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Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), prohibits surface coal mining operations in certain areas, except for those operations that existed on August 3, 1977 and, subject to valid existing rights ("VER").[1] Those areas in which such mining is precluded include 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, including study rivers, and National Recreation Areas designated by an act of Congress. Section 522(e) imposes a more limited restriction, again subject to VER and except for those operations which existed on August 3, 1977, on federal lands within a national forest, certain places included within the National Register of Historic Sites, areas proximate to public roads, occupied dwellings, public buildings, schools, churches, community or institutional buildings, public parks, and cemeteries.

SMCRA itself does not define VER. In attempting to provide a regulatory definition of VER, the Department of the Interior has promulgated definitions that have been found by reviewing courts to be either substantively deficient or improperly promulgated. Indeed, developing an acceptable definition of VER is a daunting task.

The Department of the Interior's first attempt at a definition of VER was in 1979. It included a requirement that in order to be VER, rights must have been in existence on August 3, 1977 and the owners must either have obtained all necessary mining

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Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

permits on or before that date, or have been able to demonstrate that the coal for which the exemption was sought was needed for, and immediately adjacent to, a mining operation in existence prior to that date. Upon review, the United States District Court for the District of Columbia remanded to the Secretary of the Interior that portion of the rule that required the owner to have obtained all permits necessary to mine. The Court noted that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test."[2]

In June 1982 the Department of the Interior again issued a notice of proposed rulemaking defining VER. The options included the so-called good faith-all permits test. However, the final rule relied on a general "takings" standard. In essence, that test was whether "the application of any of the prohibitions contained in [Section 522(e) of SMCRA] to the property interest that existed on [August 3, 1977] would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution . . . ."[3] Upon judicial review the United States District Court for the District of Columbia held that this test was such a significant departure from the proposed rule that a new notice and comment period was required.[4] As a result, the Department of the Interior suspended the VER definition in 30 C.F.R. Section 761.5(a).[5] According to the Department of the Interior, this suspension had the effect of putting in place the VER definition that was in use before the 1983 definition was promulgated.[6]

The legislative history of SMCRA does suggest that "Congress did not intend to infringe on valid property rights or effect takings through Section 522(e)."[7] Further, the provisions of Section 522(e) should not be used to close existing mine operations within areas subsequently declared to be subject to the protection of Section 522(e).[8] The Supreme Court has found that

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[2] *In Re* Permanent Surface Mining Regulation Litig. I, 14 Envtl. Rep. Cas. (BNA) 1083 (D. D.C. 1980).

[3] 48 Fed. Reg. 41,349 (1983), 30 C.F.R. § 761.5 (1984).

[4] *In Re* Permanent Surface Mining Regulation Litig. II, 22 Envtl. Rep. Cas. (BNA) 1557 (D. D.C. 1985).

[5] *See* 51 Fed. Reg. 41,952 and 41,961 (1986).

[6] 53 Fed. Reg. 52,374 and 52,375 (1988).

[7] National Wildlife Federation v. Hodel, 839 F.2d 694, 750 (D.C. Cir. 1988).

[8] *Id.*

the earlier promulgated all permits test "is not compelled either by the statutory language [of SMCRA] or its legislative history."[9] Beyond these findings, the legislative history of VER as used in Section 522(e) of SMCRA is difficult to gauge.

It would, however, seem to be a strained interpretation of congressional intent to infer that Congress meant for VER to be based on some variation of an all permits test. At the same time that Congress was considering SMCRA, it was also considering the 1977 Amendments to the Clean Air Act which became effective four days after SMCRA. In those amendments, Congress employed an all permits test to determine when construction of a source had commenced for purposes of prevention of significant deterioration (PSD) review. In order to have commenced construction, a source must have obtained "all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations."[10] If Congress had wished to include an all permits test in Section 522(e) of SMCRA as it did in the Clean Air Act Amendments of 1977, it could have easily done so. However, it chose not to do so.[11]

It is also a strained interpretation to require, as a part of VER, that an applicant demonstrate that it had the right to extract the coal it owns by the method it intends to use. This type of showing is similar to that required by Section 510(b)(6) of SMCRA in the case of a severed mineral estate. In that case the applicant must submit to the regulatory authority either: "the written consent of the surface owner to the extraction of coal by surface mining methods" or "a conveyance which expressly grants or reserves the right to extract the coal by surface mining methods" or "if the conveyance does not expressly grant the right to extract coal by surface mining methods, the surface-subsurface legal relationship shall be determined in accordance with State law."[12] Here too, Congress knew how to require the

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[9] Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 296 n. 37 (1981).

