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Valid Existing Rights Under the Surface Mining Control and Reclamation Act of 1977: Determination by Adjudication is Preferable to Definition by Rule

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I. INTRODUCTION

There have not been many appeals to the appeal boards in the Department of the Interior's Office of Hearings and Appeals (OHA) from determinations by the Office of Surface Mining Reclamation and Enforcement (OSMRE) whether a person does or does not hold valid existing rights to conduct surface mining operations, subject to the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act),[1] in areas where it would otherwise be precluded by Section 522(e) of the Act.[2] With the exception of the "takings" test, however, the central concepts of the rules by which the Department has attempted to define valid existing rights (VER) e.g., the "good faith-all permits" test, and the "needed for and immediately adjacent to an ongoing surface mining operation" test, have been applied in at least one decision issued by either the Interior Board of Surface Mining Appeals or the Interior Board of Land Appeals. In this article we review these decisions and the procedural rules that govern administrative review of OSMRE's

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[1] 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).

[2] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988).

VER determinations. We conclude, however, that VER should be determined by adjudication, applying state law to the legal documents under which VER are claimed, and that the additional tests that have been proposed in the Department's efforts to define VER by rule are unnecessary to and, indeed, contradictory to the proper case-by-case approach to determining whether a person holds valid existing rights in a particular situation.

II. INTERIOR BOARD OF SURFACE MINING APPEALS AND INTERIOR BOARD OF LAND APPEALS EXPERIENCE WITH VALID EXISTING RIGHTS

A. *VER to Conduct Surface Mining Operations on Non-Federal and Non-Indian Lands*

1. *The Ronald W. Johnson Cases*

a. *Factual Background*

On December 16, 1972, Ronald W. Johnson bought four acres and a residence from William Lamont, who reserved the coal and other mineral rights in the four acres. On July 14, 1977, Lamont deeded to Peabody Coal Company 406 acres adjoining Johnson's property as well as Lamont's reserved mineral rights in Johnson's property. At that time, part of the property could not be mined because of a city ordinance prohibiting mining within certain areas. On February 27, 1978, the city council of Sparta, Illinois finalized action which permitted mining within 1.5 miles of the city limits, thus allowing Peabody to mine the entire property purchased from Lamont.[3] On January 2, 1980, Peabody applied for a "new permit," which was issued on May 14, 1980. This permit, Illinois permit No. 920-82, prohibited mining within 300 feet of Johnson's house. On May 9, 1980, Johnson moved a mobile home onto the northwest corner of his lot. On May 12, 1980, he asked OSMRE to monitor his property for several possible violations of SMCRA and initial program regulations by Peabody, including mining within 300

[3] Ronald W. Johnson, 3 IBSMA 118, 120, 88 I.D. 495, 496 (1981).

feet of occupied dwellings. In late May, he moved a second mobile home onto the southwest corner of his lot.[4] On June 4, 1980, OSMRE informed Johnson that the state regulatory authority would need to make a determination of whether Peabody had VER to mine the areas around the mobile homes. OSMRE inspected the property on June 27, 1980, and issued an inspection report stating that Peabody "can (probably) demonstrate to the regulatory authority that the coal is needed for and immediately adjacent to an ongoing surface coal mining operation for which all permits were obtained prior to the enactment of SMCRA." On July 18, 1980, the OSMRE Regional Director (Region III) affirmed the decision not to take enforcement action against Peabody, and on August 27, 1980, Illinois determined that Peabody had VER under OSMRE regulations.[5]

b. *Ronald W. Johnson I*

Johnson appealed the Regional Director's decision to the Interior Board of Surface Mining and Reclamation Appeals (Board). In *Ronald W. Johnson I*,[6] the Board recognized that during the initial regulatory program, Section 522(e) of SMCRA,[7] and 30 C.F.R. Section 710.4 "place the primary responsibility for determining whether a permittee has valid existing rights with the state regulatory authority for those areas over which the state has control."[8] However, the State's responsibility "is not exercised totally independently of Federal oversight, because during the initial program, the Federal Government is an independent regulatory body."[9] The Board stated that "[A]lthough OSM may defer to the state for an initial determination on valid existing rights, when that determination is properly questioned, OSM has an independent responsibility to review it to ensure that it was made in compliance with the initial program regulations."[10] Since OSMRE's decision was issued before Illinois made its VER determination, the Board remanded the case to OSMRE for an evaluation of whether the State had properly applied the regulations.

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[4] 3 IBSMA at 120-21, 88 I.D. at 496-97.
[5] 3 IBSMA at 121, 88 I.D. at 497.
[6] 3 IBSMA 118, 88 I.D. 495 (1981).
[7] 30 U.S.C. § 1272(e) (1988).
[8] 3 IBSMA at 122, 88 I.D. at 497.
[9] *Id.*
[10] 3 IBSMA at 122-23, 88 I.D. at 498.

c. *Ronald W. Johnson II*

In *Ronald W. Johnson II*,[11] the Board reviewed the consequent decision of the Regional Director of OSMRE that Peabody had VER to conduct surface coal mining and reclamation operations within 300 feet of his dwellings. In his finding No. (1) the Regional Director set forth 30 C.F.R. Section 761.5(a), the original definition of VER promulgated by OSMRE in 1979, referred to as the "all permits" test:

> *valid existing rights* means:
> (a) Except for haul roads,
> (1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and
> (2) The person proposing to conduct surface coal mining operations on such lands either
> (i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or
> (ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977.[12]

This regulation, as originally adopted, included the following subsection (c), which was cursorily applied in the Board's *Johnson II* decision:

> Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.[13]

In his decision on remand, the Regional Director purported to apply subsection (c) in interpreting the instruments upon which Peabody relied in claiming the requisite "property rights" under 30 C.F.R. Section 761.5(a)(1):

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[11] Ronald W. Johnson, 5 IBSMA 19, 90 I.D. 54 (1983).
[12] *Id.*
[13] *Id.*

> Peabody had the requisite property rights on August 3, 1977, as required by 30 C.F.R. § 761.5(a)(1), which would authorize the company to produce coal by a surface coal mining operation, pursuant to a memorandum of agreement dated December 29, 1975, and a deed executed on July 14, 1977. By means of these instruments, Peabody acquired the necessary surface property and mineral rights. The property rights contemplated by 30 C.F.R. 761.5 were such as were held by Peabody in the instant case, i.e., a legally binding conveyance, the parties to which, at the time the deed was executed, contemplated Peabody's right to conduct surface coal mining activities. [14]

Having concluded that Peabody possessed the necessary "property rights," the Regional Director applied the "needed for and immediately adjacent to" test contained in 30 C.F.R. Section 761.5(a)(1)(ii):[15]

> (3) An investigation by OSM's Reclamation Specialists establishes that Peabody River King #6 surface operation was an operation which was established on Illinois permit 560-79 issued in 1976. Consequently, an ongoing surface coal mining operation had been installed by Peabody Coal Company prior to August 3, 1977, as required by 30 C.F.R. 761.5(a)(2)(ii);
> (4) Aerial photographs dated 1978, 1979, and 1980, reviewed by the OSM Reclamation Specialist, in addition to field observations, establish the direction of the Peabody River King #6 operation. The coal contained in Illinois permit 920-82 is immediately adjacent to the permit established in Illinois pit 560-79 and is the logical extension of the pit established in Illinois permit 560-79 as is necessary to meet the requirements of 30 C.F.R. § 761.5(a)(2)(ii);
> (5) The Reclamation Specialist, based upon his field observations, determined that the coal was needed to continue the existing operation because of the configuration of the existing

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[14] The Board inserted a reference to 44 Fed.Reg. 14,992 (Mar. 13, 1979). Ronald W. Johnson, 5 IBSMA 19, 23, 90 I.D. 54 (1983).

[15] Presumably the Regional Director's finding (No. 3) that Peabody held the necessary permits to conduct the surface mining operation explains why his findings do not contain an application of the "all permits" provisions of the regulation, i.e., 30 C.F.R. § 761.5(a)(2)(i). He simply stated that the Peabody River King #6 surface operation was "established on Illinois permit 560-79 issued in 1976." He concludes that the proposed operations on Illinois permit No. 920-82, which are the subject of the Ronald W. Johnson cases, meet the "needed for and immediately adjacent to" test of 30 CFR 761.5(a)(2)(ii). Illinois permit No. 920-82 was issued on May 14, 1980.

