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INTRODUCTION

A. *Overview of the Designation of Areas Unsuitable for Mining Provisions*

Section 522 of the Surface Mining Control and Reclamation Act of 1977[1] (hereinafter "SMCRA" or "the Act") establishes congressional policies and procedures for the designation of certain areas as unsuitable for all or certain types of coal mining.[2] The provisions of Section 522 evidence an attempt by Congress to introduce an element of land use planning into SMCRA, and thus to "respond to conflicts which often arise between coal mining and other uses of the land."[3] As was noted by the House Committee on Interior and Insular Affairs:

> The process for designation of land areas as unsuitable for surface coal mining is . . . premised on the notion that suc-

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[1] Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 522, 91 Stat. 507, (codified as 30 U.S.C. § 1272 (1988)). (hereinafter cited as SMCRA).

[2] On the designation of areas unsuitable for surface coal mining requirements, *see Surface Mining Control and Reclamation Act of 1977: Hearings on S. 7 Before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess., 31 (1977) (letter from Frederick N. Ferguson, Acting Solicitor, Department of the Interior); Dragoo, *Designation of Coal Lands as 'Unsuitable' for Surface Coal Mining Operations*, 27A ROCKY MTN. MIN. L. INST., at 1-24 (1980); Squillace, *Designating Areas Unsuitable for Surface Coal Mining*, 1978 UTAH L. REV. 321; *Prohibition of Surface Mining in West Virginia*, 78 W. VA. L. REV. 445 (1976).

[3] 44 Fed. Reg. 14,989 (1979).

> cessful management of surface mining depends, in large part, on the application of rational planning principles. While coal surface mining may be an important and productive use of land, it also involves certain hazards and is but one of the many alternative land uses. In some circumstances, therefore, coal surface mining should give away to competing uses of higher benefit.[4]

The Secretary of the Interior, acting through the Office of Surface Mining Reclamation and Enforcement ("OSM"), is required under SMCRA to develop the criteria and procedures necessary to implement the unsuitability designation provisions.[5]

Section 522 contains several different methods for designating lands unsuitable for mining. The first, found in Section 522(c)[6], allows interested parties to petition the responsible regulatory authority[7] to designate an area as unsuitable for all or some types of coal mining operations. Notice and an opportunity for comment must be provided prior to reaching a determination on such a petition.[8] If the regulatory authority determines that "reclamation pursuant to the requirements of this Act are not technologically and economically feasible,"[9] it is required to designate that area as unsuitable for all or certain types of mining.[10] In other cases, the regulatory authority has the discretion to designate an area as unsuitable if certain criteria are present.[11] The second method of designation, found at Section

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[4] H.R. REP. No. 218, 95th Cong., 1st Sess. 94, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 630.

[5] SMCRA § 201(c), 30 U.S.C. § 1211(c) (1988).

[6] SMCRA § 522(c), 30 U.S.C. § 1272(c) (1988).

[7] States wishing to assume primacy under SMCRA are required to develop the necessary regulations to enable them to make unsuitability decisions consistent with the provisions of SMCRA. SMCRA § 522(a), 30 U.S.C. § 1272(a) (1988).

[8] SMCRA § 522(c), 30 U.S.C. § 1272(c) (1988).

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

[10] *Id.*

[11] Section 522(a)(3) allows such a designation if the operation will: "(A) be incompatible with existing State or local land use plans or programs; or (B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and aesthetic values and natural systems; or (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifer recharge areas; or (D) affect natural hazard land in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology." SMCRA § 522(a)(3), 30 U.S.C. § 1272(a)(3) (1988).

522(b),[12] requires the Secretary of the Interior to review federal lands to determine whether any areas should or must be designated as unsuitable for mining under the criteria found in Section 522(a)(2) and (3).[13]

B. *Section 522(e) Areas Designated Unsuitable by Congress*

The third type of unsuitability designation is found at Section 522(e) of SMCRA.[14] Pursuant to these provisions, certain areas of land were specifically identified by Congress as warranting statutory designation of unsuitability for surface coal mining operations. The reason for this provision was explained as follows:

> Although the designation process will serve to limit mining where such activity is inconsistent with rational planning in the opinion of the [House Interior and Insular Affairs Committee], the decision to bar surface mining in certain circumstances is better made by Congress itself. Thus, section 522(e) provides that, subject to valid existing rights, no surface coal mining operation except those in existence on the date of enactment, shall be permitted on lands within the boundaries of certain Federal systems . . . or in other special circumstances. . .[15]

The Section 522(e) provisions contain five separate types of land which are or may be designated unsuitable for surface mining.[16]

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[12] SMCRA § 522(b), 30 U.S.C. § 1272(b) (1988).