[10] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 712 (codified at 42 U.S.C. §§ 7401, § 7479(2)(A) (1982)). *See* Montana Power Co. v. EPA, 608 F.2d 334, 355 (9th Cir. 1979).

[11] *Montana Power*, 608 F.2d at 356.

[12] This section then ends with the proviso that nothing in the chapter shall be construed to authorize the regulatory authority to adjudicate property rights disputes. SMCRA § 510(b)(6)(A)-(C), 30 U.S.C. §§ 1260(b)(6)(A)-(C).

owner of coal to show that it had the right to mine the coal by surface mining methods. When Congress used such express language in Section 510, it strains credulity to assert that it actually meant to use the same language in Section 522 but, for some reason, failed to do so.[13]

Furthermore, an additional administrative problem is presented if the owner of the coal must demonstrate that it had the right to mine the coal by the intended method as of the date the Section 522(e) prohibition became effective. A federal agency is then placed in the position of not only having to determine what state law is, but also what state law was at some point in the past. Indeed, this is similar to the problem that the Outer-Continental Shelf Lands Act, as passed in 1953, presented until it was amended in 1978.[14] During that time, state laws as they existed in 1953 were applied to structures on the outer continental shelf. Thus, courts were placed in the position of having to construe state laws that were no longer in force. For that reason this provision was amended in 1978.

A "takings" definition of VER suffers from a different infirmity. There is little question but that Congress sought to avoid takings as a result of Section 522(e), as the Court of Appeals for the District of Columbia Circuit found.[15] Thus, a VER definition which facially avoids a taking would certainly seem to be consistent with the relevant congressional intent; however, the takings definition promulgated by the Department of the Interior in 1983 presents a reviewing court with a riddle that it should not have to answer: when is a taking not a taking?

Simply put, in order for the taking of private property by an officer of the United States to be compensable under the Fifth Amendment, *i.e.*, in order for a taking to be a Fifth Amendment taking, it must be authorized expressly, or by necessary implication, by an act of Congress.[16] Thus, if action taken by the Department of the Interior's Office of Surface Mining is beyond the authority conferred by Congress in Section 522(e), such action probably could not be a compensable taking. It

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[13] *See also*, SMCRA § 507(b)(9), 30 U.S.C. § 1257(b)(9).

[14] Outer Continental Shelf Lands Act of 1953, as amended, Pub. L. No. 95-372, title II, § 202, 92 Stat. 634 (codified at 43 U.S.C. § 1331 (1982)).

[15] National Wildlife Federation v. Hodel, 839 F.2d at 750.

[16] Regional Rail Reorganization Act Cases, 419 U.S. 102, 127, n. 16 (1974). Recently, the Court has suggested that it may soften this requirement somewhat. *See*, Presault v. Interstate Commerce Commission, U.S. , 110 S.Ct. 914 (1990).

would simply be illegal action taken under color of Section 522(e) of SMCRA. So long as the action taken was beyond the scope of authority conferred by Congress, no Fifth Amendment taking would occur and the "takings" definition of VER would presumably not be triggered.

Reviewing courts are also presented with a jurisdictional problem. Should a final decision of the Department of the Interior that a petitioner has not suffered a taking, and thus does not have VER, be challenged in United States District Court or in the United States Claims Court? The United States Claims Court has jurisdiction over taking cases brought against the United States.[17] The United States District Courts have original jurisdiction concurrent with the United States Claims Court for taking cases not exceeding $10,000. Thus, initially, one might conclude that a taking case involving more than $10,000 must be brought in the United States Claims Court.

The problem with bringing such an action in the United States Claims Court, however, is that in seeking review of a Department of the Interior decision that no taking has occurred, and, thus, petitioner does not have VER, the petitioner may be perceived as not really seeking a money judgment against the United States, but rather a judgment that the Department of the Interior was incorrect. Although the Claims Court has been given some jurisdiction to issue declaratory judgments since *United States v. King*,[18] it is doubtful that the Claims Court has jurisdiction to enter a purely declaratory judgment against the United States finding that a taking has occurred. It could be argued that once it was determined that a taking had occurred, then VER would be established. This, at first blush, suggests that an action to review an adverse takings determination should be brought in United States District Court. However, this assumes that a United States District Court will not feel constrained by the limits of the Tucker Act,[19] and runs the risk of any subsequent action brought in the United States Claims Court being barred by 28 U.S.C. Section 1500.[20]

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[17] Act of June 25, 1948, c. 646, 62 Stat. 940 (codified as 28 U.S.C. § 1491 (1988)), as amended.

[18] 395 U.S. 1 (1969).