> operation. In addition, Peabody Coal Company, in its request to the Department of Mines and Minerals, indicates that loss of coal would be approximately 31,000 tons.
> (6) A review of the decision made by the Illinois Department of Mines and Minerals indicates that its conclusion that Peabody Coal Company has valid existing rights to mine within 300 feet of the Johnson mobile homes is consistent with Findings (1)-(5), in that Illinois found that:
> (a) Peabody had purchased the property in question prior to August 3, 1977; and
> (b) Peabody had an operation in existence on August 3, 1977 for which all permits had been issued and that the area in question is adjacent to the pre-existing permit and that the coal from the area is needed for its operation.[16]

As to Johnson's contention that Peabody did not have VER to conduct surface coal mining operations on his property because it was not zoned to permit surface mining until February 27, 1978, the Regional Director stated:

> 30 C.F.R. § 761.5 does not require that at the time a company acquires requisite property rights that it also have complete assurance, by virtue of zoning and/or permit, that it will be allowed to immediately mine the area. Neither a permit to mine nor appropriate zoning constitutes a "property right" within the meaning of 30 C.F.R. § 761.5(a)(1). All that is required is property ownership and the contemplation of surface mining by the parties to the conveyance. In the instant case the conveyance clearly and properly transferred marketable title to Peabody, thus satisfying the ownership requirement. That the parties to the conveyance contemplated surface mining is evident from the fact that seller, William Lamont, transferred both surface and mineral rights to purchaser, Peabody Coal Company, a coal company conducting surface mining activities adjacent to the property in question. [17]

Johnson argued on appeal to the Board that:

> the deed executed by Peabody and William V. Lamont did not serve to convey to Peabody the property rights necessary to satisfy the requirements of 30 C.F.R. Section 761.5(a)(1) because (1) the deed did not specifically authorize Peabody to

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[16] 30 C.F.R. § 761.5(a)(1)(ii).

[17] 5 IBSMA at 25, 90 I.D. at 57, (quoting Decision of the Regional Director at 2-5).

> produce coal by surface mining methods and (2) the zoning ordinance of the city of Sparta precluded surface coal mining at the time of the conveyance.[18]

The Board rejected Johnson's arguments.

In reviewing the Regional Director's decision, the Board considered the role of 30 C.F.R. Section 761.5(c), regarding application of local usage and custom, in applying the first element of the Department's definition of VER set forth at 30 C.F.R. Section 761.5(a)(1), i.e., "[t]hose property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation."[19] The Board noted that in connection with litigation before the District Court for the District of Columbia, the Department agreed that, as an alternative to applying subsection (c) of 30 C.F.R. Section 761.5, "existing State law may be applied to interpret whether the document relied upon establishes valid existing rights."[20]

The Board first rejected Johnson's argument that the deed between Lamont and Peabody did not convey the necessary property rights for VER under 30 C.F.R. Section 761.5(a)(1) because the deed did not specify that Peabody could surface mine the coal. The Board stated:

> Since the grantor [Lamont] did not reserve to himself any interest in the surface or mineral estates conveyed, it is immaterial that he did not specify that Peabody could surface mine the mineral estate. For the purposes of section 522(e) of the Act and 30 CFR Part 761, we assume the requisite authorization to surface mine coal, in the absence of language to the contrary in the conveyance, from the fact of Peabody's purchase of both the mineral and surface estates.[21]

Secondly, the Board rejected Johnson's contention that "the zoning ordinance of the city of Sparta was a right of the public, as referred to in the deed, that precluded the necessary authorization to produce coal by surface mining under 30 C.F.R.

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[18] 5 IBSMA at 25-26, 90 I.D. at 57.

[19] 30 C.F.R. § 761.5(a)(1).

[20] 44 Fed.Reg. 67,942 (1979); *In re* Permanent Surface Mining Regulation Litig. I, 14 Envtl. Rep. Cas. (BNA) 1083 (D. D.C. 1980).

[21] 5 IBSMA at 27-28, 90 I.D. at 58.

[Section] 761.5(a)(1)."[22] The Board deferred to State law "holding, in effect, that Sparta's zoning law could not operate to preclude surface coal mining either at the time the deed between Lamont and Peabody was executed, or on August 3, 1977, the effective date of the Act."[23]

d. "Usage and Custom" and "Intention of the Parties"

The Board stated that "Johnson's contention, that the lack of express authorization to surface mine coal precludes valid existing rights, may be the result of a misunderstanding of the regulatory background of 30 C.F.R. Section 761.5."[24] The Board recognized that "[t]he manifest intention of the parties to the document by which one claims valid existing rights was deemed relevant by the Department because of congressional references to *United States v. Polino*[25] in the legislative history of the term 'valid existing rights.'"[26]

The Board's analysis of the *Polino* case and its relevance to the background of 30 C.F.R. Section 761.5, as well as the Board's application of subsection (c) of that regulation, appears flawed for a number of reasons. In *Polino*, the U.S. District Court for the Northern District of West Virginia addressed the specific question "whether or not a reservation of coal and mining rights contained in a certain deed carried with it the legal right to employ mining methods known as 'strip mining' in the mining and removing of certain coal."[27] The lands in question were located in the Monongahela National Forest. The District Court stated that it was bound under *Erie Railroad Co. v. Tompkins*[28] to answer this question with reference to the laws of West Virginia as contained in the decisions of the Supreme

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[22] 5 IBSMA at 29, 90 I.D. at 59.

[23] *Id.* (footnote omitted) *See* American Smelting & Refining Co. v. County of Knox, 324 N.E.2d 398, 60 Ill.2d 133 (1974) (reclamation of strip mined land is governed exclusively by the Illinois Surface Mined Land Conservation and Reclamation Act of 1971, ILL. REV. STAT., ch. 96½, para. 4501 (1977), and a county has no authority to regulate reclamation procedures); Union National Bank and Trust Co. v. Board of Supervisors, 382 N.E.2d 1382, 1385-86, 65 Ill. App.3d 1004 (1978) (a county "has no power to seek to prohibit the operation of stripmining subject to the Reclamation Act anywhere in the county, pursuant to a zoning ordinance.").

[24] 5 IBSMA at 28, 90 I.D. at 58.

[25] 131 F. Supp. 772 (N.D. W.Va. 1955).

[26] 5 IBSMA at 28, 90 I.D. at 58.

[27] 131 F. Supp. at 772.

[28] 304 U.S. 64 (1938).

Court of Appeals of West Virginia. The decisions of the West Virginia Court considered by the *Polino* court define two related criteria for determining whether a deed authorizes the removal of coal by surface mining techniques: (1) the usage and custom in the locality where the coal is located and (2) whether the parties actually contemplated that the coal would be removed by surface mining methods.

In one such case, *Oresta v. Romano Bros.*,[29] the Court stated:

> It is evident from the language of the reservation of the mining rights, that, at the date of the deed of severance of the coal on February 24, 1885, the parties to the deed intended that the coal should be mined and removed by the usual method then known and accepted as common practice in Mercer County, *where the lands in question are located*, and that such method, as it then existed, did not include the practice of mining and removing coal by strip mining.

The court's reasoning in *West Virginia-Pittsburgh Coal Co. v. Strong*[30] is to the same effect:

> In order for a usage or custom to affect the meaning of a contract in writing because within the contemplation of the parties thereto, it must be shown that the usage or custom was one generally followed at the time and place of the contract's execution.
>
> . . .
>
> We are of the opinion, arrived at by reading the instrument as a whole, that it was the manifest intention of the parties to preserve intact the surface of the entire tract, subject to the use of the owner of the coal 'at convenient point or points' in order 'to mine, dig, excavate and remove all of said coal' by the usual method at that time known and accepted as common practice in Brooke County. We do not believe that this included the practice known as strip mining. [31]

In *Polino*, the court found that "at the time of the reservation of the coal and other minerals in the deed to the United

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[29] 73 S.E.2d 622, 627 (W.Va. 1952).

[30] 42 S.E.2d 46 (W.Va. 1947).

[31] *Id.* at 47, 48. The court also referred to Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 97 S.E. 684, 686 (W.Va. 1919) ("In this case we have no evidence as to the situation of the parties at the time of the grant, or their conduct under it, which would aid us in the interpretation of it.").

