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[redacted]

Dear John--

Enclosed is [what is *mighty* close to] what I will read next Sunday. (Of course I will not read any of the footnotes.)

I shifted a lot of text to footnotes from the version I read to another group the week before last. I wanted to keep the text available, and of course it benefits you because you will be able to better understand what I'm driving at.

And I do hope your wife decides to come, because so much of my opinions are rooted in sociology rather than economics.

Sincerely,

Jack

"Oh, the hills, the beautiful hills . . ."

Today, the hot-button environmental issue in West Virginia is mountaintop removal to mine coal. In the 1972 referendum, I voted for the abolition of surface-mining. I hated what it was doing to the hills of southwestern West Virginia, where you and I live.

I have changed my mind. I think the arguments against mountaintop removal are even weaker than the arguments against strip-mining before the Surface Mining Control and Reclamation Act of 1977, commonly called "Smack-Ruh". [1] West Virginia has a copy-cat version for coal mining. [2]

On January 9, we heard John Taylor's heart-felt arguments against mountaintop removal. Two days later, I called John to make sure he would be back today -- with his wife if possible. I undertook to send him an advance copy of this paper, so as to sharpen our dialogue.

This paper deals only with the ten southwestern coal counties of our State. The coal mined here is the best in the world, whereas the northern coal field has the severe problem of high sulphur content.

Now I want to show you part of a video given to me by John Payne, an environmental engineer with Pocahontas Land Corporation. Pocahontas is the largest landowner in West Virginia. [3]

I'd show the whole video if we had more time, but we don't.

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1 30 U.S.C. §§ 1201 et seq.

2 W. VA. CODE §§ 22-3-1 et seq.

3 Pocahontas in the land-owning subsidiary of Norfolk Southern Corporation. Norfolk Southern itself resulted from a merger of two major railroads, the Norfolk & Western and the Southern.

Four weeks ago, John Payne and I toured a mountaintop removal project in Mingo County. John's video was mostly made this past Summer. It covers the land we toured this winter. You'll be seeing two permit areas. The first, which is older, is going through reclamation; the second and newer permit area is still active. They cover about a square mile.

[START THE VIDEO]

Obviously, the big trees are undisturbed forest.

Medium green means the reclaimed land in the older permit area.

Light green means hydroseeding for erosion control during the active mining work.

0:20 *We are coming to views of valley fills.*

Note the white drainage channels on either side. Note also the horizontal drainage benches connecting the white channels.

1:00 *Darker is the older permit area reclaimed, and lighter or sandy is the active new permit area.*

2:03 *Here is a coal seam -- more or less horizontal, like all the other sedimentary rock in southwestern West Virginia.*

2:25 *This is the preparation plant -- to clean the coal for shipping.*

[COUNT TO ONE THOUSAND AND FIVE TO GET TO . . .]

5:20 *Get ready for major blasting-and note the truck at the back edge of the cleared land.*

6:40 *Talk about beautiful!*

[STOP WHEN THE PANORAMA OF UGLINESS IS OVER.]

The project I toured isn't anywhere near the biggest, but it's plenty big enough.

- The new permit area will remove eighty-nine million cubic yards "banked", that is, as it was in the hill. It'll result in a hundred thirty million cubic yards of fill, which will be mostly valley-fill, but partly to return the hillsides to what the law calls "approximate original contour".

  All three stages of Yeager Airport moved only nine million cubic yards -- less than one-twentieth of the active part of the Pocahontas project.

- The blasting uses thirty tons per day of ammonium nitrate. The destruction of the Murrah Federal Building in Oklahoma took one and a half tons -- five percent of the explosive used daily in the work I saw.

* * * * * * *

The time has come to talk about Judge Haden's decision on mountaintop removal. [4] The plaintiffs brought suit to rein in mountaintop removal, and they won. Judge Haden ruled that federal and State regulations prohibited what is known as valley-fill placed within one hundred feet of any part of a "perennial stream" or an "intermittent stream".

