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PRESERVATION VERSUS PRIVATE RIGHTS: MINING IN THE NATIONAL PARKS AND FORESTS

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INTRODUCTION

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) was enacted by President Carter on August 3, 1977.[1] The purpose of SMCRA was the establishment of a nationwide, environmentally effective, and administratively realistic program to protect society and the environment from the negative effects of surface coal mining operations.[2]

The primary responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations was given to the states.[3] The states operate their individual programs within a framework of national minimum standards applicable to coal mining throughout the United States. Congress, however, also determined that states should not have the authority to determine when an owner of private mineral rights within the boundaries of a federally protected area, such as a National Park, should be allowed to conduct surface mining in such environmentally sensitive areas. This authority was delegated to both the Secretary of the Interior and the U.S. Office of Surface Mining Reclamation and Enforcement (OSM).[4]

The critical nature of this responsibility is evidenced by OSM's own estimate of protected acreage with underlying federal and privately owned coal reserves: (1) over a million acres within the National Parks; (2) over three million acres within the National Wildlife Refuge System; and (3) over seven million acres within

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1. 30 U.S.C. § 1201 (1994).
2. *See* § 1202(a).
3. *See* § 1201(f).
4. *See* § 1211(c)(10).

the National Forests.[5] The fact that many of our nationally protected areas also possess abundant coal resources establishes a fundamental conflict between the goals of promoting the development of our domestic energy supplies and the preservation of our national treasures.

In the nearly twenty years since its passage, most issues with respect to SMCRA's implementation and the appropriate standards for coal mine reclamation have been resolved. Nevertheless, during this time, the federal government has not successfully fulfilled its responsibility to address the conflict between preserving federally protected areas and the claims of those who wish to proceed with the development of their privately held mineral rights.

The reasons for the delay and intransigence on the part of the government are manifold. Distilled to its essence, however, it is readily apparent that the federal officials involved have merely reacted subjectively when faced with an impossible choice. They may either: (1) recognize the outstanding property rights as superior and allow mining to proceed in an otherwise environmentally protected area; or (2) they may prohibit the exercise of the private mineral rights and preserve the surface undisturbed, but risk millions, and perhaps billions, of dollars in judgments against the United States for the improper taking of private property rights. This responsibility - bound by conflicting valid objectives - will most likely prove almost impossible to fulfil.

I. STATUTORY BACKGROUND

Coal mining is not prohibited, despite the great environmental problems it causes, because most electricity generated in the United States comes from the burning of coal which comprises more than 90% of the nation's fossil fuel reserves.[6] Therefore, coal is considered to be an integral part of United States energy supplies and over 1 billion tons of coal are mined each year in this country.[7]

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5. *See* OSM, Draft Environmental Impact Statement, Valid Existing Rights, OSM-EIS-29, III-12 tbl.III-6 (Sept. 1995) [hereinafter OSM-EIS].

6. *See* National Mining Ass'n, *Mining Information* (1997).

7. 30 U.S.C. § 1202(f) provides that a primary goal of this Act is to

SMCRA was set up to control the surface impacts of mining coal. Coal is typically mined in two basic methods: (1) in surface removal operations, and (2) in underground mining operations. SMCRA regulates surface coal mining and reclamation operations which include contour, strip, auger, mountaintop removal, box cut, open pit, and area mining. SMCRA, however, only regulates the incidental surface effects of underground coal mines.[8]

II. AREAS POTENTIALLY AFFECTED

The question of how to balance private rights and the two competing public interests in environmental preservation and coal mining is particularly difficult because of the vastness of the territory involved. The following is a summary of the different lands governed by the Federal Government and how each could be affected by this issue.

A. *National Park System Lands*

The National Park System consists of 361 areas covering more than 80 million acres. These areas are of such national significance that Congress established the National Park Service as a separate agency within the Department of the Interior with the mission to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment . . . of future generations."[9] Although best known for its beautiful scenery, more than half of the National Park System preserves or commemorates places, persons, events, and activities important in national history. The OSM estimates that slightly more than 1 million acres or 1.3% of all National Park areas contain underground coal.[10] There is currently one operating coal mine within the National Park System. It is an underground mining operation located within the New River Gorge National River in West Virginia. The mine with its surface facilities was in operation at

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strike a balance between protection of the environment (as well as agricultural productivity) and the nation's need for coal as an essential source of energy.

8. *See* 30 U.S.C. § 1291(28).