States of America, there were no coal strip mining operations in Randolph County, West Virginia, where these lands are located."[32] Moreover, the court stated that "it is obvious that both parties to that deed knew the purposes for which the United States was acquiring the land and the uses to which it was intended to be put," and that "[i]t is beyond all reason to conclude that the parties to the deed . . ., at the time of the execution of such deed, had in contemplation the possible complete destruction and removal of the entire surface of said lands, together with everything growing thereon."[33]

In the preamble to the original permanent program regulations, OSMRE defined the *Polino* court's holding in terms of "whether the deed conveying the coal . . . specifically granted the right of extraction by surface mining."[34] According to OSMRE's characterization of the ruling in *Polino*, "unless the deed or lease 'expressly grants stripping rights', the coal could only be mined by deep mining so as not to disturb the surface."[35] In OSMRE's view, *Polino* "relates to the nature of the right being conveyed between private parties and the method of interpreting the document which conveys that right."[36] The final definition of VER "incorporates these concepts." Subsection (c) of 30 C.F.R. Section 761.5, in fact, mirrors *Polino* and the West Virginia cases discussed in *Polino*.

The Board's application of 30 C.F.R. Section 761.5(c) and *Polino* in *Ronald W. Johnson II* amounts to one sentence: "Neither the *Polino* decision nor the regulatory language in 30 C.F.R. [Section] 761.5 based on that decision dictates that valid existing rights cannot be established absent express language authorizing surface mining in the document under which the requisite property rights are claimed."[37] The Board was correct in stating that the document need not expressly authorize surface mining in order for a party to have VER to conduct surface mining operations. However, under subsection (c) of 30 CFR 761.5, the Board should have proceeded to interpret the instruments, including the deed from Lamont to Johnson that reserved

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[32] 131 F. Supp. at 775.
[33] *Id.* at 776.
[34] 44 Fed.Reg. at 14,992 (1979).
[35] *Id.*
[36] *Id.*
[37] 5 IBSMA at 28-29, 90 I.D. at 59.

the coal under Johnson's land, in light of "the usage and custom at the time and place where [they] came into existence," and to consider whether Peabody had shown "that the parties to the document actually contemplated a right to conduct the . . . surface mining activities for which [Peabody] claims a valid existing right."[38] A clear demonstration of how those two criteria should have been applied appears in the *Polino* opinion. Of course, a provision expressly precluding removal of the coal by surface mining methods would amount to a clear manifestation of the parties' intention that surface mining methods not be used. If there is no express prohibition, the deed should be interpreted with reference first to usage and custom in the locality, and second, to the actual intentions of the parties. While the document need not expressly reserve unto Peabody the right to extract the coal by surface mining methods, Peabody should have been required to show that the parties to the document "actually contemplated" the use of such methods.[39]

2. *Valley Camp Coal Co.*

a. *Procedural Background*

In *Valley Camp Coal Co. v. OSMRE*,[40] OSMRE issued a Notice of Violation (NOV) to Valley Camp for conducting surface coal mining operations in violation of Section 522(e)(4) of SMCRA by stockpiling coal within 100 feet of the outside line of a public road without a mining permit, and subsequently issued a Cessation Order (CO) citing Valley Camp for failure to abate the NOV. After a hearing, Administrative Law Judge McGuire denied Valley Camp's application for review of the NOV, and its applications for review of and temporary relief from the CO, concluding that its stockpiling operations constituted surface coal mining operations in violation of Section 522(e)(4) of SMCRA, and that appellant had engaged in such operations without possessing VER.

Valley Camp appealed Judge McGuire's decision to the Board, which ruled by order that Valley Camp, "by stockpiling coal,

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[38] *Id.*

[39] *Id.*

[40] 112 IBLA 19, 96 I.D. 455 (1989).

was engaged in surface coal mining operations."[41] However, noting that Judge Flannery had remanded to the Department the regulation defining VER in terms of whether there was a "taking," the Board concluded "that there is no regulation to apply in this case in determining whether appellant has a [VER]."[42] Accordingly, the Board suspended "consideration of this case pending promulgation of a final rule defining that statutory term."[43]

On September 29, 1988, OSMRE filed a motion to lift the stay in *Valley Camp Coal Co.*, pointing to its November 20, 1986, suspension notice which explained that for . . . lands in states which have obtained permanent program approval, "State programs will remain in effect until the Director of OSMRE has examined the provisions of each State program to determine whether changes are necessary and has notified the State regulatory authority . . . that a State program amendment is required."[44] OSMRE advised the Board that West Virginia obtained permanent program approval in January 1981, and that with regard to non-Federal lands in West Virginia, West Virginia's definition of VER should govern in making VER determinations. OSMRE further advised the Board that West Virginia's permanent program contains the following VER definition, which was not affected by Judge Flannery's remand of 30 C.F.R. Section 761.5 for lack of notice and comment:

> Valid Existing Rights exists, except for haulroads, in each case in which a person demonstrates that the limitation provided for in Section 22(d) of the Act would result in the unconstitutional taking of that person's rights. . . . A person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable. Valid existing rights shall also be found for an area where a person can demonstrate that an SMA [Surface Mining Act] number had been issued prior to the time when the structure, road, cemetery or other activity listed in Section 22(d) of the Act came into existence.[45]

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[41] 112 IBLA at 23, 96 I.D. at 458, quoting Order dated Feb. 25, 1986, at 2.
[42] *Id.*
[43] *Id.*
[44] 51 Fed.Reg. 41,952 (1986).
[45] W.Va. Code of State Regulations § 38-2-2.119 (1987).

In response to OSMRE's motion that it lift the stay and apply West Virginia's regulation in determining whether Valley Camp had VER to stockpile the coal in question, the Board observed that the NOV and the CO involved were issued in 1980, while West Virginia's permanent program was not approved until January 1981, and that "[n]either OSMRE nor Valley Camp explains why or how West Virginia's permanent program regulation would apply rather than the Federal regulation in effect when the NOV and related CO were issued."[46] The Board directed OSMRE to file a brief supporting its motion, responding to a number of questions relating to whether a standard exists for determining whether Valley Camp had VER to stockpile the coal.

Rather than submit a brief as directed, OSMRE filed a motion requesting the Board to vacate the NOV and the CO issued to Valley Camp in 1980. OSMRE pointed out that Section 522(e)(4) of SMCRA prohibits surface coal mining operations within 100 feet of the outside line of a public right-of-way, with two exceptions: (1) where the operator has VER; and (2) where the subject operation was in existence on the date of enactment of SMCRA. OSMRE argued that because Valley Camp's stockpiling operation existed on the date of enactment of SMCRA, Valley Camp had no obligation to "secure a surface mining permit under either the West Virginia State Law or under SMCRA. Nor were its surface mining operations subject to the prohibitions of Section 522(e)."[47]

By order dated May 11, 1989, the Board denied OSMRE's motion to vacate the NOV and the CO, and lifted the suspension imposed in 1986. In its order, the Board declared that it would apply the definition of VER in effect at the time the NOV was issued, i.e., "the 1979 test, including the 'needed for and adjacent' test, as modified by the August 4, 1980, suspension notice which implemented the District Court's February 1980 opinion in *In Re: Permanent (I).*"[48]

b. *The "In Existence" Exception under Section 522(e)*

As previously noted, in its motion to vacate the NOV and CO, OSMRE argued that the emphasis upon VER in this case

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[46] 112 IBLA at 26, 96 I.D. at 459.

[47] 112 IBLA at 27, 96 I.D. at 460, quoting Motion to Vacate at 2-3.

