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# Valid Existing Rights in SMCRA

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## INTRODUCTION

The Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) has struggled for years to flesh out the regulatory framework under the Surface Mining Control and Reclamation Act of 1977.<sup>1</sup> One of OSMRE's most debated undertakings concerns the meaning of the clause "subject to valid existing rights," contained in Section 522(e).<sup>2</sup> Attempts by OSMRE to define the meaning and application of the valid existing rights (VER) concept in the Act have prompted court challenges resulting first in a judicial revision of the regulation and, later, in an outright rejection of a new rule on procedural grounds.<sup>3</sup> A third attempt resulted in a withdrawal of the proposed rulemaking after public scrutiny and comment.<sup>4</sup> Despite several scholarly articles,<sup>5</sup> a number of court decisions<sup>6</sup> and

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<sup>1</sup> Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, §§ 101-908, 91 Stat. 445 (codified as 30 U.S.C. §§ 1201-1328 (1988))[hereinafter cited as SMCRA or the Act].

<sup>2</sup> SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988).

<sup>3</sup> See 53 Fed. Reg. 52,374 (1988) (detailing the prior regulatory history of VER and the ensuing litigation in the Discussion of Proposed Rules).

<sup>4</sup> 54 Fed. Reg. 30,557 (1989).

<sup>5</sup> See e.g., McGinley and Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L.J. 418 (1981); Barkeley and Albert, *A Survey of Case Law Interpreting: Valid Existing Rights*'—Implications for Unpatented Mining Claims, 34 ROCKY Mtn. MIN. L. INST. 9.1 (1988); McFerrin and Whitman, *Valid Existing Rights and the Constitution: 1983 Regulatory Changes*, 87 W. VA. L. REV. 647 (1985); Toffenetti, *Valid Mining Rights and Wilderness Areas*, 20 LAND AND WATER L. REV.

administrative adjudications,<sup>7</sup> VER in the SMCRA context remains amorphous.<sup>8</sup>

This article will endeavor to advance the analysis of VER by reviewing the legislative history of VER in statutes preceding SMCRA and in SMCRA itself, by drawing from judicial, academic and advocacy writings, and of course by analyzing VER in the context of the SMCRA.<sup>9</sup> We believe the conclusions derived from our analysis fulfill the intents and purposes of Congress as expressed in the Act's delicate balance of the competing and incompatible coal extraction industry interests and environmental interests.<sup>10</sup>

31 (1985); Note, *Regulation and Land Withdrawal: Defining "Valid Existing Rights,"* 3 J. MIN. LAW & POL'Y 517 (1988).

<sup>6</sup> *In re Permanent Surface Mining Regulation Litig.*, 14 Env't. Rep. Cas. (BNA) 1083 (D. D.C. 1980), *aff'd* 653 F.2d 514, *cert denied sub nom.* Peabody Coal Co. v. Watt, 454 U.S. 822 (1981); See *Hodel v. Virginia Surface Mining & Reclamation Ass'n.*, 452 U.S. 264 (1981), in which the Supreme Court concurred in the district court's rejection of the strict VER "all permits test" but upheld the constitutionality of § 522 of SMCRA against a facial "takings" challenge. See also, *Sunday Creek Coal Co. v. Hodel*, No. C-2-88-0416, slip op. (S.D. Ohio June 2, 1988); *Whitney Benefits, Inc. v. U.S.*, 18 Cl. Ct. 394 (1989) and earlier, 752 F.2d 1558 (D.C. Cir. 1985); *In re Permanent Surface Mining Regulation Litig.*, 22 Env't. Rep. Cas. 1557 (D. D.C. 1985); *Ainzley v. United States*, 8 Cl. Ct. 394 (1985); *Otter Creek Coal Co.*, 231 Ct. Cl. 879 (1982); *Otter Creek Coal Co.*, 224 Ct. Cl. 697 (1980); *Cogar v. Faerber*, 371 S.E.2d 321 (W.Va. 1988); *Willowbrook Mining Co. v. Commonwealth*, 499 A.2d 2 (Pa. Com. Ct. 1985).

<sup>7</sup> *Valley Camp Coal Co. v. OSMRE*, 112 IBLA 19 (1989); *The Stearns Co.*, 110 IBLA 345 (1989); *Blackmore Co.*, *Hagan Estates Inc.*, 108 IBLA—(1989); *Ruth Z. Ainzley*, 98 IBLA 306 (1987).

<sup>8</sup> If one counts all the costs associated with the SMCRA VER controversy from its 1977 birth to the present, including costs associated with administrative regulation, court challenges, academic debates, citizens participation, industry defense and media coverage, the ludicrousness of the controversy astounds even the hardest-core bureaucrat. All of this may be a purely academic exercise if the applicable statute of limitations on takings claims has expired. See note 160 and accompanying text, *infra*.

<sup>9</sup> SMCRA § 522(e), 30 U.S.C. 1272(e) addresses land and mineral rights ownership in the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, National Recreation Areas, National Forests, publicly-owned parks and inclusions in the National Register of Historic Sites, public roads, occupied buildings, and cemeteries. All of the 522(e) bans are subject to VER. S. REP. NO. 128, 95th Cong., 1st Sess. 94 (1977). Any interpretation of VER must take into account that one of the purposes of SMCRA is to assure that the nation's coal supply meets its energy demands. SMCRA § 102(f), 30 U.S.C. § 1202(f) states:

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy. . . .

<sup>10</sup> See, e.g., SMCRA § 102, 30 U.S.C. § 1202 (1988).

## I. LEGISLATIVE ORIGINS OF VER IN SMCRA

It is an axiom that Congress is aware of the meaning of and interpretation of certain language when it uses such language in enactments.<sup>11</sup> Thus when Congress used the phrase "subject to valid existing rights" in Section 522, it may be presumed that the phrase carried with it all the baggage it had accumulated in nearly 100 years of prior enactments and court cases.

However, an examination of the circumstances of VER's appearance in SMCRA reveals that Congress' 1977 idea of VER may have been different from its traditional meaning.

### 1974 - S. 425 and H.R. 11500

In the legislative history of S. 425 and HR 11500, the first real attempts by Congress to pass a mining law, the 93rd Congress prohibited permit issuance on certain federal and non-federal lands.

The Report of the House on H.R. 11500 states at Section 209, Permit Approval or Denial:

(d) No permit shall be issued by the regulatory authority unless the permit application affirmatively demonstrates that, and the regulatory authority makes specific written findings to the effect that—

(3) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining pursuant to section 206 of this Act or is not within an area under study for such designation (unless in such an area under study, the operator making the permit application demonstrates that, prior to September 1, 1973, he has made substantial legal and financial commitments in relation to the operation for which he is applying for a permit);

(4) the land to be affected does not lie within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or cemetery; nor shall the land to be affected lie within one hundred feet of the outside right-of-way line of any public road, except that the regulatory authority may permit such roads to be relocated, if the interests of the public and the

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<sup>11</sup> See Note, *supra* note 5 at 544-45.

landowners affected thereby will be protected;

. . .  
(8) mining operations would not adversely affect nearby lands and waters to which the public enjoys use and access, or the mining of any area of land within one mile of publicly owned lands or parks or places located in the National Register of Historic Sites unless screening and other measure approved by the regulatory authority are used and the permit so provides, or if the mining of the area will not adversely affect or reduce the usage of the publicly owned land;

(9) the mining operations are not located within any area of the National Park System, the national forests, the National Wildlife Refuge System, the National Wilderness Preservation System, or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act: Provided, however, That this paragraph shall not prohibit surface mining operation in existence on the date of enactment of this Act, or those for which substantial legal and financial commitments were in existence prior to September 1, 1973; but, in no event shall such surface mining operations be exempt from the requirements of this Act.<sup>12</sup>

In its discussion of H.R. 11500, the 93rd Congress House of Representatives acknowledged the *per se* prohibitions on mining in the National Park System, the National Wildlife Refuge System, the National Forests (except for National Grasslands) and the Wild and Scenic Rivers System<sup>13</sup> and within 300 feet of occupied dwellings and public buildings, and within 100 feet of public roads<sup>14</sup> but did not advance any specific justification for

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<sup>12</sup> H.R. REP. No. 1072, 93rd Cong., 2nd Sess. 11-12 (1974).

In 1972, the Pennsylvania law from which Congress apparently adopted Section 209(4) read:

From the effective date of this act, as amended hereby, no operator shall open any pit for surface mining operations (other than borrow pits for highway construction purposes) within one hundred feet of the outside line of the right-of-way of any public highway or within three hundred feet of any occupied dwelling house, unless released by the owner thereof, or any public building, school, park, community or institutional building or within one hundred feet of any cemetery or of the bank of any stream.

52 Pa. Stat. Ann. § 1396.4.2(c) (1972). See also Dernbach, *Pennsylvania's Implementation of the Surface Mining Control and Reclamation Act: An Assessment of How "Cooperative Federalism" Can Make State Regulatory Programs More Effective*, 19 MICH. J. OF L. REF. 903, 927 (1986).

<sup>13</sup> H.R. REP. No. 1072, 93rd Cong., 2nd Sess. 74 (1974).

<sup>14</sup> *Id.*

the *per se* bans,<sup>15</sup> except as can be gleaned from the litany of harmful effects associated with coal mining, set forth in the House Report.

Interestingly, the Section 209(d) ban on Federal lands exempted surface mining operations "in existence on the date of enactment of this Act, or those for which substantial legal and financial commitments were in existence prior to September 1, 1973; "but did not exempt such operations from the regulatory requirements of this Act."<sup>16</sup> No exception existed from the buffer zone ban. Thus it appears that in H.R. 11500, the House members of Congress intended to exempt from the ban on mining Federal lands only existing operations or those operations that had substantial legal and financial commitments prior to enactment.