9. 16 U.S.C. § 1 (1994).

10. *See* OSM-EIS, *supra* note 5, at III-14.

the time that the New River Gorge National River was designated a National Park System unit.[11]

B. *National Wildlife Refuge System*

The National Wildlife Refuge System consists of approximately 89 million acres of land managed chiefly for the conservation of wildlife. There are units of the system in all the major ecological zones of North America.

Approximately 3.2 million acres or 3.7% of the Wildlife Refuge System contain coal reserves. There are no existing surface coal mining operations reported within the boundaries of the National Wildlife Refuge System.[12]

C. *The National System of Trails*

The National Trail System is a cooperative program between federal, state, and local agencies which establishes scenic trails, preserves their natural setting, and protects them from incompatible development.

There are currently seventeen National Scenic and Historic Trails and more than 780 National Recreation Trails, totaling more than 9,000 miles in length. While approximately 86,000 acres in the National Trail System contain coal reserves, no surface coal mining operations are reported within their boundaries.[13]

D. *National Wilderness Preservation System*

The National Wilderness Preservation System, managed by a variety of federal agencies, consists of lands that meet the criteria required for consideration as a National Wilderness. Activities within a National Wilderness are restricted and the goal is to maintain them in a primitive state, largely untouched by human activities. Restrictions otherwise applicable to Wilderness Areas

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11. *See id.* at III-14 to III-15.

12. *See id.* at III-15, figs. III-1 & III-5.

13. *See* Dep't of Interior press release, OSM to Hold Public Hearings on Proposed Valid Existing Rights Regulations 1, 2 (Apr. 25, 1997).

protect them from drilling, logging, mechanized forms of transportation, and permanent development, including roads.

The National Wilderness Preservation System includes roughly 95 million acres of land, approximately 1.4% of which contain coal reserves. There are no existing coal mining operations reported within the boundaries of the National Wilderness Preservation System.[14]

E. *The Wild and Scenic Rivers System*

The Wild and Scenic Rivers System was established to protect rivers with outstanding scenic, recreational, geologic, wildlife, historical, cultural, or similar conditions. There are 149 rivers or river segments currently protected by the Wild and Scenic Rivers System, totaling about 10,294 miles. There are approximately 39,000 acres in the Wild and Scenic Rivers System that contain coal reserves.[15]

F. *National Recreation Areas*

National Recreation Areas are lands and waters designated by Congress for recreational use. Twelve of the National Recreational Areas are centered on large reservoirs built by the federal government, such as the Boulder Dam National Recreation Area. Five other National Recreation Areas are located near major population centers. Additionally, approximately 310,000 acres of National Recreation Areas contain coal reserves.[16]

G. *The National Forests*

The National Forest System includes 155 National Forests consisting of 191 million acres. These lands encompass about 10% of the land area of the United States. Allowable uses of National Forest lands include, but are not limited to, watershed protection, timber production, outdoor recreation, mineral production, and fish and wildlife habitat. More than 7 million acres of land within the National Forest System contain coal reserves. There

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14. *See id.*
15. *See* OSM-EIS, *supra* note 5, at III-18.
16. *See id.* at III-18.

are a limited number of surface and underground coal mining operations currently existing within the boundaries of the National Forests.[17]

III. THE PROHIBITION OF MINING WITHIN NATIONALLY PROTECTED AREAS

The issue of surface coal mining within federally protected areas evolves from section 522 of SMCRA which establishes congressional policies and procedures for the designation of certain areas as unsuitable for all or certain types of coal mining.[18] The provisions of section 522 indicate an attempt by Congress to introduce an element of land use planning into SMCRA, and thus to "respond to conflicts which often arise between coal mining and other uses of the land."[19]

Where an area was deemed particularly sensitive to mining, Congress included a specific statutory provision designating the area as unsuitable for surface coal mining operations. Congressional bill drafters explained the reasons for the statutory designations as follows:

> Although the [land use planning] designation process will serve to limit mining where such activity is inconsistent with rational planning, in the opinion of the [House Interior and Insular Affairs Committee], the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus, section 522(e) provides that, *subject to valid existing rights*, no surface coal mining operation except those in existence on the date of enactment, shall be permitted on lands within the boundaries of certain Federal systems . . . .[20]

The section 522(e) "Federal systems" referenced in this congressional report include, inter alia, lands within the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, and the National Forests.[21]

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17. *See id.* at III-5.