A perennial stream is one that never runs bone dry. An intermittent stream is one that *either* drains a square mile or more of watershed, *or* lies below the local water table for part of the year. The "or" part means that

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4 *Bragg v. Robertson*, Civil No. 2:98-0636 (S.D. W. Va., 20 Oct. 1999).

after a spell of wet weather, the stream is fed by ground-water as well as runoff from rain and snow. [5]

Judge Haden didn't invent the hundred-foot buffer zone. It was already in the regulations of both the Office of Surface Mining of the United States Department of the Interior ("OSM") and the Division of Environmental Protection of the West Virginia Bureau of the Environment ("DEP"). The rules allow variances -- but not if the land disturbance will "adversely affect the water quantity and quality or other environmental resources of the stream". [6] Judge Haden held that covering over *part of a stream* necessarily wrought such adverse effects.

To sum up, Judge Haden held that OSM and DEP had always misinterpreted their own rules, and had to stop it.

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5 The OSM and DEP definitions of "perennial" and "intermittent" streams are identical, as follows (30 C.F.R § 701.5; 38 C.S.R. § 2):

> "*Perennial stream* means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. * * *."
>
> "*Intermittent stream* means–
> "(a) A stream or reach of a stream that drains a watershed of at least one square mile, or
> "(b) A stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge."

6 Judge Haden quoted (mimeo at 6-7) from a permit application which affirmed that the "normal flow and gradient of the stream will be adversely affected", and that "Fish migration and related environmental values will be adversely affected". He found as a fact that "buffer zone variances, without required findings, were granted for numerous valley fills."

OSM and DEP had decided that valley-fill was okay if it only filled *part* of a stream. [7] Judge Haden ridiculed the argument. "This interpretation," he wrote, ". . . leads to the *reductio ad absurdum* that miles of stream could be filled and deeply covered with rock and dirt, but if some stretch of water downstream of the fill remains undiminished and unsullied, the stream has been protected. The regulations provide otherwise." [8]

That's all he did, but that was plenty. In general, environmentalists went berserk with joy, while coal companies and the United Mine Workers simply went berserk.

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A question confronts us now: should the buffer zone rule be changed?

I think the answer is Yes. However, before I get to my reasons for change, I want to discuss the non-legal arguments for the rule as is.

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7 A general rule of administrative law is that judges will defer in close cases to an administrative interpretation, especially one of long standing. Judge Haden acknowledged the rule but found his way around it. Mimeo at 6-7.

There are other plausible arguments to support the OSM and the DEP, but they are complicated, and the Judge rejected them. As I read his decision, there were two keys to his reasoning. Mimeo at 16-22.

First, Judge Haden emphasized that the buffer-zone rule said nothing about parts of a stream.

Second, Judge Haden looked to the definitions in the regulations. The perennial stream definitions referred to "a stream or part of a stream". The intermittent stream definitions referred to a "stream or reach of a stream".

8 Mimeo at 16-17.

As-Is Argument Number One: valley-fills of perennial and intermittent streams destroy wildlife.

I think this is a silly argument. Even if a salamander or minnow or watercress is an endangered species, saving it is not worth the cost -- either sociological or economic. [9] I know of the philosophy that the web of life is seamless, and that public policy should forbid the extinction of any of God's creation. My rebuttal has always been a question: who mourns the extinction of smallpox germs?

In other words, I believe that people will always be more important than insignificant species whose only value is spiritual.

As-Is Argument Number Two: the blasting necessary for mountaintop removal damages nearby homes.

This argument is not silly, but I'd bet that meritorious claims are very rare.

As you know, most of my legal career was with Columbia Gas. I had to learn about what is known as vibration damage.

Some vibration damage is by shockwaves in the air. One of the telltales is that the facing windows go first. If you don't have window glass blown out or cracked, the surrounding wall won't be hurt by shockwaves through the air.