The 93rd Senate counterpart of H.R. 11500 was S. 425. Its ban on surface mining operations in Section 216(c) exempted only those in existence on the date of enactment:

(c) No surface mining operation except those which exist on the date of enactment of this Act shall be permitted—

(1) on any lands within the boundaries of units of 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, and National Recreation Areas designated by Act of Congress;

(2) which will adversely affect any publicly owned park unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park.<sup>17</sup>

S. 425 did not ban mining within any buffer zones of houses, buildings, roads and cemeteries. When the two chambers met in conference, the meld of S. 425 and H.R. 11500 produced a new Section 522(e) which incorporated Section 216(c) of S. 425 and Sections 209(d)(3), (4), (8) and (9) of H.R. 11500 into previous Section 206 of H.R. 11500. The new section numbered 522(e) read:

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<sup>15</sup> *Id* at 85. The Report states "[I]n the opinion of the Committee, the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus Section 209 provides that permit applications must be denied for operations located within certain publicly owned lands such as National Parks, national forests, wilderness areas, and the corridors of wild and scenic rivers."

<sup>16</sup> *Id.* at 12.

<sup>17</sup> S. REP. NO. 402, 93rd Cong., 1st Sess. 20 (1973).

(c) Subject to valid existing rights to [sic] surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted—

(1) on any lands within the boundaries of units of 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 designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress;

(2) on any Federal lands within the boundaries of any national forest except surface operations and impacts incident to an underground coal mine;

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site;

(4) within one hundred feet of the outside right-of-way line of any public road, except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the land-owners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.<sup>18</sup>

The pertinent differences between the 93rd Congress House and Senate bills can be summarized as follows:

(1) whereas the original version of S. 425 provided no protection of VER from the *per se* ban on new mining on federal lands in Section 216(c),<sup>19</sup> H.R. 11500 provided that existing surface coal mining operations on Federal lands or those for which substantial legal and financial commitments had been made were not *per se* banned<sup>20</sup> or subject to unsuit-

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<sup>18</sup> H.R. REP. NO. 1522, 93rd Cong., 2nd Sess. 53-54 (1974).

<sup>19</sup> Section 217(e) provided for a 15 percent expansion on existing surface coal mining operations on Federal lands. S. 425, 93rd Cong., 2nd Sess. § 217 (1974).

<sup>20</sup> S. 425, 93rd Cong., 2nd Sess., § 209(d)(9) (1974).

ability designation;<sup>21</sup> and

(2) whereas H.R. 11500 had not provided any protection of property rights impaired by the *per se* ban on surface mining operations in the buffer zones around dwellings, buildings, and public roads,<sup>22</sup> the conference bill subjected all *per se* banned areas, Federal and private, to this new clause: "Subject to valid existing rights."

The conference report on S. 425 defined the phrase "subject to valid existing rights" only in terms of "strip mining on the national forests" and an explanation that the provision was "not intended to affect or abrogate any previous state court decisions."<sup>23</sup> The Conference Report on S. 425 cited *U.S. v. Polino*<sup>24</sup>

<sup>21</sup> *Id.* at §§ 209(d)(3) and 206(a)(6).

<sup>22</sup> *Id.* at § 209(d)(4) (1974).

<sup>23</sup> H.R. Rep. No. 1522, 93rd Cong., 2nd Sess., 85 (1974).

The full text reads:

6. Valid Existing Rights.—The language "subject to valid existing rights" in Section 522(e) is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language of 522(e) is in no way intended to affect or abrogate any previous state court decisions. For example, in West Virginia's Monongahela National Forest, strip mining of privately owned coal underlying federally owned surface has been prohibited as a result of *U.S. v. Polino*, 131 F.Supp. 772 (N.D. W.Va. 1955). In this case the court held that "stripping was not authorized by mineral reservation in a deed executed before the practice was adopted in the county where the land lies, unless the contract expressly grants stripping rights by use of direct or clearly equivalent words. The party claiming such rights must show usage or custom at the time and practice where the contract is to be executed and must show that such rights were contemplated by the parties." The phrase "subject to valid existing rights" is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping.

Section 522 provides for the establishment of a process for designating lands unsuitable for surface coal mining while title VI grants authority to the Secretary to prohibit mining operations for minerals or materials other than coal on Federal lands. Designation of an area of Federal lands in Alaska under this provision or under title VI will not affect such land's availability for selection by the State of Alaska under the Alaska Statehood Act or by Alaska Natives under the Alaska Native Claims Settlement Act.

<sup>24</sup> 131 F. Supp. 772 (N.D. W.Va. 1955). Congress clearly intends to protect VER acquired in Federal lands in SMCRA just as it did so in other enactments preceding SMCRA. That Congress was aware that coal rights which achieved VER status could be acquired in a fashion different from a mining claim is underscored in its citation to *Polino*. Thus, Congress said that traditional concept of VER, *i.e.* rights acquired against the sovereign, was broad enough to include rights acquired through private contract. The principles of fair play when toying with one's private property are evident. A relatively simple concept—one who had acquired rights in Federal lands, whether by tenancy under law or by purchase before it became Federal lands was nonetheless entitled to protection of those rights from unfair action by the proprietor.



as an example of a state case where VER was not found. Unfortunately Congress did not discuss how it intended VER to operate in property rights contexts excluding National Forests. One logical conclusion which can be drawn, however, is that the clause "subject to valid existing rights" which replaced the substantial legal and financial commitments language of H.R. 11500 and no protection in S. 425 represents a compromise position between the two. We believe its scope encompasses something more than substantial legal and financial commitments coupled with a right to mine but falls just short of existing operations.

This view finds additional support in the overall structure of Section 522. Although industry has argued that the replacement VER clause now contained in 522(e) was intended to accomplish the same purpose as the "substantial legal and financial commitments" language included in the House version,<sup>25</sup> this does not explain why Congress retained the substantial legal and financial commitment language in 522(a)(6), but did not in 522(e). It is more likely that Congress did not believe the terms to be synonymous,<sup>26</sup> and intended to protect a much narrower class of rights where it banned mining by legislative fiat than the class of rights which may be impaired by an unsuitability designation through administrative process.

S. 425 was pocket vetoed by President Ford on December 30, 1974.<sup>27</sup>

### 1975- S. 7 and H.R. 25

The 94th Congress acted promptly to try to enact a coal mining law. The House reported H.R. 25 on March 6, 1975, and the Senate reported S. 7 on March 5, 1975. Section 522(e) remained essentially unchanged from S. 425 in both bills. Senate Report 94-28 on S. 7 contained a new insight of the intent of Congress in enacting the ban on surface coal mining operations in the buffer zones set out in 522(e)(4) and (5). It states:

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<sup>25</sup> See e.g., *In Re: Permanent Surface Mining Regulation Litig.*, 22 Env't Rep. Cas. (BNA) 1557 (1985). (Industry supported the "takings" based definition.)

<sup>26</sup> *But c.f.*, 30 CFR § 762.5 (1979), 44 Fed. Reg. 14,902, 15,344 (1979) (This formulation of "substantial legal and financial commitment" is more onerous than industry would probably like.)

<sup>27</sup> H.R. REP. NO. 218, 95th Cong. 1st Sess. 140, (1977). See Note, *A Summary of the Legislative History of the Surface Mining Control and Reclamation Act of 1977 and the Relevant Periodical Literature*, 81 W. VA. L. REV. 775 (1979).

[F]or *reasons of public health and safety*, surface coal mining will not be allowed within one hundred feet of a public road (except to provide access for a haul road), within 300 feet of an occupied building or within 500 feet of an active underground mine.<sup>28</sup> (emphasis added)

This language made it quite clear that with respect to the *per se* ban on mining within buffer zones contained in 522(e)(4) and (5), Congress was acting to protect the public health and safety from a "noxious use of the land." Senate Report 94-28 also adopted in essence the VER explanation contained in the report on S. 425.<sup>29</sup>

H.R. 25 and S. 7 went to conference and then were reported out of conference on May 2, 1975.<sup>30</sup> House Report 94-189 on the conference bill (H.R. 25) reported Section 522(e) verbatim from the 93rd Congress conference bill (S. 425) and reiterated the 93rd Congress' definition of valid existing rights.<sup>31</sup> H.R. 25 was vetoed by President Ford on May 20, 1975.<sup>32</sup>

#### 1976-77 - S. 7 and H.R. 2

The election of a democratic administration set the stage for SMCRA. H.R. 2 was reported out of the House Committee on Interior and Insular Affairs on April 22, 1977. Section 522(e) of H.R. 2 was unchanged except for Subsection (2), which required the Secretary to determine whether any significant recreational, timber, economic or other values existed which would be incompatible with surface operations and impacts incident to an underground mine or whether, on western lands, the forest cover is not significant.<sup>33</sup>

On May 9, 1977, the Senate Committee on Energy and Natural Resources reported out S. 7. Section 422(e) of S. 7

<sup>28</sup> S. REP. NO. 28, 94th Cong., 1st Sess. 177 (1975).

<sup>29</sup> See note 23, *supra* and accompanying text.

<sup>30</sup> H.R. REP. NO. 218, 95th Cong., 1st Sess., *reprinted in* 1977, U.S. CODE CONG. & ADMIN NEWS 593.

<sup>31</sup> H.R. REP. NO. 189, 94th Cong., 1st Sess. 85 (1975).

<sup>32</sup> H.R. REP. NO. 218, 95th Cong. 1st Sess. 141 (1977). The 94th Congress House reported two additional bills after H.R. 25. See H.R. REP. NO. 896 94th Cong., 2d Sess. (1976). On August 31, 1976, H.R. 13950 was reported out. It carried the same VER language as 522(e) and its explanation of what VER means.

<sup>33</sup> H.R. REP. NO. 218, 95th Cong., 1st Sess. at 44 (1977) *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593.

matched nearly verbatim with Section 522(e) of H.R. 2, including the rewrite of Subsection (2).<sup>34</sup>

Both bills passed their respective Houses and went to conference. The Conference Bill (H.R. 2) retained the House version of 522(e).<sup>35</sup>

The House Report on H.R. 2 reiterated that in 522(e),

“the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus Section 522(e) provides that, subject to valid existing rights no surface coal mining operation except those in existence on the date of enactment shall be permitted on lands within the boundaries of units of certain Federal systems . . . or in other special circumstances, that is within 100 feet of public roads, 300 feet of public buildings or churches, or 100 feet of a cemetery.”<sup>36</sup>

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<sup>34</sup> See, S. REP. NO. 128, 95th Cong., 1st Sess. 39 (1977).