18. *See* 30 U.S.C. § 1272 (1994).

19. Areas Unsuitable for Mining, 44 Fed. Reg. 14,989 (1979).

20. H.R. REP. NO. 95-218, at 95 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 631 (emphasis added).

21. 30 U.S.C. § 1272(e).

The statutory protections are not, however, absolute, with the primary exception being that the designations are "subject to valid existing rights" (VER).

A. *The Definition of "Valid Existing Rights"*

The phrase "subject to valid existing rights" is not defined in SMCRA and consequently its meaning has generated a great deal of controversy. The United States Supreme Court rejected a facially constitutional challenge to the statutory designations, concluding that the "mere enactment" of the statutory prohibitions on mining did not constitute a taking of private property in violation of the Fifth Amendment.[22] Section 522(e) of SMCRA was specifically addressed by the Court, which ruled that the requirements did not automatically deprive property owners of all economically viable use of their property, since any restrictions were "subject to VER."[23]

The OSM has made several failed attempts to define "valid existing rights,"[24] all of which have been the source of litigation. Final rules issued in 1979[25] and 1983[26] were withdrawn after they were successfully challenged in U.S. District Court.[27] Another proposal issued in 1988[28] was withdrawn by the agency on its own

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22. *See* Hodel v. Virginia Surface Mining Reclamation Ass'n, 452 U.S. 264, 295-97 (1981).

23. *Id.* at 296 n.37.

24. *See* 30 C.F.R. § 761.5

25. 44 Fed. Reg. 14,902, 15,342 (1979) (defining VER as "those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary mining permits on or before August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for, and immediately adjacent to, a mining operation in existence prior to August 3, 1977"). (quoting 56 Fed. Reg. 33,152-53 (1991)).

26. 48 Fed. Reg. 41,349 (1983) (defining VER broadly via reliance on a general "takings" standard).

27. *In re* Permanent Surface Mining Regulation Litigation I, No. 79-1144, 14 Env't Rep. Cas. (BNA) 1083 (D.D.C. Feb. 26, 1980); In Re Permanent Surface Mining Regulation Litigation II, Round III-VER, No 79-1144, 22 Env't Rep. Cas. (BNA) 1557, 1564 (D.D.C. Mar. 22, 1985).

28. 53 Fed. Reg. 52,374 (1988).

before a final rule was issued.[29]

On January 31, 1997 the OSM issued a new proposed rule constituting its latest attempt to define VER.[30] In its latest proposal, the OSM identified five alternative possibilities for implementing the VER exception found in section 522(e).[31] These alternatives include:

> (1) *Take no action.* Under this alternative, the OSM would not promulgate a definition of VER.
> (2) *Good Faith All Permits (GFAP).* Under this alternative, OSM would allow mining only where an operator had made a good faith effort to obtain all permits by August 3, 1977. In the case of areas newly subject to the protection of section 522(e), the applicable date would be the date that the area became so subject.
> (3) *Good Faith All Permits or Takings (GFAPT).* Under this alternative, the Good Faith All Permits test would be applied first. If mining would be prohibited, then a second review would be necessary to determine if denial would result in a compensable taking. OSM would allow mining where the prohibition would otherwise result in a taking of property in violation of the Fifth Amendment of the Constitution.
> (4) *Ownership and Authority (O&A).* Under this alternative, the OSM would allow mining whenever the mineral owner has the right to conduct mining by the method proposed.
> (5) *Bifurcated Test (BF).* Under this alternative, VER determinations would be based upon whether the severance of the mineral estate from the surface estate predated or postdated the passage of SMCRA. If the former, VER would be determined on the basis of the ownership and authority test. If the latter, VER would be based on the Good Faith All Permits test.[32]

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29. 54 Fed. Reg. 30,557 (1989).

30. Underground Mining Activities, 62 Fed. Reg. 4,836 (1997).

31. The rulemaking also provides that the prohibitions do not apply to underground coal mining. Any surface activities and facilities related to underground coal mining would still be subject to section 522(e) prohibitions and, therefore, subject to VER. However, another potential surface impact of underground mining is subsidence. Subsidence is the lowering of strata, including the surface, resulting from underground excavation. By eliminating the effects of subsidence from the prohibitions of 522(e), OSM has essentially removed underground mining from the entire VER issue.

32. *See* 62 Fed. Reg. 4,836 (1997).