[13] SMCRA § 522(a)(2), (a)(3), 30 U.S.C. §§ 1272 (a)(2) and (3) (1988).

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

[15] H.R. REP. No. 218, 95th Cong., 1st Sess. 95 (1977), *reprinted in* 1977 U.S. CODE CONG. ADMIN. NEWS 593, 631.

[16] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988) prohibits, subject to valid existing rights, mining on the following five categories of lands (known as "(e)(1) lands", etc.):

> (1) on any lands within the boundaries of units of 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, including study rivers designated under section 1276(a) of title 16 and National Recreation Areas designated by Act of Congress;
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> (2) on any Federal lands within the boundaries of any national forest: *Provided, however*, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and
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> (A) surface operations and impacts are incident to an underground coal mine; or
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> (B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests

These provisions of Section 522 have generated a great deal of controversy, and have been the source of litigation since the passage of SMCRA. The first challenge came as a facial attack on various provisions of SMCRA, including Section 522. The Supreme Court rejected the constitutional challenges to these provisions, concluding that the "mere enactment" of SMCRA did not constitute a taking of private property in violation of the Fifth Amendment.[17] Section 522(e) was specifically addressed by the Court, which found that the requirements of Section 522(e) did not automatically deprive property owners of all economically viable use of their property, since any restrictions were subject to "valid existing rights."[18] The Court did, however, leave open the possibility that a taking could be found "with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances."[19]

C. *The Valid Existing Rights Exception to Section 522(e)*

Central to the statutory designation of lands as unsuitable for mining in Section 522(e) of SMCRA is the phrase "subject

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west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. §§ 528-31], the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *and provided further*, That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest;

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

(4) [surface coal mining operations] within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and 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 landowners affected thereby will be protected;

(5) [surface coal mining operations] 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.

[17] Hodel v. Virginia Surface Mining Reclamation Ass'n., 452 U.S. 264, 295-96 (1981).

[18] *Id.* at 295 n. 37.

[19] *Id.* at 295.

to valid existing rights" ("VER"). This phrase is of critical importance to owners of minerals under the areas mentioned in Section 522(e), since it allows surface coal mining operations to be conducted on lands on which it is otherwise prohibited under Section 522(e). Given the importance of this phrase to the determination of private property rights, the fact that Congress chose not to define VER is particularly troublesome.

Although no definition of VER was included in SMCRA, the language found in the legislative history is somewhat instructive of congressional intent. Of particular importance is the discussion of VER found in the Senate Committee Report accompanying Senate Bill S. 7, which later became SMCRA. This report noted:

> The exception for 'valid existing rights' is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language . . . is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties. The phrase "subject to valid existing rights" is thus in no way intended to open up national forest land to strip mining where previous legal precedents have prohibited stripping.[20]

In addition to recognizing "previous state court" interpretations[21] of VER, Congress further apparently included the VER exception to avoid a taking of private property in violation of the Fifth Amendment. This objective was noted in Congressman Udall's opposition to an amendment that would have deleted the VER exception. Congressman Udall stated that the per se statutory prohibitions of SMCRA could not be im-

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[20] S. REP. No. 128, 95th Cong., 1st Sess., 94-95 (1977); As an example of a previous court decision prohibiting mining, *see* United States v. Polino, 131 F.Supp. 772 (N.D. W.Va. 1955). In that case, the court prohibited strip mining of privately owned coal underlying a federally owned surface in West Virginia's Monongahela National Forest. *See also*, H.R. REP. No. 218, 95th Cong., 1st Sess. 96, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, at 632 (1977).