<sup>35</sup> See, S. REP. NO. 337, 95th Cong., 1st Sess. 71-72, (1977).

<sup>36</sup> H.R. REP. NO. 218, 95th Cong., 1st Sess. 95 reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631. The full text reads:

Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the committee, the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus Section 522(e) provides that, subject to valid existing rights, no surface coal mining operation except those in existence on the date of enactment, shall be permitted on lands within the boundaries of units of certain Federal systems such as the national park system and national wildlife refuge system, on Federal lands within the boundaries of any national forest (except in those circumstances set forth in Sec. 522(c) of the committee amendment) or in other special circumstances, that is within 100 feet of public roads, 300 feet of public buildings or churches, or 100 feet of a cemetery.

As subsection 522(e) prohibits surface coal mining on lands within the boundaries of national forests, subject to valid existing rights, it is not the intent, nor is it the effect of this provision to preclude surface coal mining on private inholdings within the national forests. The language “subject to valid existing rights” in section 522(e) is intended, however, to make clear that the prohibition of strip mining on the national forests is subject to previous court interpretations of valid existing rights. For example, in West Virginia’s Monongahela National Forest, strip mining of privately owned coal underlying federally owned surface has been prohibited as a result of *United States v. Polino*, [133] F.Supp. 722 [(N.D. W.Va. 1955)]. In that case the court held that “stripping was not authorized by mineral reservation in a deed executed before the practice was adopted in the county where the land lies, unless the contract expressly grants stripping rights by use of direct or clearly equivalent words. The party claiming such rights must show usage or custom at the time where the contract is to be executed and must show that such rights were contemplated by the parties.” The phrase “subject to existing rights” is thus in no way intended to open

Once again, the House Committee defined VER only in relation to national forests, citing *U.S. v. Polino*<sup>37</sup> as an example of how VER was intended to operate in 522(e).

The Senate Committee, on the other hand, specifically stated again that the 522(e)(4) and (5) buffer zone bans in S. 7 are enacted "for reasons of public health and safety."<sup>38</sup> In its section-by-section analysis of S. 7, the Senate Committee specifies that all the Subsection (e) bans are subject to valid existing rights. The House and Senate Reports, however, explain VER in the context of national forests only.<sup>39</sup> The Conference Report on H.R. 2 does not shed further light on 522(e).<sup>40</sup>

A review of floor debates provides a bit of insight into congressional intent regarding the purpose of the VER clause. During an exchange on the House floor on an amendment proposed by Representative Roncalio of Wyoming, Representative Udall, SMCRA's chief architect, remarked that a similar VER phrase contained in Section 601 of the bill was intended to preserve valid legal rights and its removal may require payment of compensation.<sup>41</sup>

up national forest lands to strip mining where previous legal precedents have prohibited stripping.

This discussion, however, can be read to suggest that Congress intended to allow mining on private inholdings and on public lands in which court- or agency-defined VER exists. More likely, Congress intended simply to preserve these rights from extinguishment, rather than to exempt VER interest from the prohibitions.

<sup>37</sup> 131 F.Supp. 772 (N.D. W.Va 1955).

<sup>38</sup> S. REP. NO. 128, 95th Cong., 1st Sess. 55 (1977). Again, however, the Senate Committee carried the language from 94-28 that surface owner property rights under state laws must be preserved and no provision of S. 7 was intended to change such rights. *Id.* at 56.

<sup>39</sup> See, S. REP. NO. 128, 95th Cong., 1st Sess. (1977); H.R. REP. NO. 218, 95th Cong. 1st Sess. (1977), reprinted in 1977 U.S. CODE CONG. & ADMIN. NEWS 593.

<sup>40</sup> S. REP. NO. 337, 95th Cong., 1st Sess. at 111 (1977).

<sup>41</sup> See, 123 CONG. REC. H12,878 (1977) (remarks of Mr. Roncalio), cited in *Meridian Land and Mineral Company v. Hodel*, 843 F.2d 340, 346-47 (9th Cir. 1988). The following exchange between Mr. Roncalio and Mr. Udall, the Bill's principal sponsor indicates Udall's insistence on including a VER clause in SMCRA:

MR. RONCALIO:

There are those who may be reluctant to approve my amendment saying that this would amount to a "taking" and that the Government would in turn be liable for reimbursement and other associated costs. I would hope tha the Secretary might facilitate an exchange whereby a location of similar mineral value might be received for whatever claim is to be withdrawn or if that may not be feasible, it very well may be in the public interest to negotiate payment. Each situation can and should be reviewed in total and

Udall's remark implies that he was mindful of Holmes' view in *Pennsylvania Coal v. Mahon*<sup>42</sup> that if a regulation went "too far", it may constitute a taking and require invalidation or payment of compensation. In 1977, Congress did not have the benefit of the *Keystone Bituminous Coal Association v. DeBenedictis*<sup>43</sup> or *Preseault v. ICC*<sup>44</sup> decisions which together support the proposition that under its commerce clause police power, Congress may regulate to the point of prohibition a local nuisance-like activity for the protection of broad economic, social and environmental goals.

The foregoing synopsis of the legislative history of VER in SMCRA reveals that from the beginning Congress intended to ban outright any new surface mining operation on, and impacts from underground mining in the lands identified in 522(e)(1)-(e)(5).<sup>45</sup> Further, Congress intended that all the 522(e) bans were subject to VER but gave guidance about how VER was to be construed only in regard to private mining rights in national forest lands.

## II. THE HISTORICAL USE OF THE VER TERM

The term "valid existing rights", or variants thereof, have long been employed in connection with the disposition of public lands. For example, acts relating to Indian reservations from the late nineteenth century used the term,<sup>46</sup> as did subsequent executive orders.<sup>47</sup> By the middle of the twentieth century, the term

on its own merits.

I urge adoption of the amendment.

MR. UDALL: Mr. Chairman, will the gentleman yield?

MR. RONCALIO: I yield to the gentleman from Arizona.

MR. UDALL: Mr. Chairman, I would have to oppose the amendment, because it takes from the bill a statement that valid legal rights should be preserved. I do not think we should do that without paying compensation under the fifth amendment.

<sup>42</sup> 260 U.S. 393 (1922).

<sup>43</sup> 480 U.S. 470 (1987).

<sup>44</sup> \_\_\_\_ U.S. \_\_\_\_, 110 S.Ct. 914 (1990).

<sup>45</sup> SMCRA § 510, 30 U.S.C. § 1250(b)(4) (1988) provides that no permit can be issued if any 522 lands are included in the application.

<sup>46</sup> E.g. the Missions Indians Relief Act, Act of Jan. 12, 1891, c.65, § 2, 26 Stat. 712 (uncodified) preserved "existing valid rights" from the operation of the reservation; quoted in *Pechanga Band of Mission Indians v. Kacor Realty*, 680 F.2d 71, 72 (9th Cir. 1982).

<sup>47</sup> E.g., Exec. Order No. 1538, Mar. 28, 1912.

was relatively common in legislation relating to national parks.<sup>48</sup>

The VER term appeared in a 1924 Executive Order withdrawing all islands off the coast of or in the coastal waters of Florida,<sup>49</sup> and was construed in the following year in an oft-cited opinion, *Williams v. Brenning*.<sup>50</sup> That case construed VER to include preference rights earned, but not awarded, prior to the withdrawal. The agency described the purpose of the term as follows:

But the withdrawal here in question saved any "valid existing rights in and to" the lands so withdrawn, and a preferred right which had been earned, though not actually awarded, prior to the withdrawal is entitled to protection. The withdrawal was designed to prevent initiation of new claims and not the destruction of rights theretofore fairly earned.<sup>51</sup>

In a 1935 Opinion regarding an Executive Order withdrawing public lands from settlement, location, sale, or entry pursuant to the Taylor Grazing Act<sup>52</sup> "subject to existing valid rights," the Solicitor noted that the term was "not a new expression" and adopted the view espoused in *Williams*.<sup>53</sup> Interestingly, the opinion concluded that the term should be construed broadly in the context of that Order because "the public interest in particular tracts of land within the confines of the broad expanse thus withdrawn is too inconsequential to justify striking down the individual rights through technical construction or harsh application of the protective provisions of the order."<sup>54</sup>

In the Mineral Leasing Act of 1920,<sup>55</sup> Congress also provided a variant of the "valid existing rights" language in order to

<sup>48</sup> Act of Sept. 14, 1950, ch. 950, § 1, 64 Stat. 849 (codified as 16 U.S.C. § 406d-1 (1988))(Grand Teton); Act of July 26, 1950, ch. 492, § 2, 64 Stat. 377 (codified as 16 U.S.C. § 403k-1 (1988))(Shenadoah and Smoky Mountains); Act of Mar. 4, 1940, ch. 40, § 2, 54 Stat. 41 (codified as 16 U.S.C. § 80)(General Grant and Kings Canyon); Act of July 9, 1937, ch. 469, §§ 1, 2, 50 Stat. 485 (codified as 16 U.S.C. § 47(e)(1988))(Sequoia and Yosemite); Act of May 5, 1926, ch. 241, § 1, 44 Stat. 397 (codified as 16 U.S.C. § 405 (1988))(Coos County, Or.).

<sup>49</sup> Exec. Order No. 4109, Dec. 8, 1924.

<sup>50</sup> 51 I.D. 225 (1925).

<sup>51</sup> *Id.* at 226.

<sup>52</sup> Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified at 43 U.S.C. § 315 *et seq.*(1988)).

<sup>53</sup> Opinion, February 8, 1935, 55 I.D. 205, 210 (interpreting Exec. Order No. 6910, Nov. 26, 1934).

<sup>54</sup> *Id.* at 210-211.

<sup>55</sup> Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (codified at 30 U.S.C. § 192 (1988)).

protect those who had invested their money and efforts in prospecting for minerals in reliance upon Congress' invitation expressed in the 1872 Mining Law.<sup>56</sup> Sensitive to the concerns expressed in the Constitution that one's property should not be unjustly impaired each time Congress withdrew federal lands from exploration for valuable minerals or changed its policy regarding mineral exploitation,<sup>57</sup> Congress created exceptions or protections for pre-existing claims and rights.