Some vibration damage is by shockwaves through the earth. It's the kind of damage an earthquake causes. If the building doesn't have the

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[9] As far as we know, endangered species do not inhabit the streambeds threatened by mountaintop removal. You can bet the plaintiffs have looked for 'em, but they didn't cite any. If they do, and if that stops even one project, I believe it'll be a new proof of the wrong-headedness of the federal Endangered Species Act, 16 U.S.C. § 1531 et seq.

telltales of earthquake damage, it hasn't been hurt by blasting shockwaves through the earth.

Historically, invalid claims greatly outnumber the meritorious claims of vibration damage. Anyone startled by an explosion or a blast immediately looks to see what's hurt, and most find bad stuff they had never noticed.

Blasting companies commonly have their personnel visit every building the blasting might conceivably damage. They tell the landowner what's gonna happen, and go through the building with the landowner, and make records of the settling cracks and other flaws. They tell the owners that when a blast occurs, they should document new or aggravated flaws. You know what? The number of blasting claims drops off to zilch after this kind of advance education.

In West Virginia, the most recent addition to Smack-Ruh is that surface mine operators must make "pre-blast surveys" [10] to inventory the defects in "man-made dwellings or structures" within half a mile of the surface mine permit area, or within seven-tenths of a mile from the blast site -- whichever is greater.

Based on my experience with Columbia Gas, I predict that blasting claims against surface mine operators will go way down.

As-Is Argument Number Three: mountaintop removal either damages or destroys water wells.

I don't know how many water well claims have been made. However many, I predict the number will decline as radically as the other blasting

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[10] 1999 W. Va. Acts c. 120, adding §§ 13a and 22a to W. VA. CODE §§ 22-3-1 et seq.

claims. The pre-blast survey must include detailed analyses of water supplies, particularly of water wells.

As-Is Argument Number Four: the coal companies are at fault for not recruiting new industrial and commercial projects to the reclaimed areas.

I think this is another silly argument. I doubt if anyone will put Toyota factories or chemical plants or professional sports arenas on reclaimed mountaintop removal sites. [11]

To sum up, I don't think much of the As-Is arguments. If you haven't, I'll tell you straight out: I think they're all embroidery of another As-Is argument -- an argument that the opponents never used in front of Judge Haden.

The cryptic As-Is argument is this: unless you're in the construction business, mountaintop removal is ugly. On January 9, John Taylor spoke to this, and quoted from Genesis to Revelation to suggest that mountaintop removal violates the commandments of God. I can't imagine anyone doubting his sincerity, but I disagree with his position.

Ugliness is an undeniable objection to mountaintop removal, but it has nothing to do with pollution of the earth. So I dismiss it as a matter of taste which should not govern policy.

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11 As far as I know, the existing sites are host to one public school, and one regional jail. There are also a few small-town malls and houses and other buildings on old strip-mine benches. That is small beer indeed.

Now you're ready for my arguments in favor of mountaintop removal, and indeed any kind of modern coal mining. They aren't any newer than the As-Is arguments, but I think they're better.

For lack of time, I have greatly condensed all of my arguments except the fifth. I have put them in footnotes so that John Taylor could see them.

Snyder's First Argument: the reclamation of mountaintop removal projects effectively stabilizes the disturbed areas.

Smack-Ruh has three stages for the release of a surface mine reclamation bond. Phase 1 comes after the area has been regraded; Phase 2 means that the area has been revegetated; and Phase 3 requires a waiting period of two years or more, until revegetation is proved to have been successful.

I saw an interesting little valley at right angles to the hollow below where we were standing in Mingo County -- maybe half a mile away.

On the south side of the little valley, two ugly highwalls defaced the mountain -- each thirty or forty feet tall, following the contours as far as you could see. They were left after an old strip-mining job, done before Smack-Ruh.