[48] 112 IBLA at 27-28, 96 I.D. at 460, quoting Order dated May 11, 1989, at 5-6, and citing *In re*: Permanent (I), 14 Envtl. Rep. Cas. 1083 (D. D.C. 1980).

was misplaced, since Valley Camp's stockpiling activity was "in existence" on August 3, 1977, when SMCRA was enacted.[49] In rejecting this argument in its May 11, 1989, order denying OSMRE's motion to vacate, the Board reasoned as follows:

> Appellant has operated a deep mine facility together with an adjoining surface coal preparation plant since the 1930's or 1940's. The record is void of any evidence to support OSMRE's argument that appellant's stockpiling activity existed on the date of enactment of SMCRA. This activity was described by the Administrative Law Judge in his decision as follows:
> The unplanned, impromptu stockpiling effort in 1974 was occasioned by an emergency . . . which was not experienced again until 1980. The informal designation of the offending stockpile storage area was never documented and the area in question was not so designated by way of an appropriate amendment to the then current or subsequently issued mining permits.
> (Decision at 7). He concluded that by stockpiling coal Valley Camp was engaged in surface coal mining activities that subjected it to section 522(e) of SMCRA. If an operator was not engaged in a particular operation on the date of the enactment of SMCRA, the "in existence" exception of section 522(e) would not apply. Unless appellant can demonstrate that it had "valid existing rights" to engage in this particular activity, it cannot escape the restriction set forth in section 522(e)(4).[50]

Both Valley Camp and OSMRE appeared to assume that if a surface coal mining operation otherwise prohibited by Section 522(e) is "in existence" on August 3, 1977, or if the permittee has VER to conduct the operation, that operation is exempt from the requirements of SMCRA and the implementing regulations. The Board rejected this notion:

> If the prohibited operation is 'in existence,' or if the permittee has VER to conduct such operation, section 522(e)(4) merely exempts the operation from the prohibition. The permittee is still required to conduct that operation in compliance with SMCRA and applicable regulations. Regardless of whether Valley Camp's stockpiling operation was in existence on August 3, 1977, that operation, plus any other surface coal mining

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[49] The Board first rejected Valley Camp's argument that its stockpiling activity did not constitute "surface coal mining operations" within the meaning of Section 701(28) of SMCRA. 112 IBLA at 28, 96 I.D. at 460-61.

[50] 112 IBLA at 38, 96 I.D. at 466, quoting Order dated May 11, 1989, at 4-5.

> operations conducted in connection with the underground mine, are subject to the provisions of SMCRA, including those governing the issuance of permits. Moreover, even if an operator has VER to conduct certain surface coal mining operations, those operations must be conducted in accordance with SMCRA pursuant to a permit issued by the appropriate regulatory authority. VER only confers the right to conduct a certain operation; that operation must be conducted in accordance with SMCRA.[51]

c. *Application of the "Good Faith-All Permits" Test*

Applying the good faith-all permits test was a simple process in *Valley Camp*, since the Board found that the record was "barren of any evidence of property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorized [Valley Camp] to produce coal by a surface coal mining operation under 30 C.F.R. [Section] 761.5(a)(1) (1979)."[52] Moreover, there was no evidence that Valley Camp had made any attempt to obtain any permit prior to or after August 3, 1977.

d. *Application of the "Needed for and Immediately Adjacent to" Test*

The Board proceeded to address Valley Camp's argument that the underground mine operation constituted an "ongoing surface coal mining operation" and that the stockpiled coal is needed for and immediately adjacent to such operation under 30 C.F.R. Section 761.5(a)(ii). The Board was guided in responding to this argument by *Cogar v. Faerber*,[53] in which the Supreme Court of Appeals of West Virginia applied the "needed for and immediately adjacent to" test, as it appears in West Virginia's permanent regulatory program, in determining whether an operator had VER to create new openings to an underground mine

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[51] 112 IBLA at 37, 96 I.D. at 465.

[52] 112 IBLA at 41, 96 I.D. at 467.

[53] 371 S.E.2d 321 (W.Va. 1988). The openings would have violated West Virginia Code §§ 22A-3-22d(3) and (4) (1985 Replacement Vol.).

within 100 feet of a public road and within 300 feet of occupied dwellings, in violation of the West Virginia Code.[54]

The *Cogar* court found that in accordance with OSMRE's suspension notice dated November 20, 1986 the definition of VER included in West Virginia's permanent program controlled the issue. Under that definition, "a person possesses valid existing rights if he can demonstrate that the coal is immediately adjacent to an ongoing mining operation which existed on August 3, 1977 and is needed to make the operation as a whole economically viable."[55] The court first considered whether there was an "ongoing mining operation," stating that "the term 'surface mining operations' is most often used in connection with activities occurring within an area currently under permit or for which a permit application has been filed."[56] Thus, the court concluded that "[i]n the context of valid existing rights, we read the statute to mean that an operation includes only that area covered by a permit or permit application."[57] The operator in *Cogar* argued that its entire 1,825 acre tract consisted of a single mining operation, that it had conducted surface mining operations on a portion of the tract, and that the proposed openings would be adjacent to this single mining operation. The court rejected this argument, finding that the openings would not be "adjacent" to an area covered by a permit issued prior to August 3, 1977, or to an area for which the operator had applied for all necessary permits prior to that date.

The Board applied the *Cogar* court's analysis in *Valley Camp*, rejecting the contention advanced by OSMRE and Valley Camp that the stockpiling operation was "immediately adjacent to an ongoing surface coal mining operation:"

> Under the *Cogar* court's reasoning, which we find persuasive, in order to qualify for VER under the 'needed for, and immediately adjacent to, an ongoing surface coal mining operation' test, as modified by Judge Flannery, Valley Camp must

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[54] The relevant portions of that statute provide that after Aug. 3, 1977, "subject to valid existing rights, no surface mining operations, except those which existed on that date, shall be permitted . . . [w]ithin one hundred feet of the outside right-of-way line on any public road . . .," or "[w]ithin three hundred feet from any occupied dwelling." In addition W. Va. Code § 22A-3-3(w)(l) (1985 Replacement Vol.) provides that surface mining operations include the surface impacts incident to an underground mine.

[55] W.Va. Code of State Regulations § 38-2-2.119 (1983).

[56] 371 S.E.2d at 324.

[57] *Id.*

> still have made a good faith attempt to secure the requisite permits for conducting its 'ongoing surface coal mining operation' prior to August 3, 1977. Again, other than seeking oral approval from WVDNR [the West Virginia Department of Natural Resources] for its stockpiling operation, Valley Camp has made no showing that it made any effort to obtain any permit with regard to the surface impacts of the underground mining operation. Under the reasoning of *Cogar*, we conclude that Valley Camp's stockpiling activity is not being conducted 'immediately adjacent to an ongoing surface coal mining operation.'[58]

In arguing that the stockpiling operation was "needed for" the underground mining operation, OSMRE and Valley Camp relied upon the following definition of VER contained in the Department's permanent program regulations promulgated on September 14, 1983, at 30 C.F.R. Section 761.5(c):

> A person possesses valid existing rights if the person proposing to conduct surface coal mining operations can demonstrate that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation which existed on August 3, 1977. A determination that the coal is 'needed for' will be based upon a finding that the extension of mining is essential to make the surface coal mining operation as a whole economically viable.[59]

OSMRE couched its argument that Valley Camp's stockpiling operation was "needed for" its underground mining operation in terms of the "economically viable" language of the 1983 VER definition. The Board found such an application "reasonable," but concluded that Valley Camp failed to meet the standard. At the hearing, Valley Camp's witness responded negatively when asked whether there was an actual need to stockpile the coal in the manner in which they did. The Board concluded:

> Even if we were to find that Valley Camp's surface operations at the No. 3 underground mine qualified as ongoing surface coal mining operations for VER purposes, we would reject the argument that stockpiling coal on two occasions, first in 1974

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[58] 112 IBLA at 45-46, 96 I.D. at 470.

[59] This "needed for" rule was related to the "taking" test which Judge Flannery remanded to the Department for proper notice and comment. *See In re* Permanent Surface Mining Regulation Litig. 22 Envtl. Rep. Cas. (BNA) 1557 (1985). OSMRE subsequently suspended paragraph (c) of 30 C.F.R. § 761.5. 51 Fed.Reg. 41,961 (1986).

and again in 1980, is sufficient to demonstrate that such activity is needed for an ongoing surface coal mining operation."[60]

3. *VER to Conduct Surface Coal Mining Operations on Federal Lands*

a. *The Blackmore Co. Case*

Blackmore Co.[61] involved a decision by the Director of OSMRE that Blackmore Coal Company (Blackmore) and Hagan Estates, Inc. (Hagan) did not have VER to surface mine coal on certain lands located in the Jefferson National Forest, Virginia. Blackmore and Hagan had sought a determination that they had such rights.