More recently, the Wilderness Act of 1964,<sup>58</sup> the Wild and Scenic Rivers Act,<sup>59</sup> and the Federal Land Policy and Management Act of 1976,<sup>60</sup> and other legislation affecting mining claims<sup>61</sup> have included provisions which are "subject to valid existing rights."

The Alaska Native Claims Settlement Act (ANSCA), passed in 1971,<sup>62</sup> was another productive source of VER interpretation. That legislation, and Public Land Order 4582 which preceded it, withdrew certain public lands from entry in order to make them available for selection and conveyance to the Eskimo Aleut and certain Alaskan native groups in settlement of their claims.<sup>63</sup> These withdrawals were "subject to valid existing rights."<sup>64</sup> In the various interpretive opinions that followed, the department relied on earlier VER precedents in holding that the language protected such interests as prior valid entries,<sup>65</sup> preference rights,<sup>66</sup>

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<sup>56</sup> General Mining Law of 1872, 17 Stat. 91 (current codification at 30 U.S.C. §§ 22-54 (1988)).

<sup>57</sup> See, Barkeley and Albert, *supra* note 5.

<sup>58</sup> Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. § 1133 (1988)). See also Toffenetti, *Valid Mining Rights and Wilderness Areas*, 20 LAND AND WATER L. REV. 31 (1985); Note, *Regulation and Land Withdrawals; Defining 'Valid Existing Rights'*, 3 J. MIN. L. POL'Y 517 (1988).

<sup>59</sup> Pub. L. No. 90-542, 82 Stat. 906 (codified at 16 U.S.C. §§ 1271-1387 (1988)).

<sup>60</sup> Pub. L. No. 94-579, 90 Stat 2744 (codified at 43 U.S.C. §§ 1701 *et seq.*, §§ 1716, 1781 (f), and 1783 (1988)).

<sup>61</sup> See, e.g., Whiskeytown-Shasta-Trinity National Recreation Area, Pub.L. No. 89-336, § 1, 79 Stat. 1295 (1965) (codified at 16 U.S.C. § 460 q (1988)); Oregon Dunes National Recreation Area, Pub. L. No. 92-160, §1, 86 Stat. 99 (1972) (codified at 16 U.S.C. 460z (1988)); Sawtooth National Recreation Area, Pub. L. No. 92-400, 86 Stat. 612 (1972) (codified at 16 U.S.C. § 460aa (1988)); Glen Canyon National Recreation Area, Pub. L. No. 92-593, 86 Stat. 1311 (1972) (codified at 16 U.S.C. § 460 dd (1988)). See also Mining in the Parks Act, Pub. L.No. 94-429, 90 Stat. 1342 (1976) (codified at 16 U.S.C. § 1901 (1988)) ("valid existing mining rights").

<sup>62</sup> Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1624 (1988)).

<sup>63</sup> *Id.*

<sup>64</sup> ANSCA §§ 11, 14, 16, 19(a), 43 U.S.C. §§ 1610, 1613, 1615, 1618 (1988).

<sup>65</sup> Jack Z. Boyd (On Reconsideration) 15 IBLA 74, 81 I.D. 150 (1974).

<sup>66</sup> Louis J. Hobbs, A-3501, 77 I.D. 5 (1970).

and options to purchase under open entry leases.<sup>67</sup> A 1977 Secretarial Order held that this language protected rights preserved or maintained under state law in addition to those created under federal law.<sup>68</sup>

The common thread which runs through the legislation containing VER protections and through the case law is the concept of fairness<sup>69</sup> in the sense that the government as proprietor should not take advantage of its essentially powerless tenant.<sup>70</sup> The federal government, owner of the land upon or in which mining rights are acquired, is not permitted to extinguish the mineral rights holder's equity (read VER) in the federal land in an unfair fashion.<sup>71</sup> Thus we find language describing the relationship between the government and a mineral prospector<sup>72</sup> such as:

Indeed, this court is of the opinion that the subject extension applications give the applicants valid existing rights where, as here, they have met statutory and regulatory requirements and have expended substantial time and money to develop their prospecting permits. It would be unfair to encourage private development of coal on federal lands, with the attendant expenditures, without giving the applicant a fair opportunity to capitalize on his investment.<sup>73</sup>

Statutorily created mining rights have also been interpreted by the courts as resting on equitable estoppel principles,<sup>74</sup> i.e. one

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<sup>67</sup> In re Miller, 3 ANCAB 238, 86 I.D. 285 (1979).

<sup>68</sup> Secretarial Order No. 3016, 85 I.D. 1, (1977).

<sup>69</sup> See, e.g., Noyes v. Mantle, 12 U.S. 348, 351 (1888) (a prospector acquires a beneficial interest in lands held by the U.S. in trust). Equity requires no less. See, Note, *supra* note 58, at 538.

<sup>70</sup> Compliance with statutory requirements is a prerequisite to protect against divestiture because of the superior title of the U.S. See Note, *supra* note 58, at 527.

<sup>71</sup> *Id.*

<sup>72</sup> Peterson v. Department of Interior, 510 F.Supp. 777, 783 (D. Utah 1981).

<sup>73</sup> See Hickel v. Oil Shale Corp., 400 U.S. 48, 52 (1970) (noting "judicial attitude of fair treatment for claimants who have substantially completed the assessment work required by 30 U.S.C. § 28); Noyes v. Mantle, 127 U.S. 348 (1888); The Yosemite Valley Case, 82 U.S. 77 (1872); Opinion of the Attorney General, 25 I.D. 48 (1897); Peterson v. Dept. of Interior, 510 F. Supp. 777 (D.C. Utah 1981); Williams v. Brening, 51 I.D. 225 (1925). See also Rocky Mountain Oil & Gas Assn. v. Andrus, 500 F.Supp. 1338, 1345 (D.C. Wis. 1980) (A lease without developmental rights constitutes the destruction of a valid existing right which is "blatantly unfair to lessees.")

<sup>74</sup> See Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428, 430 (1892); Noyes v. Mantle, 127 U.S. 348 (1888); The Yosemite Valley Case, 82 U.S. 77 (1872).



“who has in good faith relied on and complied with the statute by ‘doing all he could do’ should not be deprived of those rights.”<sup>75</sup>

The principle that pre-existing unpatented mining claims became valid existing rights enjoying a status as “property in the fullest sense of that term” traces some of its roots to the Supreme Court’s ruling in *Benson Mining and Smelting Co. v. Alta Mining and Smelting Co.*,<sup>76</sup> which created the doctrine of “equitable title” in public lands.<sup>77</sup>

Recently, the Supreme Court has described mining claims as a “unique form of property” accorded the protections available to traditional vested property rights, but subject nonetheless to the police power with regard to their use.<sup>78</sup>

Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties . . . .

This power to qualify existing property rights is particularly broad with respect to the “character” of property rights at issue here. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims . . . we have recognized these interests are a “unique form of property.” The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased or acquired.<sup>79</sup>

Throughout these various interpretations, the precise meaning of VER has defied definition, and the circumstances of each

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<sup>75</sup> See note, *supra* note 58, at 528; *Ickes v. Virginia-Colorado Dev. Corp.*, 295 U.S. 639 (1935) held that when Congress changed the prior method of exploiting minerals on public lands under the Mineral Leasing Act subject to “valid claims existent on date of the passage of this Act,” Congress intended to not void a claim which failed to comply with the new requirement. See discussion in Note, *supra* note 55, at 535.

<sup>76</sup> 145 U.S. 428 (1892).

<sup>77</sup> *Id.* at 430. See also *Barkeley and Albert*, *supra* note 5, at 9-14.

<sup>78</sup> *United States v. Locke*, 471 U.S. 84, 105 (1985).

<sup>79</sup> *Id.* at 104 (citations omitted). See also, *Barkeley and Albert*, *supra* note 5, at 9-16.

case have been considered in reference to the purpose and language of the underlying statute in applying the provision. For the most part, however, the historical approach of the executive to the various VER issues arising under these statutes and legislative orders has been a proprietary one between the government and the claimant of VER: i.e., do the interests in question, though short of full legal or equitable title, rise to a level that it would be unfair to extinguish or withhold what the claimant earned or bargained for or, as in the case of ANSCA, to convey the property to someone else?

This analysis, however, would seem on its face inappropriate to SMCRA in two respects. One area of apparent incongruity is that when VER has been used in these various public lands programs, it generally describes the relationship between the individual VER claimant who asserts an interest and the sovereign who owns fee title to the land. In this context, if a private person actually holds title by conveyance to the mineral rights the question of VER usually does not arise, because the sovereign is not in the position to assert its own conflicting proprietary interest in the property. For example, in a 1979 opinion regarding the Bureau of Land Management's wilderness review and valid existing rights,<sup>80</sup> the Solicitor stated that "valid existing rights' are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion."<sup>81</sup> While this definition may not be entirely satisfac-

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<sup>80</sup> Solicitor's Opinion M-36910 (Supp.), 88 I.D. 909, 912 (1981), modifying 86 I.D. 89 (1979).

<sup>81</sup> The discussion was as follows:

Although the legislative history is largely silent on the scope of this term, it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguished three terms: "vested rights," "valid existing rights," and "applications" or "proposals." "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are Property interests rather than mere expectancies. *Compare* Shraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir 1969) and George J. Propp, 56 I.D. 347, 351 (1938) with Udall v. Tallman, 380 U.S. 1, 20 (1965), United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931), and Albert A. Howe, 26 IBLA 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied. *Compare* Stockley v. United States, 260 U.S. 532, 544 (1923) with Wyoming v. United States, 255 U.S. 489, 501-02 (1921) and Wirth v.

tory depending on the governmental action in question and how one defines "vested rights,"<sup>82</sup> it illustrates the point that VER historically has been a device employed to resolve apparent conflict between the government and the legitimate interests of private individuals who hold less than fee interests in public lands to which the government holds title. The applicability of traditional VER analysis to non-public lands in Section 522(e)(4) and (5) of SMCRA, therefore, on its face seems suspect.

Pre-SMCRA VER analyses also have tended to focus on the question of property rights, acquired from the government as owner of the fee, in a traditional proprietary sense, evaluating interests earned or acquired from the government as a form of

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Branson, 98 U.S. 118, 121 (1878). Thus "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercises of secretarial discretion.