On the north side, there was a similar strip-mine reclaimed four or five years ago. I could see two strips of different vegetation than on the rest of the hill. On this side, the coal had been strip-mined *after* Smack-Ruh, and returned to what Smack-Ruh calls "approximate original contour", and then revegetated.

The difference was astonishing -- at least to me. [12]

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[12] Since Smack-Ruh in 1977, all surface mining -- mountaintop (continued...)

Snyder's Second Argument: reclaimed mountaintops can be, *and are being*, reforested for hardwoods as well as softwoods.

James Burger is a professor of forest soil science at Virginia Tech. He has co-authored at least five papers advocating surface mine reclamation to grow new forests. In 1994, he explained his advocacy: "Most of the

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[12] (...continued)
removal, strip-mining, augur-mining, and underground mining surface use -- has several constraints. Here are some of the most important.

- During the mining activity, flow controls and catch-basins are required to prevent downstream siltation. Before Smack-Ruh, strip-mining silted up a lot of streams like Coal River. No more!

- The slope of the face of a valley-fill cannot exceed forty-five degrees. Many natural slopes in West Virginia are a lot steeper. For example, on either side of the ridge of Bee Mountain in Boone County (where the fire tower used to be), the slopes are at least sixty degrees, maybe seventy -- and fully forested.

- Permanent drainage systems must be built into the area. As you saw on the video, drainage channels are constructed on each side of the face of a valley-fill. You also saw the horizontal benches connecting the drainage channels. They're sloped to carry run-off from rain and snow to the channels.

  These drainage systems prevent gullying on the face of the reclaimed slope. They also encourage faster and better revegetation. Thus they limit downstream siltation forever.

reclaimed surface-mined land in the Appalachian region cannot realistically be used for *anything* [--] other than growing trees." [13]

I think that statement is as true as a value judgment can be for the ten coal counties of southwestern West Virginia. [14]

Unlike the revegetation we see on the Interstate and Appalachian Highways, new forests are valuable to landowners.

On the project I toured, Pocahontas requires revegetation not only with grasses to stabilize the soil, but also with seedlings of trees. The company will get two hundred seventy-five "stems" per acre. On the older

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13 JOHN L. TORBERT, JAMES A. BURGER, & JAMES E. JOHNSON, COMMERCIAL FORESTRY AS A POST-MINING LAND USE 1 (Virginia Cooperative Extension Pub. No. 460-136, 1994).

14 Burger co-authored a 1998 article with William Maxey. They begin with a statement that I wouldn't have dreamed of before my Pocahontas tour:

> "Land reforestation[,] after being drastically disturbed by surface mining[,] can produce high-value commercial forests while providing watershed protection and wildlife habitat."

Burger and Maxey attacked the Smack-Ruh administrators for discouraging new forests. They wrote that appropriate reclamation "would result in a commercially-harvestable hardwood forest in about . . . [sixty] years, and a commercially-harvestable pine forest in about . . . [thirty] years." James A. Burger & William R. Maxey, *Maximizing the Value of Forests on Reclaimed Mined Land*, GREEN :LANDS 37 (Spring 1998).

On June 4, 1998, Maxey did a good deed: taking advantage of his position as the State Forester of West Virginia, he executed a "memorandum of understanding" with DEP that encourages surface mine reclamation for commercial forests. Its "Planting Plan Guidelines" cover the grading of the reclaimed land, the selection of the soil, the soil nutrients and ground covers, the species of the trees, and the planting and handling of seedlings.

reclaimed area, I saw hardwood saplings up to three feet tall -- white oak, black oak, red oak, birch, sycamore, and others. The very few softwoods included white pine, Virginia pine, and loblolly pine up to five or six feet tall. [15] The trees, in other words, doubled the cost of revegetation.

Pocahontas is not being noble. It's being capitalistic. Once the coal is gone, new forests are the only large-scale way for Pocahontas to make money off its land. Pocahontas prefers hardwoods -- because they make more money than softwoods. [16]

Snyder's Third Argument: mountaintop removal gets more coal mined.

