.In adopting this rule, the Court expressly repudiated the earlier, longstanding English rule, which absolved a landowner of any liability for interference with percolating groundwater. As the Court explained, the English rule was based on the older scientific view that it was impossible to determine the origins or direction of flow of underground water. The Court justified rejection of the older common law rule based on advances in the understanding of subsurface waters which now make it possible to describe, with some measure of confidence, the sources of interference with ground water supplies. *Id*. at 326, 15 Ohio St. at 386.

In this case, the Magistrate, based on a careful review of the record, determined that, at a minimum, a prohibition on coal mining within Tracts C, D and E, was warranted in order to prevent an unreasonable interference with the Village's existing drinking water wells. The evidence showed, based on the results obtained from monitoring wells, that drilling within 2000 feet of the wells (and below the 820 foot elevation) would be likely to adversely affect the Village's wells. As the Magistrate explained, a 2000-foot perimeter around the wells was necessary, based on the professional judgment of the Chief of the Division of Reclamation, to protect the cone of depression created by the Villages' pumping under normal operations. As the magistrate explained, this area simply protected the area of perceived present usage by the Village. The evidence also showed that a great deal of the water flow toward the Village's wells came from north and east, where Tracts C, D & E are located. Finally, the evidence showed that mining of the aquifer in areas adjacent to the wells would dramatically alter the underground stratigraphy, which could in turn permanently impede underground water flow. Although it is difficult to predict the effects of mining on the Village's drinking water wells with scientific certainty, the evidence was more than sufficient to show, by a preponderance of the evidence, that proposed mining in these several tracts would result in an unreasonable interference with the Villages' water supplies.

Despite the Magistrate carefully articulated findings on the nuisance issue, the Court of Appeals concluded that these regulatory restrictions could not be justified as to any Relator based on nuisance doctrine. The Court of Appeals offered two explanations for this conclusion. Neither explanation is persuasive.

First, the Court of Appeals accepted the argument that the State demonstration that it met the criteria for designating the area as unsuitable for mining under the Ohio coal mining law was insufficient, standing alone, to demonstrate that mining in the area would constitute a nuisance. This argument may or may not be correct, but it is completely beside the point.

The Magistrate very carefully stated that nuisance law justified rejection of claims arising from specific tracts in close proximity to the Village's wells (Tracts C, D, and E). The Magistrate did not seek to extend the nuisance finding to the entire area designated as unsuitable for mining under the statute. Thus it is simply irrelevant whether a determination that the statutory criteria have been met would be sufficient to demonstrate a nuisance.Indeed, the narrowness of the Magistrate nuisance finding strongly suggests that the Magistrate believed that the statutory criteria differed from the nuisance standard.

Second, the Court of Appeals concluded that the State was not entitled to rely on a nuisance defense to defeat the takings claims unless it could also demonstrate that it would have possessed sufficient grounds to obtain a common law injunction against the mining. Believing that the State could not demonstrate the kind of serious, impending harm necessary to obtain an injunction, the Court of Appeals rejected the nuisance defense.

The error in this analysis is the mistaken premise that a government defendant in a taking suit must demonstrate that it could obtain an injunction in order to be able to rely on the nuisance defense.In *Lucas*, the Supreme Court simply said that, in order to rely on the nuisance defense, the government must demonstrate that the challenged regulatory restrictions inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. 505 U.S. at 1029.Nothing in *Lucas* states that the defendant in a taking suit must demonstrate that it would have been entitled to an injunction if the activity had been allowed to proceed. Moreover, such a requirement would be completely unworkable. In a regulatory taking case, the government has prevented a particular proposed use of property. Thus, there is obviously no actual nuisance to consider enjoining. To require the government to show not only that the proposed use would have resulted in a nuisance but that the government would have been entitled to an injunction would involve the courts in almost hopeless speculation.