On March 9, 1937, the U.S. Department of Agriculture, Forest Service (Service), received by condemnation certain lands located in Wise and Scott Counties, Virginia, and owned by Hagan, for inclusion in the Jefferson National Forest. The condemnation was subject to a mineral reservation which gave Hagan the right to mine and remove all valuable minerals, including coal, oil, gas, and petroleum.

It appeared from the record that E.M. Frederick & Associates, Inc. (Frederick), requested permission from the Service to prospect and mine for coal on part of the lands condemned from Hagan. By letter dated July 3, 1962, the Service sent Frederick a proposed permit for prospecting by earthmoving equipment. However, the Service noted that under its interpretation of the deed through which the United States acquired the property, surface mining methods, including strip mining and auguring, were not allowed. The Board surmised that the Service's "concern was apparently based upon its research indicating that strip mining was not practiced in this part of Virginia until well into the 1940's. . . . The [Service] thus believed that extracting coal by strip mining methods was not contemplated by the 1937 conveyance and reservation."[62]

On July 11, 1980, Hagan leased the reserved mineral rights in 9,973.89 acres of land in Scott County, Virginia, to the W.P.

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[60] 112 IBLA at 48-49, 96 I.D. at 471.

[61] 108 IBLA 1 (1989).

[62] *Id.* at 2.

Corporation (W.P.), and on November 1, 1980, W.P. assigned all its interest in the coal lease to Blackmore. Prior to June 1983, Blackmore entered into discussions with the Service concerning the development of Hagan's reserved mineral rights. Because the Service could not proceed with the discussions without an OSMRE determination that Blackmore had VER to develop the mineral estate, Blackmore requested that OSMRE make such a determination.

By letter dated December 3, 1986, the OSMRE Director determined that Blackmore and Hagan did not have VER under Section 522(e) of SMCRA and the implementing regulations. The Director adverted to 30 C.F.R. Parts 740-745, which required Blackmore and Hagan to satisfy the requirements of the Virginia permanent regulatory program, specifically Section V761.5 of the Virginia Coal Surface Mining Reclamation regulations. That section mirrors 30 C.F.R. Section 761.5, except that subsection (2)(i) had been modified in accordance with Judge Flannery's statement in *In re Permanent Surface Mining Regulation Litigation*,[63] suggesting that a "good faith effort" on the part of the VER applicant in obtaining all State and Federal permits necessary to conduct the operation prior to August 3, 1977, would be sufficient to satisy the "all permits" test. Thus, Section V761.5(2)(i) of Virginia's regulation provided that the VER applicant must have "made a good faith effort to obtain State and Federal permits necessary to conduct [a surface coal mining] operation on those lands on or before August 3, 1977." The Director interpreted Section V761.5(2)(i) as requiring that Blackmore and Hagan have the requisite "property rights" under subsection (1) of the regulation, and that they had made a good faith effort to obtain all necessary permits. He concluded that "there is no evidence that as of August 3, 1977, there had ever been a serious effort to obtain all the permits necessary to mine the coal."[64]

On appeal to the Board, Blackmore and Hagan placed into focus two major difficulties with the "all permits" test as promulgated by OSMRE and as adopted by Virginia. First, they state that "[n]o question has been raised about our property right or title; just did we have all permits by an arbitrary date subsequent to condemnation where the condemnor's express document

[63] 14 Envtl. Rep. Cas. (BNA) 1083, 1090 (D. D.C. 1980).

[64] 108 IBLA at 4, quoting Decision at 3.

granted stripping rights."[65] Second, they complain that "[i]t seems odd that we lack VER because we didn't get permits from Virginia which couldn't issue them."[66]

After setting forth the history of OSMRE's attempts at defining VER, the Board examined the additional question of what version of the definition applies to federal lands located in Virginia. The Board noted that Virginia's permanent regulatory program was conditionally approved in December 1981.[67] Under the terms of the conditional approval, "the Department of Conservation and Economic Development, Division of Mined Land Reclamation, shall be deemed the regulatory authority in Virginia for all surface coal mining and reclamation operations and all exploration operations on non-Federal and non-Indian lands," and "[o]nly surface coal mining and reclamation operations on non-Federal and non-Indian lands shall be subject to the provisions of the Virginia permanent regulatory program."[68] On June 6, 1983, the limitation restricting the application of Virginia's permanent regulatory program to operations on non-Federal and non-Indian lands was removed.[69]

In accordance with Section 523(c) of SMCRA and 30 C.F.R. Section Part 745, on March 26, 1982, Virginia filed a formal request with the Secretary for a cooperative agreement giving it authority to administer its approved permanent regulatory program on Federal lands within the Commonwealth. Virginia's proposed cooperative agreement was published as a proposed rule in the Federal Register on June 27, 1983[70] and as a final rule on April 7, 1987, with an effective date of May 7, 1987.[71] However, pursuant to the reservation of authority set forth in 30 C.F.R. Section 740.4(a)(4) and 745.13(o), the preamble to the final rule contains the following statement concerning VER determinations:

> [C]ertain responsibilities under SMCRA that are reserved to the Secretary are not delegated by this agreement, such as . . . [determinations of] valid existing rights [on Federal lands].

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[65] 108 IBLA at 4, quoting Statement of Reasons.

[66] *Id.*

[67] 46 Fed.Reg. 61,088 and 61,114 (1981).

[68] 30 C.F.R. § 946.10 (1982); 46 Fed.Reg. 60,108 and 61,114 (1981).

[69] 30 C.F.R. § 946.10 (1983); 48 Fed.Reg. 15,184 and 15,186 (1983).

[70] 48 Fed.Reg. 29,545 (1987).

[71] 30 C.F.R. § 946.30 (1987); 52 Fed.Reg. 11,044 (1987).

> Requests for determinations of valid existing rights will be processed in accordance with the District Court opinion in *In Re: Permanent Surface Mining Regulation Litigation II*, [22 Env't Rep. Cas. 1557 (D. D.C. 1985)].[72]

The Board rejected OSMRE's argument that the Virginia definition of VER should be applied under the November 20, 1986, Federal Register notice suspending the "taking" test, in which OSMRE stated:

> Suspending the rule has the effect of undoing the improper promulgation and leaving in place the VER test in use before the 1983 definition was promulgated. The test was the 1979 test, . . . as modified by the August 4, 1980 suspension notice which implemented the District Court's February 1980 opinion in *In Re: Permanent (I)* (the 1980 test) [14 Env't Rep. Cas. 1083 (D. D.C. 1980)]. The suspension notice stated that pending further rulemaking OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.
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> . . .
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> During the period of the suspension OSMRE has decided, consistent with 30 C.F.R. § 740.11(a), to make VER determinations on Federal lands . . . using the VER definition contained in the appropriate State or Federal regulatory program.[73]

The Board observed that the November 22, 1986, suspension notice did not become effective until December 22, 1986. Thus, it concluded that "[t]he suspension notice cannot be applied because it simply was not in effect at the time of the decision in this case."[74] However, based upon the following rationale, the Board applied Virginia's permanent program definition of VER anyway: "Although Virginia lacked authority to administer its approved program on Federal lands until May 7, 1987, and still does not have authority to make a determination of VER on Federal lands, its permanent regulatory program definition of VER should be applied on Federal lands within the Commonwealth."[75] Apparently, this conclusion is based upon the fact that while VER determinations on Federal lands is a matter reserved to OSMRE under the cooperative agreement, OSMRE

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[72] 52 Fed.Reg. 11,044 (1987).

[73] 51 Fed.Reg. 41,954-55 (1986).

[74] 108 IBLA at 7.

[75] *Id.* at 8.

is required to apply Virginia's definition in making such determinations.