Valid existing rights may arise in two situations. First, a statute may prescribe a series of requirements which, if satisfied, create rights in the claimant's actions under the statute without an intervening discretionary act. The most obvious example is the 1872 Mining Law: a claimant who has made a discovery and properly located a claim has a valid existing right by his actions under the statute; the Secretary has no discretion in processing any subsequent patent application. Second, a valid existing right may be created as a result of the exercise of secretarial discretion. For example, although the Secretary is not required to approve an application for a right-of-way, if an application is approved the applicant has a valid existing right to the extent of the rights granted. Similarly, the Secretary has discretion to approve, deny, or suspend an application for an oil and gas lease. Once the lease is issued however, the applicant has valid existing rights in the lease.

Valid existing rights are not, however, absolute. The nature and extent of the rights are defined either by the statute creating the rights or by the manner in which the Secretary chose to exercise his discretion. Thus, it is not possible to identify in the abstract every interest that is a valid existing right; the question turns upon the interpretation of the applicable statute and the nature of the rights conveyed by approval of an application. Because of the importance of the individual approval and its stipulations, a review of each approval document will be required to determine the precise scope of an applicant's valid existing rights where such rights are created by an act of secretarial discretion.

*Id.* at 911-12 (footnotes and citations omitted).

A much more comprehensive analysis of the various types of protectable private interest in public lands, including those recognized as "valid existing rights," appears in Laitos and Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV. ENV'T'L L. REV. 1 (1987). This article identifies six classes of property interests: (1) vested rights, (2) non vested rights, (3) protected possessory interests, (4) non discretionary entitlements, (5) rights of possession, and (6) applications. *Id.* at 9-18.

<sup>82</sup> For example, in *Natural Resource Defense Council v. Berkland*, 609 F.2d 553 (D.C. Cir. 1969) a preference right coal lease was held to be a "vested right" to a lease entitled to protection under a VER clause.

“real property,”<sup>83</sup> which the “subject to valid existing rights” language seeks to protect from subsequent competing proprietary activity on the part of the government. When VER-protective language appears in legislation designed to curtail the adverse effects of the claimant’s activity however, these prior precedents seem less instructive.

Despite these inconsistencies, it is nevertheless quite possible to find a theme in the use and interpretation of VER clauses prior to the passage of SMCRA. This theme was summarized in a recent ANSCA case:

We conclude that “valid existing rights” does not necessarily mean vested rights. . . . The term “valid existing rights” does not necessarily mean present possessory rights, or even a future interest in the property law sense of existing ownership that becomes possessory upon the expiration of earlier estates. Legitimate expectations may be recognized as valid existing rights, especially where the expectancy is created by government in the first place. . . . A government is most responsible when it recognizes a right that which (sic) is not strictly enforceable but which flows nevertheless from the government’s own prior representations.<sup>84</sup>

Valid existing rights, in the broadest sense, historically flow from government-induced expectations. And it is these expectations that arguably are protected by SMCRA’s VER clause.

In order to understand these expectations in the context of mineral lands, however, it is necessary to understand the interests involved. These interests undoubtedly embrace the reliance and “sweat equity” of the mining entrepreneur, but they also embrace fully the notion that government has always retained the right to regulate activity in the public interest. While the courts have not allowed the federal government as proprietor to unfairly extinguish VER (once established), exploitation of VER is nonetheless subject to regulation under the police power.<sup>85</sup>

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<sup>83</sup> *E.g.*, *Wilbur v. Krushnic*, 280 U.S. 306, 316 (1930).

<sup>84</sup> *Aleknagik Natives, Ltd. v. United States*, 806 F.2d 924, 926-927 (9th Cir. 1986).

<sup>85</sup> *U.S. v. Locke*, 471 U.S. 84 (1985). *But see* *Rocky Mountain Oil & Gas Assn. v. Andrus*, 500 F.Supp. 1338 (D. Wyo. 1980), *reversed on other grounds*, 696 F.2d 734 (10th Cir. 1982), where the court held that the grant of a leases grandfathered under the FLPMA included a right of development at pre-FLPMA levels, but that environmental concerns (FLPMA wilderness nondegradation policy) would be applied to future leasing activity and development. *Id.* at 749. *See also* Solicitor’s Opinion, 86 I.D. 89 (1979).

### III. IS 522(E) A REGULATORY TAKING?

Recent Supreme Court cases have provided some comfort to those who have looked to SMCRA for relief against the ravages of surface mining. The 1981 case of *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*<sup>86</sup> and, more recently, *Keystone Bituminous Coal Association v. DeBenedictis*<sup>87</sup> have relieved concerns that statutory prohibitions of surface mining or surface effects of underground coal mining will be held facially invalid as contrary to the dictates of *Pennsylvania Coal v. Mahon*,<sup>88</sup> in which Justice Holmes declared "to make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it."<sup>89</sup> While these decisions put to rest industry's contention that such statutory limitations on mining, including Section 522(e) of SMCRA, by their very enactment went "too far,"<sup>90</sup> each left a wake of uncertainty about future challenges.

The *Hodel* discussion of takings was terse. The Court, overturning a district court determination that the performance standards on steep slope mining and the Section 522 prohibitions in SMCRA constituted unconstitutional takings, emphasized that the takings analysis focuses on "ad hoc, factual inquiries," which must be "conducted with respect to specific property and the particular estimates of economic impact and ultimate valuation relevant in unique circumstances."<sup>91</sup> It held, simply, that because the statute did not, on its face, prevent all beneficial use of coal bearing lands and because the industry plaintiffs had failed to avail themselves of opportunities for administrative relief, there was no basis for declaring the act an unconstitutional "taking." The court addressed Section 522(e) in a footnote, describing the challenge as "premature"—first, because plaintiffs had failed to show they were actually affected; second,

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<sup>86</sup> 452 U.S. 264 (1981). *Hodel v. Indiana*, 452 U.S. 314 (1981), decided as a companion case, also addressed issues regarding the constitutionality of certain provisions of SMCRA. Insofar as the issue of takings under the Fifth Amendment is concerned, the decisions are essentially the same and are treated together for purposes of this discussion.

<sup>87</sup> 480 U.S. 470 (1987).

<sup>88</sup> 260 U.S. 393 (1922).

<sup>89</sup> *Id.* at 414-415.

<sup>90</sup> *Id.* at 415. ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.')

<sup>91</sup> *Hodel*, 452 U.S. at 295.

because the act on its face did not proscribe economically viable non-mining uses; and third, because “[Section] 522(e)’s restrictions are expressly made subject to ‘valid existing rights’.”<sup>92</sup>

The absence in *Hodel* of any serious confrontation with *Pennsylvania Coal* left open to discussion among litigants and scholars the vitality of the takings issue in the field of mining regulation. It was not until 1987 when the *Keystone* decision was issued that the theoretical bulwark of *Pennsylvania Coal* was examined by the Supreme Court. *Keystone* concerned the constitutionality of Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act,<sup>93</sup> which prohibited mining that causes subsidence damage to public buildings and noncommercial buildings generally used by the public, dwellings used for human habitation, and cemeteries. Pennsylvania’s Department of Environmental Resources had enforced the provision by regulations requiring operators to leave 50% support under such structures, and it was stipulated that this would prevent the removal of 27 million tons of coal in the plaintiff’s various operations throughout the state. On its face, industry contended, the act ran directly afoul of *Pennsylvania Coal*, which some sixty-five years earlier had invalidated Pennsylvania’s Kohler Act prohibiting the mining of anthracite coal in a manner that would cause subsidence of land where certain structures existed.

The majority opinion in *Keystone* distinguished *Pennsylvania Coal* on the basis that the Kohler Act, as viewed by Justice Holmes, served only private interests rather than interests in public health and safety protected by the police power and made it commercially impracticable to mine coal;<sup>94</sup> by contrast, the court held, the Subsidence Act under consideration was designed to serve important public interests<sup>95</sup> and did not, at least on its face, make it commercially impractical to mine.<sup>96</sup> The Court honored *Pennsylvania Coal* as having heralded its modern takings analysis, which it proceeded to apply to the industry challenge.

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<sup>92</sup> *Id.* at 296 n.37.

<sup>93</sup> Pa. Stat. Ann. 717. 52, § 1406 (Purdon Supp. 1986).

<sup>94</sup> Although the majority opinion in *Keystone* is compelling in its emphasis on the Subsidence Act’s protection of public health and safety, and in particular in its nuisance-like activity, an examination of Chief Justice Rehnquist’s dissent reveals that some of these public concerns were, in fact, asserted as a basis for the Kohler Act. *See Id.* at 506.

<sup>95</sup> *Keystone*, 480 U.S. at 486.

<sup>96</sup> *Id.* at 492.

The Court in *Keystone* began by stressing the "critical" importance of the "nature of the State's action," and its historical "hesitance to find a taking when that state merely restrains uses of property that are tantamount to public nuisances. . . ." <sup>97</sup> Indeed, the Court suggested, this factor alone might have provided an independent basis for rejecting the state's challenge.

[T]he public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. The Subsidence Act, unlike the Kohler Act, plainly seeks to further such an interest. Nonetheless, we need not rest our decision on this factor alone . . . . <sup>98</sup>

Chief Justice Rehnquist, speaking bluntly in his dissent, characterized this view as a "'nuisance exception' to takings analysis." <sup>99</sup>

Proceeding to the more current analysis of "Diminution of Value and Investment Backed Expectations" <sup>100</sup> the Court emphasized the "importance of a distinction between the claim that the mere enactment of a statute constitutes a taking and the claim that a particular impact of governmental action on a specific piece of property requires the payment of just compensation. <sup>101</sup> Pointing to the "ad hoc, factual inquiries" required by *Hodel*, the Court concluded that the heavy burden of sustaining a facial attack on the Act had not been met.

The Court then undertook an approach to diminution of value which may be instructive in future mining cases by addressing the question of defining "the unit of property whose value is to 'furnish the denominator for the fraction'." <sup>102</sup>

Recent court precedents have commented that, ordinarily, property consists of a "bundle of rights," and "that the destruction of one strand of the 'bundle'"—however valuable—"is not a taking because the aggregate must be viewed in its entirety." <sup>103</sup>

<sup>97</sup> *Id.* at 491.