The importance of the distinction between requiring a showing that a regulated activity would likely have produced a nuisance and requiring a showing that the government could have obtained an injunction is illustrated by the principal decision relied upon by the Court of Appeals in its analysis of the nuisance issue, *State ex rel. Chafin v. Glick* (1960), 113 Ohio App. 23, 177 N.E. 2d 293. In that decision, the Court defined a nuisance, in straightforward terms, as belonging to that class of wrongs which arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing material annoyance, inconvenience, discomfort, or hurt. *Id*. at 26, 177 N.E. 2d at 296, citing 66 Corpus Juris Secundum (1988), 727, Nuisances, Section 1.On the other hand, in a separate section of the opinion, the Court said that, [i]n order to justify the granting of equitable relief against a nuisance, there must be an actual, and, according to the decisions on the question, there must be a real, material, positive, substantial, serious, and permanent, or potentially permanent, injury, or an appreciable interference with the ordinary enjoyment of property, physically, or with the ordinary comfort, physically, of human existence. *Id*. at 27, 177 N.E. 2d at 297, citing66 Corpus Juris Secundum (1988), 872, Nuisances, Section 111b. The Court of Appeals plainly rejected the nuisance defense, not because the State could not demonstrate the likelihood of a nuisance, but because the Court believed the State could not demonstrate that it would have been entitled to equitable relief. The Court of Appeals applied too demanding a standard and accordingly erred in rejecting the Relators nuisance defense.

CONCLUSION

For the foregoing reasons, the Ohio Environmental Council respectfully urges this Court to affirm the judgment of the Court of Appeals insofar as it rejected the Relators takings claims and to reverse the judgment of the Court of Appeals insofar as it upheld the Relators takings claims.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Amicus Curiae The Ohio Environmental Council, In Support Of The State of Ohio was sent by ordinary U.S. mail this 27th day of June, 2001 to:
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Footnotes:

[1] With the enactment of Sub. H.B. 601 on June 14, 2000, the former Division of Mines and Reclamation merged with the former Division of Oil and Gas, and became the Division of Mineral Resources Management.

[2] "Supp." refers to the Supplement filed with this brief pursuant to S. Ct. Prac. R. VII."App." refers to the Appendix attached to this brief pursuant to S. Ct. Prac. R. VI(B)(5).

[3] Certain activities, such as mining, can adversely affect the long-range productivity of the Village's water] well[s], the aquifer and the recharge area. For example, excavated mine pits are dewatered, creating a cone of depression which may intersect the cone of depression of an adjacent [water] well. This dewatering may also reduce groundwater levels, at least temporarily.During reclamation the original stratified deposits removed during excavation are replaced with 'mine spoil.' Mine spoil is a mixture of the excavated material and is less permeable that the original stratified material. This can affect the water storage capacity and water transmission ability of the aquifer and recharge area. * * *" *Village of Pleasant City v. Division of Reclamation, supra* at 313-314, 1105 (emphasis added, footnote omitted).

[4] The property on which the water works was developed is literally across the street from one of the leases that the appellate court has ordered the State to appropriate.

[5] The State of Ohio's expert, Truman Bennett, has been evaluating intermittently the Village's aquifer for approximately 15 years. (Supp. 00002-00004). He is the Managing Principal for the firm of Bennett & Williams.He has over forty years of experience as a hydrogeologist in the development of water supplies, including the public water supplies for the Cities of Columbus (Ohio), Sioux Falls (South Dakota) and Pella (Iowa). Mr. Bennett has conducted hydrologic evaluations in many foreign countries.(Supp. 00226).

[6] Relators' expert identified the boring logs/exploratory holes Nos. 172, 173, 174, 175 and 176 as the location of the significant sand and gravel deposits. (Supp. 00045-00046, 00463-00464, 00467, 00642). These boring logs, and their corresponding important sand and gravel deposits, are located on Tracts D and E.(App. A-60)

[7] Various maps in the Supplement show the approximate location of the lands unsuitable designation area, the Villages of Pleasant City and Fairview; the Village's wells; R.T.G., Inc.'s mine site; and the monitoring wells. (Supp. 00640-00641). Monitoring wells MW-1 and MW-4 are located on the Haught property. (Supp. 00551).

[8] Approximately 22 of the 100 affected acres were located on the Gilmore property in Section 7. (Supp. 00295).The Gilmore property was not included in Relators' complaint.