The Board stated that under Virginia's permanent program definition of VER, Blackmore and Hagan "bear the burden of proving their good faith efforts to obtain all necessary State and Federal permits."[76] Noting that Blackmore and Hagan, "or their predecessors-in-interest or agents, attempted to obtain [the Service's] permission to conduct surface mining operations in 1962 and in 1975-77," the Board ruled: "One attempt to obtain permission to conduct surface coal mining operations which resulted in permission only to explore for coal, which permission was never acted upon in any way for 15 years, does not constitute a good faith effort to obtain all necessary State and Federal permits."[77] The Board suggests what steps, in its view, would have indicated a good faith effort on the part of Blackmore and Hagan:

> [N]either appellant took any further steps on their own to challenge the [Service's] alleged statements that it could not process an application for surface mining, to determine what agency or agencies were responsible for issuing the necessary State and Federal permits, or even to determine what permits were required. Appellants' statement that the Virginia Attorney General doubted the Commonwealth's authority to issue a mining permit on Federal lands on August, 3, 1977, does not show compliance with other State permit requirements. Neither is there a showing that appellants attempted to obtain any Federal permits that were necessary in addition to surface mining permits. [78]

The Board ruled that OSMRE properly denied the request of Blackmore and Hagan for VER.

b. *The Stearns Co. Case*

In *The Stearns Co.*,[79] The Stearns Company (Stearns) appealed from an OSMRE decision rejecting its application for a ruling that it holds VER to mine coal under Federal lands within the Daniel Boone National Forest in McCreary County, Ken-

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] 110 IBLA 345 (1989).

tucky. Stearns owns the rights to the coal "in, upon and under" the subject lands pursuant to a reservation in the deed dated December 18, 1937, by which the United States acquired the lands. By letter application dated March 24, 1986, Stearns sought recognition of VER to mine the coal by underground mining operations (including the creation of surface effects of underground mining).

In his December 3, 1986, decision, the Director of OSMRE, applied the definition of VER contained in Kentucky's permanent regulatory program. Specifically, he found that under 405 Ky. Admin. Reg. (KAR) 24:040 Section 4, Stearns must establish that it has property rights pursuant to a legally enforceable instrument to produce coal by surface mining methods, and further that the applicant had, prior to August 3, 1977, obtained or made a good faith effort to obtain the permits necessary to conduct such operations. Based upon Stearns' indication in a follow-up letter to its application that it had not applied for mining permits, the Director concluded that Stearns failed to satisfy the regulatory requirements for VER.

On appeal to the Board, Stearns argued, *inter alia*, (1) "that application of the State regulations to deny VER in the absence of a pending application for all necessary permits as of August 3, 1977, constitutes an unconstitutional taking of property rights and is inconsistent with the clear language and intent of section 522(e) of SMCRA recognizing an exception for VER;" (2) "that reliance upon the State regulation in denying the VER application constitutes an improper delegation of the authority to determine VER for surface mining operations on Federal lands in violation of the terms of 30 CFR 745.13(o);" (3) "that in the absence of a valid Federal regulation governing the VER ruling, the Board should apply the 'taking' test to avoid an unconstitutional application of the statute;" and (4) "that application of disparate state regulatory standards to VER determinations for Federal lands in different states as opposed to a uniform Federal standard violates constitutional requirements of equal protection of the law made applicable to the Federal Government through the due process clause of the Fifth Amendment."[80]

Relying upon the Board's previous decision in *Blackmore*, Administrative Judge C. Randall Grant, Jr., in the lead opinion,

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[80] *Id.* at 346.

rejected Stearns' argument that it should apply the regulation containing the "taking" test. Judge Grant observed that even though OSMRE's suspension of the regulation containing the "taking" test occurred after the OSMRE decision involved in Stearns, after Judge Flannery's March 22, 1985, decision invalidating that regulation, "the Department was without authority to apply that standard."[81]

Noting that Kentucky's permanent regulatory program was conditionally approved on May 18, 1982,[82] Judge Grant found that OSMRE properly applied Kentucky's definition of VER pursuant to 30 C.F.R. Subchapter D regarding the Federal lands program. He reasoned that "[i]n view of appellant's concession that applications were not pending for the necessary permits as of the enactment of SMCRA on August 3, 1977, we find the rejection of appellant's VER application must be affirmed."[83]

While Administrative Law Judge Burski agreed with Judge Grant that Stearns had "failed to establish the existence of VER," he recorded his disagreement with the Board's conclusion that it "may apply the definition of VER contained in the various approved state regulatory programs in determining the existence of VER on those Federal lands for which the Secretary has retained jurisdiction to adjudicate the existence of VER."[84] Judge Burski's view is that in such cases "the Board must apply the presently existing Federal regulatory definition [30 C.F.R. § 761.5], as amended by the Department on August 4, 1980."[85]

Judge Burski rejects the rationale propounded by the Board in *Blackmore*, and followed in Judge Grant's lead opinion in *Stearns*, i.e., "that, under 30 CFR 740.11, upon approval of the state permanent regulatory program, Federal lands became subject to the state program and, therefore, the state definition of VER properly applied to determinations of the existence of VER on all Federal lands within that state."[86] He notes that "in promulgating the 1983 revisions to the Federal Lands Program, 30 C.F.R. Part 740, the Department expressly noted that [v]alid existing rights determinations of [30 U.S.C. § 1272(e)(1) and (2)]

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[81] *Id.* at 350.
[82] 30 C.F.R. § 917.10 (1987)
[83] 110 IBLA at 350.
[84] *Id.* at 352.
[85] *Id.*
[86] *Id.* at 354.

areas are of such paramount national importance that this responsibility appropriately should not be delegated."[87] He finds it "scarcely credible that so critical a matter as defining the terms 'valid existing rights' would have been delegated to the states, at the exact same time that the Department was expressly recognizing the paramount national importance of the ultimate decision."[88]

Judge Burski rejected OSMRE's argument that the following language in the November 20, 1986, suspension notice had the effect of making the state regulatory definition applicable to Federal VER determinations: "During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations . . . using the VER definition contained in the appropriate State or Federal regulatory program."[89]

Judge Burski noted that under 30 C.F.R. Section 732.15, the State's regulatory program must be "in accordance with the provisions of the Act and consistent with the requirement of the Chapter." He observes that "virtually every state permanent program was approved prior to the change to the 1983 'taking' test, so that all programs which had defined VER had necessarily, because of the consistency requirement, embraced the 'all permits test'."[90] However, he noted a problem in the fact that during the period 1983 to 1986 a number of states amended their regulatory programs to adopt the "taking" test, which amendments were approved as "consistent with" the new definition of VER. Thus, the effect of applying the State's definition of VER is that in those states which have adopted the "taking" test, Section 522(e)(1) and (2) areas would be governed by the "taking" test. He was concerned that in *Blackmore* and *Stearns*, "the Board is setting the stage for the eventual application of the 'taking' test definition to Federal lands within section 1272(e)(1) and (2) areas in those states which have adopted that definition."[91]

For reasons set forth in Judge Burksi's opinion, OSMRE would be without authority to apply the "taking" test in making a VER determination regarding Federal lands. While he focuses

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[87] *Id.* at 355, quoting 48 Fed.Reg. 6,917 (1983).

[88] 110 IBLA at 355.

[89] 51 Fed.Reg. 41,955 (1986).

[90] 110 IBLA at 357-58. (footnote omitted).

[91] *Id.* at 359.

primarily upon the VER determination involved in *Stearns*, his analysis would be equally applicable should OSMRE eventually attempt to apply the "taking" test as adopted by a state. The most persuasive reason that OSMRE would be without authority to apply the "taking" test, at least as long as the Department's version remains invalid due to invalid promulgation, is that to the extent that Judge Flannery remanded the "taking" test definition to the Department because it was improperly promulgated, this action necessarily invalidated all state regulations which had been adopted consistent therewith. To the extent, therefore, that the Department seeks to utilize a taking test in such states, it is indirectly applying the same regulation which it could not directly apply at this time.[92]

III. PROCEDURAL REGULATIONS GOVERNING APPEALS OF VER DETERMINATIONS MADE SEPARATELY FROM PERMIT DECISIONS

30 C.F.R. Section 761.12(h) provides that a determination by the regulatory authority that a person holds or does not hold valid existing rights shall be subject to administrative review under 30 C.F.R. Section 775.11. When a determination on VER is made by OSMRE in conjunction with a decision on an application for a permit, administrative review takes place under the regulations for review of the decision on the application, *e.g.*, 43 C.F.R. Section 4.1360 *et seq.* When a VER determination is made by OSMRE separately from a decision on an application to mine the lands involved, then administrative review of the determination occurs in accordance with 43 C.F.R. Sections 4.1390-94.[93] Procedures for administrative review of state regulatory agency determinations on valid existing rights would conform to the requirements of 30 C.F.R. Section 775.11(b).