The results of the OSM rulemaking are of critical importance to both owners of minerals and to those interested in preserving certain areas undisturbed by mining. Surface coal mining operations will be either allowed to proceed or prohibited within the areas listed in section 522(e), depending upon how the term is ultimately defined.

B. *The Problem of Private Inholdings and Severed Mineral Rights*

Central to the problem of prohibiting mining within the section 522(e) areas designated as unsuitable for mining by Congress is the fact that much of the property involved is privately owned. Three historic reasons contribute to this problem: (1) the government simply may not have bought a private inholding within the boundary of the protected area due to a lack of sufficient appropriations or reluctance on the part of the owner to sell, (2) federal ownership of the area may not have been mandated by Congress, or (3) the federal government may have acquired only the surface estate and allowed the "severed" mineral estate to remain in the hands of the private landholder.

Private inholdings exist within all of the section 522(e) protected areas. For example, much of the affected land within the National Trail and Wild and Scenic Rivers Systems is privately owned. Congress did not mandate federal ownership of those lands under either the National Trails System Act or the Wild and Scenic Rivers Act. The OSM estimates that there are approximately 104,000 acres of land within the nationally protected lands that are potentially at risk from surface coal mining because of private property rights within their boundaries.[33]

With respect to the National Forests, private ownership also evolved from the relatively common practice of the U.S. Forest Service of acquiring the surface estate, but leaving the severed mineral estate in private hands. The Forest Service estimates that approximately 4.1% of the private mineral owners within the National Forests possess the right to conduct surface mining.[34] This means that, according to OSM estimates, approximately 270,000

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33. *See* OSM, Draft Economic Analysis, Valid Existing Rights, III-3 (March 1996) [hereinafter OSM-EA].

34. *See* OSM-EIS, *supra* note 5, at V-9.

acres are potentially at risk.[35]

The question of private inholdings was considered, if not resolved, by Congress during the deliberations leading up to the passage of SMCRA. During the debates on the surface mining, then-Congressman Manuel Lujan observed:

> Naturally, the bill's language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method.
>
> Concerns in this area are not merely hypothetical. For example, in the establishment of the national forest system in many areas of the country, grantors sold land to the United States government for inclusion in a national forest system in many areas of the country, but reserved mineral rights for themselves in deeds of conveyance for which the United States was a 'party'. The language of Section 522(e) itself . . . is that enactment of this legislation does not disrupt the relationship between the owner of the coal and the Federal Government. I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, for the Forest Service (or anyone else) to argue that the Surface Mining Control and Reclamation Act somehow modifies the relationship between the owner of the surface and subsurface rights.
>
> . . .
>
> Clearly alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right to mine the coal in any way modified if such right existed prior to enactment of the Act.[36]

The statements of Congressman Lujan may or may not reflect the will of the entire Congress. Nevertheless, his statements do indicate that Congress intended, at least to some extent, to allow the continued exercise of private property rights within otherwise protected areas.

Other language in the legislative history of SMCRA suggests that while the language "subject to valid existing rights" may have been intended to acknowledge the existence of some outstanding private mining rights, it was not intended to expand upon those rights or to grant additional mining rights where such rights did not previously exist. This limitation is reflected in

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35. *See* OSM-EA, *supra* note 33, at III-3.

36. H.R. REP. NO. 95-218 at 189 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 718.

the discussion of VER found in the Senate Committee Report accompanying Senate Bill S. 7, which later became SMCRA. That report noted:

> The exception for "valid existing rights" is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language . . . is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase "subject to valid existing rights" is thus in no way intended to open up national forest land to strip mining where previous legal precedents have prohibited stripping.[37]

Finally, the valid existing rights exception was apparently included to avoid a taking of private property in violation of the Fifth Amendment. This objective was noted in Congressman Udall's opposition to an amendment that would have deleted the VER exception. Congressman Udall, widely considered to be the "father" of SMCRA, stated that the *per se* statutory prohibitions of SMCRA could not be implemented without "paying compensation under the fifth amendment" if the VER exception were removed.[38]

IV. BALANCING PRESERVATION AGAINST DEVELOPMENT: THE OSM PREFERRED ALTERNATIVE

The lack of direction found in the legislative history of SMCRA has left room for endless debate over what Congress actually intended by including the phrase "subject to valid existing rights" in section 522(e).