On my tour, one of the fellows told me why Pocahontas had chosen mountaintop removal rather than underground mining. The former will

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15 Premium Energy budgeted six hundred dollars per acre for revegetation -- three hundred to hydroseed the ground cover, and another three hundred to plant the seedlings of the trees. The trees, in short, double the cost or reclamation.

Moreover, David Fletcher believes that he will have to spend another $150 per acre for replanting of trees to meet the Phase 3 bond release to the Pocahontas standards. A nearby landowner lets his cattle and horses on the reclaimed land, and they have eaten most of the tree seedlings on a third of the land planted to meet the Phase 2 revegetation requirement. I saw six or eight horses and a dozen or so cattle, and David has seen as many as twenty horses and thirty head of cattle.

No one has objected to the landowner's trespassing. I am certain that the reason is that Pocahontas and Mingo-Logan and Premium Energy are afraid the landowner would escalate his efforts -- not with cows and horses, but with dynamite.

16 The heart of the project you saw on the video has a master plan beyond mere reforestation. Five hundred acres will become a golf course. Pocahontas and its coal lessee are each paying ten cents per ton of coal to fund the cost of the course.

recover ninety-eight percent of the coal, whereas the latter would only recover seventy percent.

That is one hell of a difference.

Snyder's Fourth Argument: coal mining employs a lot of people, directly and indirectly.

At the end of 1998, the ten counties had twelve thousand four hundred mining jobs. About thirty percent were in surface mining.

Two weeks ago, John Taylor suggested that underground miners could take care of the demand for coal. In 1972, Jay Rockefeller ran for Governor on that argument, and both he and the strip-mining referendum lost. They even lost in southwestern West Virginia -- the very place where the voters know the most about coal mining of all kinds. These counties are full of what used to be called yellow-dog Democrats, and yet they voted against the abolition of strip-mining and helped to defeat Rockefeller.

The number of miners is going down. The fewer the miners, the fewer the people that the economy will support in the ten counties. This is bad for the miners, and for their families, and for all others nearby, and for West Virginia as a whole.

Snyder's Fifth Argument: mountaintop removal will help to continue the decline in coal-field population, which is the only long-term solution to poverty in the ten counties.

This is a direct counterpunch to As-Is Argument Number Four, which blames the coal companies for laying off the miners and yet failing to establish new industry. I've said the As-Is point is silly, and it's also wrong. John Llewellyn Lewis, the legendary president of the United Mine Workers,

had his grand vision in the 1920s: machinery could work as well for coal miners as for the employees at Ford Motor Company, by substituting fewer high-pay jobs for more low-pay jobs. [17]

For three-quarters of a century, the United Mine Workers have cooperated with the coal companies to bring in ever-better machinery, and ever-better standards of living for the miners.

I want to show you two tables to illuminate what all of you know in general about West Virginia's declining population. [18]

Table 1 has two curves. The blue curve is the population of the ten southwestern coal counties from 1950 through 1998, and the green curve is the population of the twenty-six counties that have had little or no coal production for the same period.

In 1950, as you can see, the southwestern counties had many more people then the twenty-six non-coal counties. But in 1998, the southwestern counties *lost* a fourth of their people, whereas the non-coal counties *grew* about fifteen percent.

At first blush, this looks like a good development.

Table 2 shows how awful the situation really is. The blue curve is the same blue curve as on Table 1 -- hundreds of thousands of population in the southwestern counties. The pink curve is tens of thousands of miners.

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17 ROBERT H. ZIEGER, JOHN L. LEWIS at 30-31 (1988), citing Lewis's own book, THE MINERS' FIGHT FOR AMERICAN STANDARDS (1925).

18 The figures are based on several of the annual WEST VIRGINIA BLUE BOOKS, the 1995-96 WEST VIRGINIA STATISTICAL ABSTRACT, and the records of the West Virginia Office of Mine Safety, Health, and Training.