<sup>98</sup> *Id.* at 492.

<sup>99</sup> *Id.* at 512.

<sup>100</sup> See generally, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>101</sup> *Keystone*, 480 U.S. at 494.

<sup>102</sup> *Id.* at 497, quoting Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

<sup>103</sup> 480 U.S. at 497; quoting *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, at 130-31.

This principle, of course, begs the question of what is the "entirety" of the property, and on this latter issue the Court was less definitive. In the case before it, the Court had little problem rejecting industry's argument that the 27 million tons of coal left in place by operation of the Subsidence Act defined the unit taken. Rather the Court likened the limitation to setback ordinances and other zoning restrictions limiting use of certain areas of one's property, the validity of which have long been recognized, and concluded that this coal, amounting to less than two percent of petitioner's property, did not constitute a "separate segment of property for takings law purposes".<sup>104</sup>

Justice Stevens' opinion for the majority in *Keystone* thus resolved the issue in the negative without really saying what the applicable unit of property is. This aspect of the opinion drew a strong dissent from Chief Justice Rehnquist who posed the more troubling issue peculiar to subsurface interests where the "'bundle' of rights is sparse"—and the prohibition or regulation of mining "extinguishes the whole bundle of rights in an identifiable segment of property."<sup>105</sup>

Chief Justice Rehnquist's criticism, in the context of the Subsidence Act, is not compelling. As the majority noted:

When the coal that must remain in the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.<sup>106</sup>

It may be argued, however, that the majority's failure to resolve the single-use property issue leaves the question open for successfully challenging applications of SMCRA that result in complete denials of the right to mine an entire tract where only mineral rights are held.<sup>107</sup> According to the analyses in *Hodel* and *Keystone*, however, it is more likely that the Court intended

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<sup>104</sup> 480 U.S. at 498.

<sup>105</sup> *Id* at 517. The dissent quotes Pennsylvania Coal for the proposition that for practical purposes, the right to coal consists of the right to mine it.

<sup>106</sup> *Keystone*, 480 U.S. at 499.

<sup>107</sup> This issue is considered at length in McGinley and Barrett, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?*, 16 TULSA L.J. 418, 438-442 (1981).



this issue to be among the many factors considered in "ad hoc, factual inquiries" that the takings analysis embraces.

This need not necessarily cause panic among environmentalists. Considering the Court's historical "hesitance," if not outright refusal, to find takings where "activities akin to a nuisance" are prohibited under the police power, the single use property "taking" is illusory in any event where the prohibition is calculated to prevent a nuisance-like activity. The right to use one's property to create a nuisance or to harm others is simply not part of anyone's "bundle of rights."<sup>108</sup> Accordingly, if the would-be operator owns only minerals, any exploitation of which would result in a nuisance or harm to others, nothing is "taken" by the government's prohibition of mining notwithstanding apparent destruction of any economically viable use of the property.<sup>109</sup> Further, the limited scope of the various 522(e) prohibitions on most mining operations<sup>110</sup> will result in most challenges based on diminution of value and investment-backed expectations falling short of the mark.

The more troubling spectre is that the availability of a potential takings challenge may cause regulatory agencies charged with the administration of SMCRA or a state program thereunder to be less aggressive, or at least inconsistent, in enforcing statutory prohibitions. Some relief from this concern appears in a related line of authority addressing the remedy available when a taking is proven. In *Hodel*, for example, the Court commented in a footnote that operators were free to show that their particular parcels of land were taken by the subject regulation, but added: "Even then, such an alleged taking is not unconstitutional unless just compensation is unavailable."<sup>111</sup>

More recently, in *Preseault v. ICC*,<sup>112</sup> the court considered a takings claim predicated on the theory that the National Trails

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<sup>108</sup> *Keystone*, 480 U.S. at 491 n. 20; see also *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 325 n.4 (1987), (Stevens, J., dissenting). On the other hand, the majority in *Keystone* agreed with the dissent that the "nuisance exception to the taking guarantee is not coterminous with the police power itself." 480 U.S. at 491 n. 20.

<sup>109</sup> The owner still, of course, owns the coal, can prevent others from taking it, and may in the future find productive uses for it employing technological advances which do not create a nuisance. See note 157, *infra*.

<sup>110</sup> See discussion *infra* at text accompanying notes 86 through 133.

<sup>111</sup> *Hodel*, 452 U.S. at 297 n. 40.

<sup>112</sup> \_\_\_ U.S. \_\_\_, 110 S.Ct. 914 (1990).

System Act Amendments<sup>113</sup> unconstitutionally destroyed state created reversionary interests in former railroad rights of way which, under the statute, could be converted to trails. Rather than addressing the takings issue on its merits, however, the Court held that because the Fifth Amendment does not prohibit the taking of private property, but merely conditions the exercise of that power upon an obligation to compensate, the real issue is whether there exists, at the time of the taking, a “reasonable, certain and adequate provision for obtaining compensation.”<sup>114</sup> Noting that an “unambiguous intention to withdraw the Tucker Act remedy” did not appear from the statute, the Court determined that petitioner’s remedy lay there, rather than in the proceeding before it.<sup>115</sup> Thus, while the possibility of having to pay just compensation may yet have a “chilling effect” on governmental action,<sup>116</sup> these precedents, at the very least, tend to enable regulators to enforce severe limitations on mining without fear of judicial invalidation in a takings challenge.

### Intent of SMCRA

SMCRA was enacted to correct the inadequacies of state laws regulating coal mining by establishing uniform minimum nationwide standards.<sup>117</sup>

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<sup>113</sup> Pub. L. No. 98-11, 97 Stat. 48 (1983) (codified at 16 U.S.C. § 1247(d) (1988)), amending the National Trails System Act, Pub. L. No. 90-542, 82 Stat. 929 (codified at 16 U.S.C. § 1241)(1988)).

<sup>114</sup> *Preseault*, \_\_\_ U.S. \_\_\_, 110 S. Ct at 921 (citing *Regional Rail Reorg. Act cases*, 419 U.S. 102, 124-125 (1974), quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)).

<sup>115</sup> *Id.* at 922. For a discussion of the Tucker Act remedy, see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>116</sup> See *Nollan v. California Coastal Comm’n.*, 483 U.S. 825 (1987) (Stevens, J. dissenting).

<sup>117</sup> Section 102 (30 U.S.C. 1202) states in part:

It is the purpose of this chapter to —

- (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
- (b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;
- (c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;
- (d) Assure that surface coal mining operations are so conducted as to protect the environment . . .

. . .

In the House Report on SMCRA, the impacts of coal mining on the environment and upon society are painstakingly documented.<sup>118</sup> That the House believed that surface coal mining and surface impacts of underground mining was and is a "noxious" use of the land is clear from its statements that surface mining operations "involves the temporary or permanent degradation of vast tracts of land"<sup>119</sup> and it should constitute a "temporary use of the land"<sup>120</sup> to minimize "the undesirable consequences of surface mining."<sup>121</sup> The House further eliminated this belief by stating: "the environmental problems associated with underground mining . . . include surface subsidence, surface disposal of mine wastes, disposal of coal processing wastes, sealing of portals, entry ways or other mine openings and the control of acid and other toxic mine drainage."<sup>122</sup>

The Senate expressed sentiments that:

[s]urface coal mining activities have imposed large social and environmental costs on the public at large in many areas of the country in the form of unreclaimed lands, water pollution, erosion, floods, slope failures, loss of fish and wildlife resources, and a decline in natural beauty. Uncontrolled surface coal mining in many regions has effected a stark, unjustifiable, and intolerable degradation in the quality of life in local communities.

If surface mining and reclamation are not done carefully, significant environmental damage can result. In addition, unreclaimed or improperly reclaimed surface coal mines pose a continuing threat to the environment, and at times are a danger to public health and safety, public or private property. Similar hazards also occur from the surface effects of underground coal mining, including the dumping of coal waste piles, subsidence and mine fires.<sup>123</sup>

If there is any lingering doubt that the Supreme Court agrees, one need only read *Hodel* and the doubt rapidly dispels. The *Hodel* decision recites:

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<sup>118</sup> H.R. REP. No. 218, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. ADM. NEWS 593.

<sup>119</sup> *Id.* at 73.

<sup>120</sup> *Id.* at 93.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 126.

<sup>123</sup> S. REP. No. 128, 95th Cong., 1st Sess. 50 (1977).

Many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.<sup>124</sup>

Justice Marshall in *Hodel* lists acid drainage, loss of prime hardwood forest, destruction of wildlife habitat, degrading of productive farmland, landslides, siltation and sedimentation, reduced recreational values, fishkills, reduced waste assimilation capacity, and impaired water supplies among the adverse impacts which the Act was designed to cure. The Court quotes House Report 95-218 that "most widespread damages . . . are environmental in nature."<sup>125</sup> That Congress had plenary power under the Commerce Clause to regulate a local activity, akin to a nuisance, the product of which affects interstate commerce seemed a foregone conclusion to the Justices.<sup>126</sup> "The Act's restrictions on the practices of mine operators all serve to control the environmental and other adverse effects of surface coal mining."<sup>127</sup> The Court observed that Congress was "concerned about preserving the productive capacity of mined lands and protecting the public from health and safety hazards that may result from surface mining."<sup>128</sup> The Court further noted that Congress adopted the Surface Mining Act in order to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment or public health and safety, *injury to any of which interests would have deleterious effects on interstate commerce.*<sup>129</sup>

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<sup>124</sup> *Hodel*, 452 U.S. at 277 (citing SMCRA § 101(c), 30 U.S.C. § 1201(c) (1976 ed., Supp III)).

<sup>125</sup> *Id.* at 280.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 283.

<sup>128</sup> *Hodel v. Indiana*, 452 U.S. 314, 327 (1981) (citing *Hodel v. Virginia Surface Mining and Reclamation Assn. Inc.*, 452 U.S. at 277-280).

<sup>129</sup> *Id.* at 329 (emphasis added).