[19] *See* South Delta Water Agency v. United States Department of the Interior, 767 F.2d 531 (9th Cir. 1985).

[20] In essence, 28 U.S.C. § 1500 (1988), as amended, bars an action in United States Claims Court when that action is based on a claim pending in U.S. District Court. *See* Johns-Manville Corp. v. U.S., 855 F.2d 1556 (Fed. Cir. 1988).

Issues of reviewability under a VER definition incorporating a "takings" test are further clouded by a 1985 decision of the United States Claims Court invoking primary jurisdiction.[21] The court noted that primary jurisdiction applies where a claim may be cognizable originally in a court, but enforcement of a claim requires a resolution of issues that have been placed within the special competence of an administrative body, here the Department of the Interior. The court observed that delays experienced in previous VER cases were largely attributable to challenges to the validity of the VER definition contained in 30 C.F.R. Section 761.5 and noted that inasmuch as disputes over this definition had been substantially settled, the agency proceedings in this case should move along quickly. Suffice it to say that the Department of the Interior has no special competence in the area of "takings" law, and disputes over the proper definition of VER are ongoing.

Why is it so difficult to develop a regulatory definition of VER? The answer to this question lies, perhaps, in long-recognized distinctions between agency rulemaking and agency adjudication. As noted in the *Attorney General's Manual on the Administrative Procedure Act* prepared by Attorney General Tom Clark in 1947,

> [T]he entire [Administrative Procedure Act] is based upon a dichotomy between rule making and adjudication. Examination of the legislative history of the definitions and of the differences in the required procedures for rule making and for adjudication discloses highly practical concepts of rule making and adjudication. Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future rather than the evaluation of a respondent's past conduct.
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> Conversely, adjudication is concerned with the determination of past and present rights and liabilities.
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> [It] may involve the determination of a person's right to ben-

[21] Ruth Z. Ainsley v. U.S., 8 Cl. Ct. 394 (1985).

> efits under existing laws so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are sharply controverted.[22]

This passage suggests that the determination of what is meant by VER may be more appropriately done by adjudication, in individual cases, than by rulemaking.[23]

The Department of the Interior might well wish to consider what Professor Davis said, albeit in a slightly different context: "Sometimes the best solution of the problem in a particular case of classifying borderline activities may be to avoid classifying them—to skip the labeling and to proceed directly to the problem at hand."[24] Here, what the Department might do would be to refrain from defining VER by regulation and simply to apply the term on a case-by-case basis, as it has under other statutes, such as the Federal Land Policy and Management Act. Such an application should be grounded on the notion that VER under Section 522(e) of SMCRA is very similar to those referred to in Section 701(h) of the Federal Land Policy and Management Act, and other laws administered by the Department of the Interior. [25] The inquiry over whether VER existed would begin and end with a determination that the one asserting VER must establish a right to the coal, as of August 3, 1977 or, whatever subsequent date the Section 522(e) prohibition became effective.

It makes little sense for the Department of the Interior to decide within the context of a VER determination whether and to what extent a putative holder of VER may mine coal by any particular method. SMCRA requires that as part of the application process,

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[22] U.S. DEPT. OF JUSTICE, *Attorney General's Manual on the Administrative Procedure Act* (1947) 14-15. (1973 reprint, Wm.W. Gaunt & Sons, Inc.).

[23] Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264 (1981) can be read to suggest that adjudication rather than rulemaking is the appropriate means for evaluating VER. The Court speaks in terms of the Act being applied in specific circumstances and its effect on particular coal mining operations. The Court also suggests that mutually acceptable solutions might well be reached with regard to individual properties. 452 U.S. at 297.

[24] K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2 at p. 7 (1979) (emphasis deleted).

[25] *See* Solicitor's Op. M-36910 (Supp.), 88 I.D. 909, 912 (1981). *See also*, Note, *Regulations and Land Withdrawal: Defining "Valid Existing Rights"*, 3 J. MIN. L. & POL'Y 517 (1988).

> the applicant . . . file [a map or plan] clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and . . . a statement of the those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation . . . ."[26]

Section 510, referred to earlier, contains additional requirements that are imposed when the mineral estate is severed from the surface estate.[27]

To the extent that there still exists some vestige of a regulation defining VER, the Department would have to conduct a rulemaking proceeding to eliminate that definition.[28] This, however, should not prove to be a major obstacle.

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[26] SMCRA § 507(b)(9), 30 U.S.C. § 1257(b)(9) (1988).

[27] SMCRA § 510, 30 U.S.C. § 1260 (1988).

[28] *See* Motor Vehicle Manufacturers Assn. of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 41-42 (1983).