TABLE 1

Population from 1940 through 1998 in Two West Virginia County Groups: (1) Ten Southwestern Coal-Mining Counties and

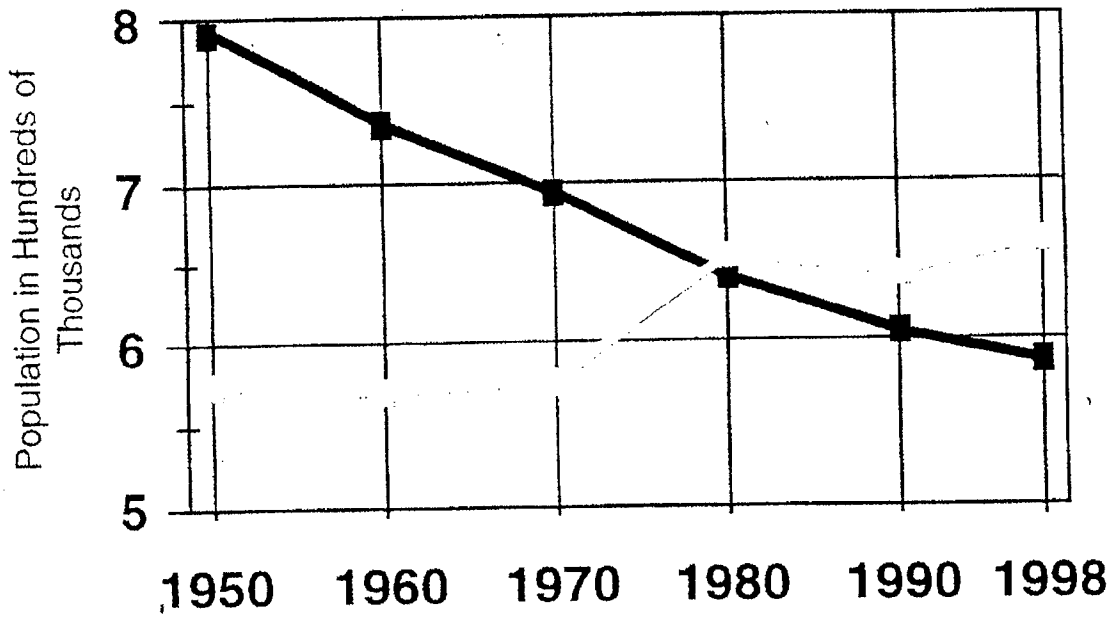
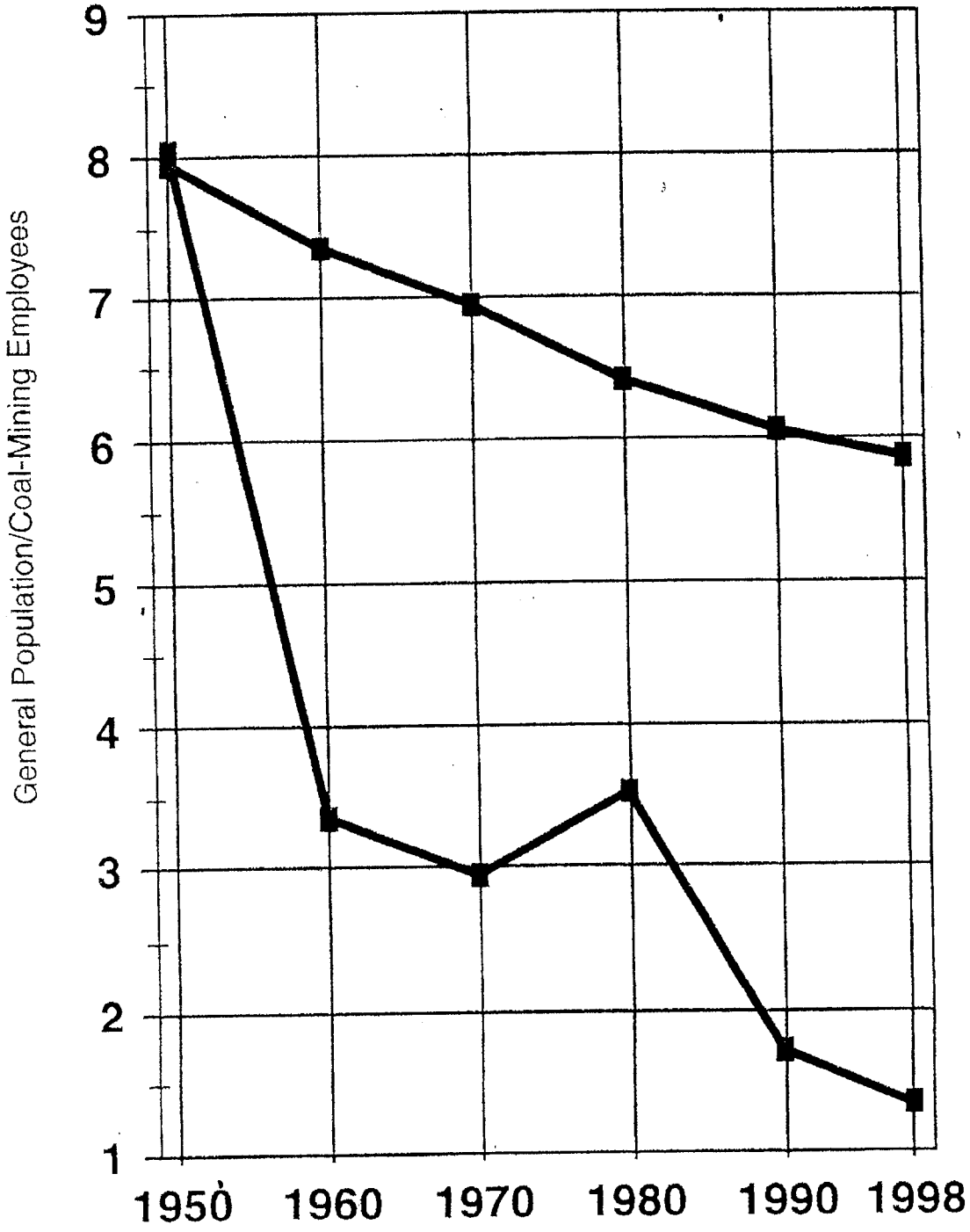