Under 43 C.F.R. Section 4.1390-4.1394, a request for review of the determination is to be filed in the office of the OSMRE official who made the decision and a copy sent to the Interior Board of Land Appeals at the same time.[94] The request is to be

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[92] *Id.* at 358. *See* Harman Mining Corp. v. OSMRE, 569 F.Supp. 806, 810-11 (W.D. Va. 1987).

[93] *See* 52 Fed.Reg. 39,525 (1987).

[94] 43 C.F.R. § 4.1391(a). Direct appeal to the Board is provided for "[b]ecause these determinations will usually involve legal rather than factual issues." 51 Fed.Reg. 35,251 (1986). "If the Board determines a factfinding hearing is necessary it may order one under 43 CFR 4.415." *Id.*

filed, *i.e.*, mailed,[95] within thirty days after the applicant or permittee is notified by publication in a local newspaper of notice of OSMRE's written determination.[96] In March 1989, the Office of Hearings and Appeals proposed to amend this rule to require the filing of a request for review within thirty days after an applicant or permittee is notified of OSMRE's written determination by certified mail or overnight delivery service.[97] The comment period on this and other amendments proposed in March was reopened in July,[98] and the amended rules have not yet been promulgated in final form.

The OSMRE official is to file the complete administrative record of the decision under review as soon as practicable with the Board. This provision was included in the rule because the Board's experience under 43 C.F.R. Section 4.1280 et seq., the rules authorizing appeals to the Board from decisions of the Director of OSMRE, indicated the need for a statement that it was OSMRE's responsibility to prepare a record for its decision and to deliver it promptly if the decision was appealed. In *Save Our Cumberland Mountains, Inc.*,[99] we repeated our "requirements for records forwarded by agencies whose decisions are subject to our review:"

> The proper assembly of a case record should not be a difficult matter. However, the agency should not wait to begin this task until after a notice of appeal has been filed. It should start to assemble a file at the initiation of any process which might culminate in a decision subject to this Board's review. The first document in the record should be the one that initiates the process. In certain cases, this might be a notice from the agency, which should be placed in a file with any documents necessary to establish the basis for issuing the notice. Cases such as this, however, are initiated by an application by a member of the public, and a case file should be opened upon receipt of such a document. Any correspondence should be dated and included in the case file chronologically as it is issued or received, along with memoranda of meetings and telephone conversations. See NLRB v. West Texas Utilities Co., 214 F. 2d 732, 737 (5th Cir. 1954). It may be necessary

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[95] *See* 43 C.F.R. § 4.1107(g).
[96] 43 C.F.R. § 4.1391(b).
[97] 54 Fed.Reg. 9,852 and 9,855 (1989).
[98] *See* 54 Fed.Reg. 30,766 (1989).
[99] 108 IBLA 70 (1989).

> to include additional reports, plans, and other documents, depending on the type of case. The final documents added should be the decision and proof of service thereof. The record should be maintained in such a manner that when a notice of appeal is timely filed, the only task remaining is to add the notice to the record and transmit it to this Board. [100]

If the record is compiled and maintained in accordance with this guidance, it should be possible for the office of the OSMRE official whose determination on an application for VER is the subject of a request for review, to copy the record, if it wishes to keep one for its reference, and forward the original to the Board within five days.[101] Additionally, if the record is complete it should not be necessary for the Board to set the OSMRE decision aside as unsupported.[102]

The Interior Board of Land Appeals has often observed that it is incumbent on the agency whose decision it must review "to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision and demonstrated in the record. Otherwise the Department is left open to the charge that its actions are arbitrary."[103] In the context of reviewing the rejection of a competitive bid for an oil and gas lease, we have said that a person "is entitled to a reasoned and factual explanation for the rejection of its bid. Appellant must be given some basis for understanding and accepting the rejection or alternatively appealing it and disputing it before this Board."[104] The Board has the "plenary authority to review *de novo* all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights."[105] It is therefore advisable for the agency to prepare a decision that provides the procedural background of the case, the facts from the record, the texts of the relevant legal documents, and a thorough discussion, with citations, of the reasons that support the agency's conclusion of the proper application of the law to the facts. "[T]he Board will require sufficient facts

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[100] *Id.* at 85.

[101] *See* Harriet B. Ravenscroft, 105 IBLA 324, 330 (1988).

[102] *See* Fred D. Zerfoss, 81 IBLA 14, 17 (1984).

[103] Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983).

[104] Southern Union Exploration Co., 51 IBLA 89, 92 (1980).

[105] Alvin R. Platz, 114 IBLA 8, 15 (1990); United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983).

and a sufficiently comprehensible analysis to insure that a rational basis for the determination is present."[106]

Filing a request for review stays the effectiveness of OSMRE's decision. Section 4.1393 of 43 C.F.R. provides that 43 C.F.R. Section 4.21(a) applies to OSMRE's determinations under Section 522(e) of the Act. The latter regulation provides that "a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal." The applicability of this regulation provides an opportunity for administrative review before OSMRE's decision becomes final agency action for purposes of judicial review. It permits the Board to review, and perhaps supplement, the record and the rationale supporting a decision. It may also protect private parties from investing resources on the basis of an initial OSMRE decision that may be modified or found erroneous. Because a determination on an application for VER that is separate from a permit decision precedes a decision on an application for a permit, and because the issues on review of the decision are more likely to be legal rather than factual, suspending the effect of the OSMRE decision should not disadvantage the applicant.[107]

If the applicant for VER requests review of the OSMRE determination, OSMRE bears the burden of presenting a prima facie case in support of its decision and the applicant bears the burden of ultimate persuasion by a preponderance of the evidence that OSMRE's decision is erroneous. If any other person seeks review, that person bears both the burden of going forward with evidence and the ultimate burden of persuasion that the OSMRE decision is in error.[108]

IV. SHOULD VER BE DEFINED BY RULEMAKING OR DETERMINED BY ADJUDICATION?

In the preamble to the 1979 final permanent program regulations, in the context of discussing whether VER must be determined "on a case-by-case basis," OSMRE stated its belief that VER "is a site specific concept which can be fairly applied

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[106] M. Robert Paglee, 68 IBLA 231, 234 (1982).

[107] *See* 52 Fed.Reg. 39,525 (1987).

[108] 43 C.F.R. § 4.1394.

only by taking into account the particular circumstances of each permit applicant."[109]

OSMRE said it "considered not defining VER, which would leave questions concerning VER to be answered by the States, the Secretary and the courts at later times."[110] OSM stated that [w]ithout a definition . . . many interpretations of VER would be made and no doubt challenged by both operators and citizens; and once valid existing rights determinations are challenged, the permitting process would be delayed.[111]

This language originated in the January 1979 Comment Evaluation Sheet (CES) prepared by the OSMRE task group designated to consider the issue of how to define valid existing rights. The document analysed five alternatives in response to the comments submitted on the proposed definition.[112] In the context of discussing the legislative history of VER the document states that "the task group has endeavored to determine that point at which payment would be required because a taking had occurred, and then to define valid existing rights in those terms, *i.e.*, those rights which cannot be affected without paying compensation,"[113] and this language, too, was repeated in the preamble to the regulations.[114] The document makes clear that the group's concern was "to make the exemption more specific" and to define VER in a way that "would provide a definite standard against which to determine VER and would be readily enforceable by State and Federal inspectors."[115] The document also makes clear that the task group thought defining VER simply as "having a property right for the coal as of August 3, 1977, would be a very broad construction favorable to most operators. Because property rights are transferrable and saleable, all coal for which there existed a valid property right on August 3, 1977,

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[109] 44 Fed.Reg. 14,993 (1979).

[110] *Id.*

[111] *Id.*

[112] The five alternatives were "1) retain present definition of VER; 2) do not define VER; 3) define VER has having a property right for the coal as of August 3, 1977; 4) define VER as having all validly issued permits to mine the coal as August 3, 1977; and 5) define VER as both owning a property right to the coal prior to August 3, 1977, plus either (i) having all permits or (ii) the coal is both necessary for and contiguous to an ongoing operation." The task group recommended alternative 5. Comment Evaluation Sheet (CES) at 1. (Available from the J. MIN. L. & POL'Y.).