As noted, *supra*, the *Keystone* Court has reaffirmed that the prohibition of a "noxious use" first articulated in *Mugler v. Kansas*<sup>130</sup> by the exercise of the police power will not constitute a taking requiring just compensation.<sup>131</sup> In *Keystone*, the Court upheld the Pennsylvania Subsidence Act which prohibited the mining of coal in a manner which could cause damage as a result of subsidence to certain structures<sup>132</sup> on the grounds that "the public interest in preventing activities similar to public nuisances is a substantial one . . . ."<sup>133</sup>

#### IV. RECONCILING THE LEGISLATIVE HISTORY OF VER WITH MODERN TAKINGS ANALYSIS

The statutory structure and legislative history of Section 522 reveal an intent on the part of Congress to create the strongest possible protections in the "designations by act of Congress" in Section 522(e). A comparison of the discretionary designation requirements in 522(a)(6), which excepted areas where the operator had made "substantial financial and legal commitments," with the prohibitions in 522(e) "subject to valid existing rights" leads ineluctably to the conclusion that Congress intended the 522(e) bans to be all encompassing within the limits of the Constitution.

Congress was quite explicit that the mere ownership or acquisition costs of the coal itself or the right to mine it did not warrant protection for an unsuitability designation.<sup>134</sup> Congress was also clear in its judgment that Federal lands should not be subject to "new surface coal mining operations"<sup>135</sup> and that the buffer zones on private lands were necessary for the protection of the "public health and safety."<sup>136</sup> This, in combination with the various discussions of VER in the legislative history, strongly suggests that Congress intended that the VER clause be defined narrowly enough so that the designated lands were not subject

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<sup>130</sup> *Mugler v. Kansas*, 123 U.S. 623 (1887).

<sup>131</sup> *Keystone*, 480 U.S. at 470.

<sup>132</sup> *Keystone*, 480 U.S. at 476 n. 6.

<sup>133</sup> *Id.* at 492 n.22. See also McGinley and Barrett, *supra* note 104, at 443, (discussing *Star Coal Co. v. Andrus*, 14 Env't Rep Cas. (BNA) 1325 (D. Iowa 1980)).

<sup>134</sup> H.R. REP. No. 218, 95th Cong., 1st Sess., reprinted in 1977 U.S. CODE CONG. ADM. NEWS 593. Only when coupled with "substantial legal and financial commitments" did such rights obtain any protection under Section 522(a).

<sup>135</sup> S. REP. No. 128, 95th Cong., 1st Sess. 55 (1977).

<sup>136</sup> H.R. REP. No. 218, 95th Cong., 1st Sess. 95 (1977).

to new mining operations, yet broad enough to prevent a regulatory takings challenge. The articulation of that balance has proved daunting, but it is not insurmountable.

It is impossible to say whether those who first inserted VER language into legislation a century ago had in mind the issue of takings in the constitutional sense. The issue, however, certainly has been in the congressional mind in recent years,<sup>137</sup> and a congressional desire to avoid takings in the application of the VER-clause of 522(e) of SMCRA is supported, though not conclusively demonstrated, in the legislative history.<sup>138</sup>

The lines of authority interpreting and applying various pre-SMCRA VER clauses and the "takings" analysis, while seemingly independent of one another, appear to have intersected in recent years. The common thread which seems to have emerged is twofold: First, property—irrespective of its source, may be restricted, conditioned or forfeited in furtherance of legitimate legislative objectives.<sup>139</sup> Thus with *United States v. Locke*,<sup>140</sup> the Supreme Court has dispelled any notion that private rights in public lands are immune from regulation or even subsequent forfeiture; with *Keystone* and *Hodel*, the Court, similarly, has shaken the foundations of industry's favorite argument that *Pennsylvania Coal* hangs threateningly over the head of any regulator who might dare to be too zealous in attempting to prevent injury to the public health and valuable resources.

The second common aspect of these authorities is that they embrace a notion of fundamental fairness in which the nature

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<sup>137</sup> The legislative history of the Wilderness Act, for example, includes the following discussion in the Technical Amendments to H.R. 9162:

7. Page 11, line 11, insert the words "subject to valid existing rights" between the words "hereafter" and "all."

The requirement of the bill that all patents issued after the effective date of this act shall convey title to mineral deposits with a reservation to the United States of all title to the surface of the lands must be subject to "valid existing rights." The owner of a valid mining claim perfected under the mining laws prior to the effective date of this act has already acquired a possessory title to the surface of the land and any patent issued on such a claim after the effective date of this act must convey title to both the land and mineral deposits therein, unless provision is made for just compensation. See Solicitor's Opinion, M-36467 (August 28, 1957).

1964 U.S. CODE CONG. & ADMIN. NEWS, 3624.

<sup>138</sup> See, e.g., 123 CONG. REC. 12,878 (1977) (exchange of Mr. Udall and Mr. Roncalio).

<sup>139</sup> See, e.g., *United States v. Locke*, 471 U.S. at 104; *Texaco, Inc. v. Short*, 454 U.S. 781 (1982).

<sup>140</sup> 471 U.S. at 104.

of the government's action plays a vital part. The protection of VER emerges from a recognition, almost on a visceral level, of the unfairness of government disavowing its own representations after it has induced private parties to rely on them.<sup>141</sup> The takings analysis also focuses on the property owner's reasonable investment-backed expectations<sup>142</sup> in recognition of the inherent unfairness of destroying all economically viable use of the landowner's property.<sup>143</sup> But just as each examines the fairness to the aggrieved property owner, each also recognizes that it is not inherently unfair for private expectations to yield to the greater public good.<sup>144</sup>

In this regard it may cogently be argued that the Secretary's conclusion in 1935 that the public interest in certain tracts was "too inconsequential to justify the striking down of individual rights" in applying the savings clause in the Taylor Grazing Act<sup>145</sup> was a reflection of the same thinking which caused Justice Holmes to conclude in 1922 that the Kohler Act's effort to prevent structures from mine subsidence did nothing to advance the public interest.<sup>146</sup> Changing times aside, the real issue in both instances is not whether "rights" have been "extinguished" or can be "protected," but whether it is fundamentally unfair for society to deny, without just compensation, a particular use of property in light of the particular private expectations which government has induced by specific representations and understandings.

Such questions, admittedly, would appear to be a regulator's worst nightmare in a system such as SMCRA which seeks, by its very existence, to create uniformity in the regulation of surface mining.<sup>147</sup> Upon closer examination, however, this should not be so. As noted above, Section 522(e) restricts mining on property falling into two general categories—those affecting private lands only and those affecting public lands. With respect to private lands, the prohibition is extremely narrow, consisting

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<sup>141</sup> See, e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 504-05 (1986).

<sup>142</sup> *Penn Central Transp. Co. vs. New York City*, 438 U.S. 104, 127-28 (1978).

<sup>143</sup> *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

<sup>144</sup> See, e.g., *United States v. Locke*, 471 U.S. at 104-106; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *Keystone*, 480 U.S. at 491.

<sup>145</sup> See *supra* note 52 and accompanying text.

<sup>146</sup> See *supra* note 91.

<sup>147</sup> See *supra* notes 86-133 and accompanying text.

of "buffer zone" limitations placing distances between surface mining activity and such protected structures as occupied dwellings, churches, cemeteries and the like.<sup>148</sup> Prohibition of surface mining and surface effects of underground mining in these areas survives any possible challenge as a threshold matter because it seeks to prevent activity similar to a nuisance.<sup>149</sup> Further, a takings claim based on diminution of value and investment backed expectations would ordinarily fail because the area deleted from mining is so limited.<sup>150</sup>

The public lands prohibitions in SMCRA Sections 522(e)(1)-(3),<sup>151</sup> on the other hand, create a greater potential for substantial conflict with private rights since they can result in the total ban of substantial mining operations.<sup>152</sup> Of course, each claim would necessarily require a threshold determination of whether the rights asserted are among those protected by VER in the first instance — a determination which the Secretary of the Interior, or Secretary of Agriculture in some instances, is presumptively

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<sup>148</sup> SMCRA §§ 522(e)(4) and (5), 30 U.S.C. §§ 1272(e)(4) and (5) (1988).

<sup>149</sup> *Keystone*, 480 U.S. at 491-92.

<sup>150</sup> Further, the availability of waivers and variances eliminate any reasonable possibility of a taking. *Hodel v. Indiana*, 452 U.S. 314 (1981).

<sup>151</sup> 30 U.S.C. §§ 1272(e)(1)-(3) (1988).

<sup>152</sup> OSM determined that because the severance deed allowed for deep mining without protecting subjacent support, the ban on mining and surface impacts from underground mining in the Monongahela National Forest amounted to a taking under the 1983 takings regulation then in effect. *Otter Creek Coal*, 231 Ct. Cl. 879 (1982). The result is arguably supportable on the theory that the ownership of the coal was totally appropriated by the government when it was put to use for the public purpose of providing subjacent support to the National Forest. In *Keystone*, the Supreme Court upheld as a valid exercise of the police power the Pennsylvania Subsidence Act, which prohibited the mining of the coal beneath certain structures in a manner which resulted in "the caving-in, collapse, or subsidence" of those surface structures "overlying or in the proximity of the mine." *Keystone*, 480 U.S. at 470. The Supreme Court, rejecting industry's challenge, held *inter alia* that the exercise of the police power to prevent nuisance-like activity (e.g. subsidence) does not require compensation, and that the public interest served by the Subsidence Act in preventing subsidence damage to structures, supported the exercise of the police power without compensation.

See also administrative findings by OSM that:

although most of the surface operations and impacts incident to such underground mining could be constructed or directed so as not to affect wilderness land, certain surface impacts to the wilderness could not be avoided, namely subsidence and hydrologic effects" and therefore Otter Creek's rights were taken. Both of these effects were deemed nuisances caused by coal mining operation which Congress intended to prevent when it enacted SMCRA. Thus, there was no taking.

*Otter Creek Coal Co.*, 231 Ct. Cl. 879 (1982).



and historically well-equipped to make.<sup>153</sup> If the mining rights created by conveyance or acquired under the applicable statute do not include mining by the method contemplated such as, for example, strip mining, then under *Polino* no further inquiry is necessary since no rights are impaired.

Once a threshold of protectible rights has been proven, an analysis of the nature of the governmental action and the diminution of value and investment backed expectations may be considered in determining whether the prohibition operates to destroy VER, or stated differently, to affect a taking.

