

Property Rights in a Sustainable World: More than Minerals and Surface

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§ 2.01. Introduction.

The nation's collective view of energy sources and what is necessary to produce energy has changed markedly during recent years. Whether one accepts data or theories that concern climate change and the impact of carbon dioxide and other greenhouse gases, leaders in government, business, and communities have publicly adopted those ideas. Moreover, newly empowered voices are questioning whether certain forms of energy production are worth the price paid in environmental disruption, and attention is focused on a green or sustainable energy economy. As a result, traditional producers and users of energy based on fossil fuels are facing major changes that may affect interests in coal, oil, and natural gas and related property. This chapter explores the concept of sustainability as applied to energy resources, then

examines how a trend toward sustainability may implicate property rights that are not yet well defined.

§ 2.02. Sustainable Development.

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹ A recent evaluation of the United States’ progress toward sustainability made 10 recommendations, which included suggestions that the United States “should systematically reduce its ecological footprint” and “must adopt, as soon as possible, greenhouse gas emission reduction programs . . .”² Traditional energy uses of fossil fuels may not fit well into this model of sustainable development due to the environmental disruption caused by extraction of the fossil fuels and the pollutants produced by their combustion. In addition, the supply of fossil fuels is finite.

[1] — Sustainability and Fossil Fuels.

For some commentators, the use of fossil fuels is inconsistent with the concept of sustainability.³ Some will argue that use of a fossil fuel, which by its nature is of finite quantity and quality, is not sustainable because if we burn a ton of coal today, then that coal will not be available for use by future generations. When the supposed impact of carbon dioxide and other greenhouse gases is added to this consideration it appears that the use of fossil fuels is not compatible with sustainable development because the use of those fuels may change the planet’s climate and adversely affect future generations.

The largest single source of carbon dioxide emissions is from utilization of fossil fuels. The EPA has summarized the anthropogenic release of carbon dioxide in the United States as follows:⁴

¹ U.N. Report of the World Comm’n on Environment and Development: Our Common Future, Ch. 2, ¶ 1 (1987)(hereinafter, the “Brundtland Commission”).

² *Agenda for a Sustainable America* 27 (John C. Dernbach, ed. 2009).

³ See, e.g., David M. Driesen, “Air Quality: The Need to Replace Basic Technologies with Cleaner Alternatives,” *Agenda for a Sustainable America* 244 (John C. Dernbach, ed. 2009)(“We must begin the process of phasing out the nonrenewable fossil fuels that lie at the heart of so many serious environmental problems.”).

⁴ U. S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2005*, 2 - 4 (2007)(comparing anthropogenic sources of carbon dioxide).