[113] CES at 3.

[114] 44 Fed.Reg. 14,992 (1979).

[115] CES at 18.

would be exempt from the prohibition on mining. This construction would make [Section] 522(e) almost meaningless and would allow almost all mining to proceed despite Congress' prohibitions."[116]

In the preamble to the final rule OSMRE concluded that "VER should be defined in order to achieve a measure of consistency in interpreting this important exemption."[117] OSMRE concluded this discussion with the comment that "[u]nder the final definition, VER must be applied on a case-by-case basis, except that there should be no question about the presence of VER where an applicant had all permits for the area as of August 3, 1977."[118]

We suggest that OSMRE's premise that VER must be determined on a case-by-case basis was correct, but that it was contradicted by OSMRE's wish to "achieve a measure of consistency in interpreting" VER. While we appreciate that having a "definite standard" would be administratively more convenient than figuring out in each case whether a denial of VER would constitute a taking, OSMRE's effort to define VER in the 1979 rulemaking precluded the very analysis of the facts and the law of each VER situation that case-by-case determinations entail. If, by definition, one must have obtained all permits needed to mine in order to demonstrate VER, then the failure to have done so makes a case-by-case examination of the legal instruments that may serve as a basis for VER under state law unnecessary.

The Surface Mining Act does not mandate that VER be defined by rule, and, in our view, adjudication is a more appropriate method of making VER determinations because it allows an evaluation of the particular facts and the applicable law of a given situation. Ever since the *Chenery* decisions[119] it has been clear that an agency is free to choose, with some limitations, between establishing prospective policies by rulemaking or by adjudication. Although the Administrative Conference of the United States recommends rulemaking as generally preferable, it suggests two advantages of adjudication that seem applicable in the VER context: the reduced political vulnerability of policy-

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[116] *Id.* at 17-18.

[117] 44 Fed. Reg. 14,993 (1979).

[118] *Id.*

[119] *See* SEC v. Chenery Corp., 332 U.S. 194, 202-3 (1974).

making by adjudication, and the avoidance of the difficulty of drafting rules that are neither too broad or too narrow.[120]

OSMRE recognized the difficulty of writing a rule that was "neither overinclusive nor underinclusive of all potential takings which might result from Section 522(e) prohibitions,"[121] and, as a result, promulgated its September 1983 rule that defined valid existing rights as a property interest the application of Section 522(e) prohibitions to which would "effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments."[122] As the Commonwealth of Pennsylvania pointed out in its brief challenging this rule as so far removed from what was proposed in 1982 as to be in violation of the notice and comment provisions of the Administrative Procedure Act, however, this definition would have put both state agencies and the Department in the position of ruling on applications for VER in terms of a constitutional issue, something they are neither equipped nor authorized to do.[123]

Some of the advantages of developing policy by rulemaking, *e.g.*, its openness to comments from different perspectives,[124] can be achieved by giving notice in advance that a particular adjudication is the vehicle for the resolution of a certain issue, as the Nuclear Regulatory Commission does in its lead cases,[125] and by allowing intervention or encouraging amicus briefs on the matter. The Office of Hearings and Appeals regularly updates a summary of appeals under the Surface Mining Act that are currently pending, and the rule governing intervention in surface mining proceedings, 43 C.F.R. Section 4.1110, is quite liberal, although it has not always been generously interpreted.[126]

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[120] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL AGENCY RULEMAKING (1983) 81-83.

[121] 48 Fed.Reg. 41,314 (1983).

[122] 48 Fed.Reg. 41,349 (1983).

[123] Commonwealth of Pennsylvania, Department of Environmental Resources; Memorandum of Points and Authorities in Support of its Motion for Summary Judgment in Commonwealth of Pennsylvania Department of Environmental Resources v. U.S. Department of the Interior, Civil Action No. 83-3368, U.S. District Court for the District of Columbia, *In re*: Permanent Surface Mining Regulation Litig. II, Civil Action No. 79-1144, dated July 13, 1984, at 15-16. *See* Amanda Coal Co., 2 IBSMA 395, 87 I.D. 643 (1980); Ptarmigan Co., Inc., 91 IBLA 113, 116 (1986).

[124] *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 683 (D.C. Cir. 1973).

[125] Philadelphia Electric Co., et al. (Peach Bottom Atomic Power Station, Units 2 and 3), et al., ALAB-480, 7 NRC 796, 804-06 (1978).

[126] *See* Rebel Coal Co., Inc., 4 IBSMA 69, 89 I.D. 331 (1982).

V. CONCLUSION

Before the U.S. District Court remanded the Department's 1979 rulemaking effort to define VER in terms of having all permits necessary to exercise a property right, that rule contained the provision that the Interior Board of Surface Mining Appeals applied in the *Ronald Johnson II* case discussed above, namely, that "interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right."[127] Although we have criticized IBSMA's failure to analyze this provision adequately in its *Ronald Johnson II* decision, the provision nevertheless represents our view of the appropriate standard to apply in case-by-case adjudication of applications for VER.

Similarly, Option 1, as set forth in OSMRE's December 27, 1988, rulemaking proposal provides an appropriate vehicle for determining VER on a case-by-case basis. Former 30 C.F.R. Section 761.5(c) and proposed and withdrawn[128] Option 1 share an approach which emphasizes the importance of State law in determining VER. As stated by OSMRE, VER exists under Option 1 "when an applicant has a legal right to the coal resource and has authority to mine by the method intended, as determined by State law."[129]

As OSMRE explained in its preamble to the December 27, 1988, proposed rulemaking, Option 1 "finds extensive support in the legislative history of the Surface Mining Act," and reflects Congress intention "that there must be some deference to State law in determining what constituted VER."[130] Prior to proposing Option 1, OSMRE "reviewed the law of States where coal mining is conducted to determine whether adoption of the proposed rule would allow surface mining to occur where such a method was not contemplated at the time the mineral estate was

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[127] 30 C.F.R. § 761.5(c) (1980).

[128] On July 21, 1989, OSMRE withdrew the proposed rule for further study. 54 Fed.Reg. 30,557 (1989).

[129] 53 Fed.Reg. 52,374 (1988).

[130] *Id.* at 52,377.

severed from the surface estate."[131] OSMRE's conclusion was that "in most States surface mining where the surface is not owned by the mineral owner is not authorized absent other evidence that such a mining method is consistent with the parties' intentions."[132] Presumably, under Option 1, OSMRE would look to State law in determining what "other evidence" is relevant in determining whether surface mining is consistent with the parties' intentions. Using *Polino* as an example, evidence relating to custom and usage would be relevant in determining the parties' intentions in West Virginia.[133]

OSMRE's December 27, 1988, proposed rule contains a "new introductory statement . . . [that] constitutes the basic definition of VER . . . [but] does not constitute a test which must be met for VER to be found."[134] Instead, "it simply defines VER as a right to conduct surface coal mining operations on lands on which, without such a right, mining operations would be prohibitited [by section 522(e) of the Act]."[135] There follow two standards for establishing VER: (1) subsection (a) of 30 C.F.R. Section 761.5 provides that "[i]n order to demonstrate VER, a person must show possession of a conveyance, lease, deed, contract, or other document establishing a right to the coal resource;" and (2) subsection (a)(2)(i) (Option 1) requires the person to "demonstrate the right, as determined by the laws of the State in which the mining would occur, to extract the coal by the method that person intends to use."[136] These standards would serve as a basis for adjudicating whether a person had valid existing rights in a particular situation.

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[131] *Id.*

[132] *Id.*

[133] Congress' intention that VER determinations be made in accordance with State law is demonstrated in the discussions concerning the broad form deed question. For example, Congressman Udall stated that there had been "testimony and controversy about the problem of the so-called broad form deed, but a decision was made by the conferees that this is largely a matter of State property law and State constitutions, and that there is a serious question about the ability of the Federal government to move into such a situation." 53 Fed.Reg. 52,377 (1988), quoting 121 CONG. REC. H6679 (1975). OSMRE concludes that "Congress clearly contemplated the preservation of mineral rights under State law, even where such rights were created by a broad form deed." 53 Fed.Reg. 52,378 (1988).

[134] 53 Fed.Reg. 52,376 (1988).

[135] *Id.* at 52,383.

[136] *Id.* at 52,376-77.