[9] Lands above 820 feet in elevation included forty acres on Tract C (Haught property) and seventeen acres on Tract F (R.T.G. property) (Supp. 00293-294). Lands outside of Sections 7 and 8 included 15 acres immediately north of Tract C and 39 acres (aka 42.7 acres) on Tract D (former Haught property).(Supp. 00620-621, 00634, 00643).

[10] Since the beginning of the mandamus litigation, RTG has undertaken several prophylactic measures to place actual title to the coal rights in RTG. For example, as recently as June 28, 1999, RTG acquired coal rights on Tracts A, B and F by Sheriff's Deed; yet that measure did not extinguish an outstanding one-half interest in the coal still held by L.G. Sallady, who is not a party to this case. *See* Magistrate's Report and Recommendation, App. A-35 through A-37.

[11] It is noteworthy that if the Rossiters and the Trust were allowed to join in this suit after the limitations period has run, then there are still others who possess some type of interest in certain of the properties which are the subject of this action who might, under Relators view, also be entitled to join in this action, presumably even at this late date. These additional Relators might include, for example, the Salladays (who have a partial interest in parcel B) and the Penn Central Company (which has a partial interest in parcel C). It would obviously contradict the basic policy underlying statutes of limitations to subject the State to this type of continuously mushrooming litigation.

[12] In prior briefing in this case, Relators, echoing a theme articulated by many property rights advocates, have contended that they are not challenging the authority of the State to declare certain areas off limits to surface coal mining, but merely seeking payment of compensation as a condition of the State pursuit of that objective. This argument is specious.First, to require the government to pay in order to regulate fundamentally alters the intended character of the governmental action, from a restriction on use to a purchase of property. Second, as a practical matter, government, particularly at the state and local levels, could not conceivably pay for every effect regulatory action has on property interests.Thus, a broad compensation rule would have a direct and immediate effect on the permitted scope of legislative action. *See generally*, J. Peter Byrne, Regulatory Takings and Judicial Supremacy' (2000), 51 Ala. L. Rev. 949, 954. The reality is simple: acceptance of Relators expansive takings theory would impose such an enormous potential financial liability on the State that the State would have to stop regulating where strip mining can and cannot occur.

Beyond its unworkabality, an expansive reading of the Takings Clause would be fundamentally unfair because it would ignore the enormous givings land owners receive as a result of effective regulatory controls and other government actions. *See* C. Ford Runge, The Congressional Budget Office Regulatory Takings and Proposals for Change: One-Sided and Uninformed (1999), 7 Environmental Law & Practice 5 (collecting the results of numerous empirical studies documenting the extent of governmental givings in the land use field).

[13] While it is unnecessary for the Court to address the issue, it could be contended that a more expansive definition of the relevant property should be applied to RTG. The record apparently shows that the mining area adjacent to the Village which is the subject of this case is only one of several mining operations conducted by RTG in Guernsey County. In other cases, where a firm has held and managed geographically dispersed properties as part of a single business operation, the courts have overlooked the lack of physical contiguity and treated the properties as part of asingle unit for the purpose of takings analysis. *See Naegele Outdoor Advertising, Inc v. City of Durham* (4th Cir. 1998), 844 F.2d 172, 178 (relevant property consisted of billboard company's separate billboards throughout metropolitan area); *Ciampitti v. United States* (1991), 22 Cl.Ct. 310, 320 (relevant property consisted of non-contiguous lots owned and managed by developer as part of a single development business). Applying this analysis in this case, the unit of property for the purpose of analyzing RTG taking claim very arguably should include all of its mining properties that make up its business including, at a minimum, all of its mining properties in Guernsey County.

[14] On the other hand, the conclusion that mining interests in contiguous tracts should be treated as part of one property is of little significance in the case of the Rossiters, who hold only mining interests, none of which have been exploited to date. However, the Rossiters takings claim is barred on a number of alternative grounds, including the that fact that the Rossiters hold mining interests in properties outside the area designated as unsuitable for mining but adjacent to certain of their properties within the designated area, and the fact that the designation only restricts mining below elevation 820 feet, as discussed below. Again, however, the Trust claim fails on alternative grounds, including the statute of limitations defense and a lack of investment-backed expectations sufficient to support a taking claim.