TABLE 2

Comparison of (1) General Population and (2) Coal-Mining Employment in the Ten Southwestern Coal-Mining Counties of West Virginia

Note: The graph indicates tens of thousands of coal-mining employees and hundreds of thousands of general population.



This Table 2 suggest to me that a healthy economy in the ten counties will support eight to ten people for every miner. Look at the 1950 figures -- eight hundred thousand people, and eighty thousand miners. Ten to one. [19]

Look at the huge imbalance today -- five hundred eighty-four thousand people, and twelve thousand four hundred miners. Forty-seven to one. Even if my eight-to-ten generalization is off by half, [20] that still leaves more than two-thirds of the people in ten counties weighing down the others.

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The core problem is too many people. Way too many people. Some coal people say that mining in West Virginia will be over by the year 2025 or so. [21] Some of the environmentalists are orgasmically happy with such a

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19 I realize that the eighty thousand miners were working a three-day week under the labor contract between the United Mine Workers and the Southern Bituminous Coal Association. However, the population had as yet changed very little from 1948, when the three-day week began.

20 If anything, my eight-to-ten generalization is optimistic. If you subtract Kanawha County because of its overall economic importance, and Mercer and Wayne counties because the mining jobs are relatively few, the other counties had a seven-to-one ratio of population to miners in 1950.