In regard to surface mining, the ban on Federal lands is essentially total, but the nature of the governmental activity militates against a compensable taking. Aside from the specific legislative findings discussed earlier, perhaps the best description of the problem appears in the legislative history of the 1976 Mining in the Parks Act, imposing a moratorium on mining in national parks, which vividly described the threat of modern mine technology:

Death Valley offers an example of the impact of mineral activity within these areas. At the time that the monument was opened to mineral entry, it was recognized that a significant aspect of the history of this area was the role of the prospector. By leaving the monument open to the Mining Law of 1872, it was anticipated that the picturesque figure of the prospector and his burro would continue to be a part of the scene. But evolving mining technology has altered this situation radically. In recent years, major surface mining operations using massive earthmoving equipment have begun within the monument. Where once the impact of mineral exploration and development was hardly noticeable, the very character of Death Valley is now threatened with serious alteration.<sup>154</sup>

In regard to deep mining, mining *per se* is not prohibited, only the surface impacts are prohibited.<sup>155</sup> Thus this situation would appear to be controlled by *Keystone*. In *Keystone*, the

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<sup>153</sup> See *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

<sup>154</sup> H.R. REP. NO. 1428, 94th Cong., 1st Sess., reprinted in, 1976 U.S. CODE CONG. AND ADMIN. NEWS 2487.

<sup>155</sup> Surface impacts are permissible upon a finding by the Secretary that there are no significant recreational, timber, economic or other values which may be incompatible or the lands west of the 100th meridian do not have significant forest cover. SMCRA § 522(e)(d), 30 U.S.C. § 1272(e)(2) (1988).

Court held that the Pennsylvania Subsidence Act withstands an attack on diminution of value and investment backed expectation grounds because the whole parcel was not affected by the ban on mining and there was no showing that the owners were denied the economically viable use of their property.<sup>156</sup> No taking occurs since not all economically viable use of the land has been destroyed.<sup>157</sup> The coal may still be mined provided surface impacts are prevented. Thus 522(e) does not prohibit the activity but only the manner in which it may be conducted. Since one cannot acquire the right to exploit property and foist off the attendant harms upon the public,<sup>158</sup> no legitimate expectation is defeated.

Nevertheless, there is evidence that courts remain sensitive to the concern that government not overstep its bounds by physically appropriating desirable property under the guise of regulation.<sup>159</sup> Concerns about Section 522(e) takings are further minimized by the fact that Sections 522(e)(2) and (3) contain provisions which effectively limit the prohibitions to circumstances where it is administratively determined that there is a true threat to the values which these provisions seek to preserve.<sup>160</sup> Since government can eliminate these threats without

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<sup>156</sup> 480 U.S. at 485.

<sup>157</sup> Coal may not necessarily be a single use property. It may be mined for its methane gas or subjected to *in-situ* processing.

<sup>158</sup> McGinley and Barrett, *supra* note 104 at 441. See also, McFerrin and Whitman, *Valid Existing Rights and the Constitution: 1983 Regulatory Changes*, 87 W. VA. L. REV. 647 (1984-85). The authors state:

Thus, very few mining companies would have valid existing rights under a "reasonable investment-backed expectation." They could not expect to impose their externalities with impunity. The distance and location limitations of the Act are designed to ensure that the effects of the mining are confined to the mine site. Since one's ownership and use of property is always limited by potential harm to others, one could reasonably expect limits such as the Act imposes and could rarely have the expectations needed to support a finding of valid existing rights." (citations omitted).

<sup>159</sup> The Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which held that the Coastal Commission could not, without paying compensation, condition a rebuilding permit upon the requirement that the owner allow the public to pass across his beachfront property, reveals a judicial antipathy to regulatory conduct which is perceived as a thinly disguised physical acquisition of property for public use and enjoyment. See generally, McGinley and Barrett, *supra* note 104, at 447-48.

<sup>160</sup> SMCRA § 522(e)(2), 30 U.S.C. § 1272(e)(2) (1988) provides "That surface coal mining operations may be permitted on such [national forest] lands if the Secretary finds that there are no significant recreational, timber, economic, or other uses which may be incompatible with such surface mining operations . . ." SMCRA § 522(e)(3), 30 U.S.C. 1272(e)(3) (1988) does not prohibit mining which will adversely affect a public park or

compensation, the issue, if at all, exists in the broader prohibition of Section 522(e)(1).

## V. A PROPOSED REGULATORY APPROACH

### *Consideration of the Statute of Limitations*

Since claims against the United States for regulatory takings must be brought within six years of when the cause of action occurs,<sup>161</sup> there is a serious question of the continued vitality of takings claims under SMCRA if the accrual of the claim occurred on August 3, 1977, when SMCRA became law. One might construe the Section 522(e) VER clause as the predicate act which triggered running of the clock on SMCRA claims.<sup>162</sup> While authority for the proposition that the statute of limitations does not begin to run until administrative action is taken recognizing a protectible coal interest and subsequently denying the owner the right to mine the coal,<sup>163</sup> the more compelling argument is that the holder of the claim should not be the master of its maturity since that renders the statute of limitations ineffective

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registered historic site if there is joint approval by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or historic site.

<sup>161</sup> See 28 U.S.C. § 2501 (1976) which states:

Time for filing suit:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

See also, 28 U.S.C. § 2401 (1976), which states:

Time for commencing action against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

<sup>162</sup> See, e.g., *Inupiat Community of Arctic Slope v. United States*, 746 F.2d 570, (C.A. Ak 1984), *cert. denied*, 106 S. Ct. 68, which found that the date of enactment of the Alaska Native Claims Settlement Act was the operative date which began the running of the statute of limitations for purposes of a takings claim.

<sup>163</sup> See *Meridian Land & Mineral Company v. Hodel*, 843 F.2d 340 (9th Cir. 1988) (the issue of taking the claimant's coal rights by the ban on mining in the Custer National Forest was ripe without first requiring the coal owner to apply for a surface mining permit or seeking an agency determination that he possessed "valid existing rights.") In *Sunday Creek Coal Co. v. Hodel*, No. C-2-88-0416 slip op. (S.D. Ohio, June 2, 1988), District Judge Graham found that the denial by OSMRE that Sunday Creek Coal Co. had VER did not require exhaustion of administrative remedies before a takings claim in District Court could be filed.

and frustrates its underlying purpose of finality.<sup>164</sup> Holders of VER should not be encouraged, indeed, required to sit on their rights awaiting the election of a favorable administration or other events perceived by them to be favorable before presenting their takings claims; rather, they should be encouraged to present their claims as soon as possible after a takings by legislative or regulatory action occurs so that certainty in the management of public lands is served. The recent decision in *Preseault* makes an action in the Claims Court under the Tucker Act the exclusive remedy to determine if a compensable taking has occurred. Nothing in SMCRA implies that Congress intended to withdraw the Tucker Act remedy. Indeed one may posit that the VER clause implicitly recognizes that valid existing rights are afforded protection and one vehicle by which such protection is invoked is a takings claim under the Tucker Act.<sup>165</sup> Further discussion of this topic is beyond the scope of this article.

### *Substantive Regulatory Approach*

The purpose of the foregoing analysis has been to examine the possible sources of guidance from the legislative history, historical precedents, and constitutional principles which inform the concept of valid existing rights and how they may be protected. It is, obviously, up to the regulators to formulate an approach to VER which is reasonable and consistent with the statutory language and legislative objectives of SMCRA. This review, we believe, supports the following approach: First, although the phrase "subject to valid existing rights" applies to the entirety of Section 522(e), its historical usage is limited to the public lands. Subsections (e)(1) through (3) are potential sources of future VER issues under the analysis that has emerged in this discussion of VER, but the most likely source of future conflict exists with respect to the public lands and resources identified in Section 522(e)(1). We believe that the traditional role of the Secretary in determining the existence of VER should be maintained. Although the Act shows an intent to protect VER in the implementation of these prohibitions, modern tak-

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<sup>164</sup> See *Whitney Benefits v. U.S.*, 18 Cl.Ct. 394 (1989). (recognizing the SMCRA enactment date as the date of the taking).

<sup>165</sup> *Preseault v. Interstate Commerce Commission*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 914 (1990).

ings jurisprudence and the recognized subjugation of all property rights, including the special category of less-than-fee interests in publicly held lands historically recognized as VER, to the health and safety of the public and the preservation of its values militate against the finding of takings under SMCRA. The 522(e)(4) and (5) "buffer zone" limitations are virtually immune from takings challenges under these precedents. While some question may linger under the federal public lands provisions discussed above, we feel that the agency would be justified in adopting either an approach which permits case by case consideration of takings claims in these areas or simply denies all such claims, preserving the right to just compensation through the Tucker Act if such is available.

In any event, the issue should be reserved to Interior, rather than the applicable state regulatory authority, because of its plenary jurisdiction over public lands and, more importantly, because the potential for inconsistent findings on the part of competing state regulatory authorities is contrary to the statutory goal of uniformity and may encourage a "race to the bottom".

#### CONCLUSION

The transplantation of statutory VER language from its traditional soil in the area of public land to the muddy area of land-use regulation in SMCRA has caused difficulties that Congress surely did not fully intend when it introduced the language in the Ninety-Third Congress and passed it into law two years later. Evolving notions of property and the police power, however, reveal that the issues presented by Congress' arguably unfortunate choice of words are perhaps illusory. Under SMCRA and the law as articulated by the Supreme Court, Congress can do what it set out to do: eliminate the destructive effects of surface and underground mining on our most treasured values. Therefore, we believe that a future proposed rule promulgation should:

A. Recognize the presumptive validity of all "buffer zone" prohibitions against takings challenges;

B. Establish standards necessary to recognize and protect existing entitlements in the form of permits existing at the time of passage and applications which, but for the passage of the Act, met all statutory requirements for permitting the operation at the time of passage; and

C. Establish standards to determine which pre-SMCRA

activities on publicly owned lands are entitled to protection under traditional VER analysis (e.g., performance of necessary tasks to create and maintain the claim), and evaluate on a case-by-case basis whether operation of the prohibition will effectively extinguish all rights previously obtained from the sovereign.