Social interest groups have attempted to fashion congressional support for their own interpretation of VER. Those who favor fewer restrictions on mining of affected mineral lands naturally advocate the VER tests that allow such mining operations to occur, and cite portions of the legislative history to support their position.[39] On the other hand, those who wish to see little or no

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37. S. REP. NO. 128, 95th Cong., 1st Sess., 94-95 (1977).

38. 123 CONG. REC. H12,878 (daily ed. Apr. 29, 1977) (statement of Congressman Udall).

39. *See* 62 Fed. Reg. 63,190 (1997).

mining occur in the section 522(e) areas have used congressional intent to push for regulations that would prohibit most surface coal mining.[40]

The "ownership and authority test" is the VER test most favored by mineral owners. This test would recognize otherwise valid property rights, and reflect the legislative history's apparent reliance on state property law. The "ownership and authority" test would also be in accordance with Congressman Udall's concern that takings of private property in violation of the Fifth Amendment should be avoided. On the other hand, the "ownership and authority" test might allow some mining within the boundaries of certain protected areas, such as various lands within the boundaries of the National Park System. This result would be unacceptable to many.

Application of the "good faith all permits test" is generally advocated by those who wish to prohibit all mining within any of the areas covered by the section 522(e) prohibitions. It is generally recognized that hardly any surface coal mining operations could qualify for VER under the "good faith all permits test." Alternatively, the "good faith all permits test" would virtually ensure that the section 522(e) prohibitions would result in a number of property takings in violation of the Fifth Amendment.

In issuing its proposed rule on January 31, 1997, the OSM elected to designate the "good faith all permits test" as the preferred alternative.[41] The OSM has thus made a value judgment in favor of preservation over the interests of private land owners.

It is not surprising that the preferred alternative weighs most heavily against surface mining within the nationally protected areas given the ambiguous congressional intent and the pressures

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40. *See id.* at 63,191.

41. In its rulemaking, OSM states a number of times that "*None* of the alternatives authorizes or precludes mining. They merely set the standards and procedures for making Federal VER determinations or for determining if the 522(e) prohibitions apply to underground mining." While it is true that this rulemaking makes no actual determination on the mineability of any of the surface areas within the protected areas, the standard selected will make it impossible to obtain permits to surface mine many of these areas, essentially precluding mining of these areas.

on the OSM if it appears to favor mining in the National Parks. Even this choice, however, may turn out to be a blessing in disguise for the mineral owner. Federal inaction has had the effect of rendering the private mineral owner's property rights valueless. The door is thus open to takings claims, since no one knows if the private mineral rights can be exercised in the future.

In the interim, individual VER decisions continue to be made around the country. On November 26, 1997, OSM granted VER to Buckingham Mining Company, allowing the surface mining of 25.2 acres of the Wayne National Forest in southeastern Ohio in order to recover 88,200 tons of coal.[42] OSM determined that, under the *Belville* decision, a prohibition on the mining would create a compensable taking of the property interest under the Fifth Amendment and OSM would, therefore, have to pay the landowners for the value of the property interest, i.e. for the lost tonnage.[43] OSM's environmental evaluation of the proposed mining showed little short-term impact and no anticipated long-term impact on the Wayne National Forest and the US Forest Service concurred with this evaluation. OSM then granted VER.[44]

CONCLUSION

The balance between preservation and private property rights is difficult to strike in today's world. The VER debates teach us that the typical federal government agency is poorly equipped to manage these types of problems effectively.

The question is simply: "Do we protect the surface of land within our national parks and forests and other environmentally sensitive areas from mining?" The easy answer is "yes." Government agencies, however, must look at the impact of their actions on both private property rights and on the areas that mining would affect. While mining in a national park would undoubtedly lead to public outcries, a change to the other end of the spectrum and the denial of any mining in these protected areas could result in infeasible takings payments. OSM has attempted to avoid this no-win situation by remaining inactive.

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42. 62 Fed. Reg. 63,187 (1997).
43. *See id.*
44. *See id.* at 63,190-91.

Neither option is particularly appealing for a federal agency. The land holdings involved are massive. Overlapping jurisdiction with other federal agencies is a problem, and coordination is not the government's strong suit. The value of a particular piece of land depends on the evaluator and there are often many splintered factions involved in second-guessing such judgments. Further, the litigation expenses of these types of individual actions by government agencies may themselves run into millions of dollars.

The entire VER issue has been unresolved for the last twenty years and the latest rulemaking is yet another round in the struggle to balance our need to preserve sensitive areas without interfering with private property rights. It will probably not be the final round.