21 The short-term predictions come from the coal industry, but I don't know what evidence the predictors used. The 1998 BLUE BOOK at 842 tabulated almost 54 billion tons of "estimate recoverable reserves" remaining in West Virginia. Even if the current annual production 180 million tons could be doubled, the production would take a hundred and fifty years to exhaust

(continued...)

prospect. In the name of God, what do they propose for the unneeded people?

I want to offer five proposals. They may not sensible in political terms, but they're sensible to me. They're designed to hasten the depopulation of the ten counties -- and yet make a better life for the people most affected.

Proposal One: the State should systematically destroy decrepit houses in the coal fields.

One mechanism would be a rigorous enforcement of housing standards. The law on the books already gives this power to counties as well as cities, [22] and the State should give 'em money to beef up enforcement.

Some homeowners will be unable to afford to upgrade. In such cases, the State should pay the value of the house less the cost of demolition, give relocation assistance, and let the homeowner keep the land subject to a permanent easement prohibiting the erection of any buildings. [22]

Proposal Two: the State should make annual assistance grants for a period of years to low-income families who choose to relocate outside of West Virginia. If they came back, they'd lose their entitlement.

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21 (...continued)
the reserves. However, as Parker Smith pointed out in the discussion of the first edition of this paper, such reserve statistics are notoriously unreliable.

22 W. VA. CODE §§ 7-1-3n (counties), 8-12-13 (cities).

17 W. VA. CODE §§ 11-22-4 through -6 prescribe an analogous system to control outdoor advertising along highways.

Proposal Three: the State should offer free college education at State-supported schools to the coal-field kids whose families move out and stay out. Monetary grants should be made for those who want to attend UC, or Virginia Tech, or wherever. And I can't think of any good reason why similar assistance shouldn't be given to childless couples and single adults who go to college, except that the assistance would be in the form of loans to be forgiven over a five-year period if the folks left and stayed away.

The primary aim of my educational proposal is to encourage people to move. An ancillary goal is to show the children who return to college in West Virginia that they might come home if they can get good jobs.

Proposal Four: the State should condemn the land of stubborn people in the way of a permitted surface mine project, pay 'em the cost of relocation as well as the value of their property, and then sell the condemned land to the permittee or its landowner. The permittee and the landowner would guarantee to reimburse the State for its costs and expenses.

Here in Charleston, the Urban Renewal Authority has cleared an astonishing amount of run-down acreage. [23] I propose an analogue for the coal fields. Sure, some folks would have to move. So what? Who would countenance that every urban renewal project in the history of Charleston should have been blocked because one-tenth of one percent of the populace didn't want to move?

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23 W. VA. CODE §§ 8-24-36 et seq. is the State law on urban renewal. Municipalities have the right to use it or not.

Proposal Five: a family should have the right to qualify for assistance under two or more of the other proposals.

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To tell the truth, I've just about given up on the possibilities of progressive government in West Virginia. I do not believe we'll develop the political guts to lead to the kind of depopulation we need in the coal fields. It'll happen, but more slowly and more painfully than it ought to.

The principal argument against subsidized depopulation is that we'll lose the very folks we want to keep. The most self-reliant of the laid-off miners are long gone, and the most self-reliant still around would be the first wave of applicants under my proposals. Almost every kid with a grain of sense already leaves the southwestern coal fields as soon as formal education ends. The folks that are left, old and young alike, will be less and less able to go elsewhere. But by jingo, we *should* help the ones we *can* help.

"Oh, the hills, the beautiful hills." Indeed they are beautiful. None the less, they're not as beautiful as children with reason to hope for a better life. The State of West Virginia ought to be working on the social policies to help those children to move out and *get* a better life.

Instead, we are distracted, and our political leaders are distracted. The State adds more and more band-aids for fewer and fewer citizens, and all of us fuss -- fuss about how pretty our hills shall be.

23 Jan. 2000 **H. L. Snyder**

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