[21] Defining VER in terms of a person's property right in the coal resource, as interpreted in accordance with state law, appears to be within the scope of the reasoning of the U.S. Court of Appeals for the District of Columbia Circuit in NWF v. Hodel, 839 F.2d 694 (D.C. Cir. 1988).

plemented without "paying compensation under the Fifth Amendment to the Constitution" if the VER exception were removed.[22]

One of the recurring questions in the evaluation of the congressional intent of the VER exception concerns the use of the term "valid existing rights" in SMCRA and the use of same or similar terms in other federal laws. Some commentators have asserted that, by its use of the term, Congress must have intended that the SMCRA definition of VER be the same as that found in the other federal laws. After a thorough analysis of the term's use in federal statutes generally, then law student Monroe Jamison, in a Note written for the Journal of Mineral Law and Policy, concluded that:

> Congress was aware of the meaning of VER at the time the Act was passed . . . [N]ot only was the term used in three separate Acts of Congress passed in the mid-1970s, it is also currently found in over 100 statutes. This extensive congressional recognition strongly indicates that the legislature knew what it was doing when it incorporated the term into SMCRA. Between this current use and the extensive background of interpretation of the term, VER can be referred to as having a definite meaning.[23]

However, despite the logic inherent in this assertion, OSM has found the congressional intent regarding a VER definition to be anything but clear. As a result, OSM's rulemakings on VER have contained a wide range of definitions.

I. REGULATORY TESTS FOR VALID EXISTING RIGHTS

Since 1979, OSM has made a number of unsuccessful attempts to define VER. Numerous methods of defining VER have been proposed and, on two occasions, regulatory standards were finalized. Both of these final definitions were later struck down by the U.S. District Court for the District of Columbia.[24]

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[22] 123 CONG. REC. H12, 878 (daily ed. April 29, 1977); This statement is cited in the preamble to the 1979 VER rule, 44 Fed. Reg. at 14,992 (1979) (citing incorrect CONG. REC. reference).

[23] Note, *Regulation and Land Withdrawal: Defining "Valid Existing Rights,"* 3 J. MIN. L. & POL'Y 517, 544 (1988).

[24] *In Re*: Permanent Surface Mining Regulation Litig., 14 Env't. Rep. Cas. (BNA) 1083 (D. D.C. 1980); *In Re:* Permanent Surface Mining Regulation Litigation (II), 620 F.Supp. 1519 (D. D.C. 1985).

A third set of proposed standards was advanced by OSM,[25] but was later withdrawn for further consideration.[26] It is interesting to note that, as is demonstrated by the following discussion, each successive proposed test for VER has differed greatly from the one that proceeded it.

A. *The "All Permits Test"*

The first attempt by OSM to define VER came in 1979. The 1979 test, which became known as the "all permits test," required an applicant to demonstrate that, as of August 3, 1977, it possessed both the legal right to mine the coal and all necessary permits required to conduct mining operations.[27] This test was challenged by industry and was remanded to OSM by Judge Flannery, who found the test to be too narrow.[28] Accordingly, the "all permits test" was suspended by OSM "insofar as it requires that all permits must have been obtained prior to August 3, 1977, in order to establish a valid existing right to surface mine."[29]

B. *The "Takings Test"*

OSM's next rulemaking produced a VER test which was completely different from the "all permits test." The 1983 test, which became known as the "takings test," defined VER as existing if the application of any of the Section 522(e) prohibitions would "effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. . . ."[30] This test was subjected to judicial scrutiny and was remanded, for procedural reasons, to OSM for further rulemaking.[31]

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[25] 53 Fed. Reg. 52,374 (1988).

[26] 54 Fed. Reg. 30,557 (1989).

[27] 30 C.F.R. § 761.5 (1979).

[28] *In Re*: Permanent Surface Mining Regulation Litig., 14 Envt. Rep. Cas. (BNA) 1083, 1091 (D. D.C. 1980).

[29] 45 Fed. Reg. 51,547 (1980).

[30] 48 Fed. Reg. 41,312, 41,349 (1983).

[31] *In Re*: Permanent Surface Mining Regulation Litig. (II), 620 F.Supp. 1519 (D. D.C. 1985). The court found that the final definition differed so significantly from the proposed rule that a new notice and comment period was necessary.

C. *The "Good Faith-All Permits Test"*

The "good faith-all permits test" was derived by OSM from the wording in Judge Flannery's 1980 opinion which struck down the "all permits test."[32] Under this test, VER is defined in terms of whether the applicant for VER had made a good faith effort to obtain all necessary permits for a mining operation as of the date the prohibition against mining came into effect. OSM first utilized the "good faith-all permits test" after Judge Flannery struck down the "all permits test" in 1980.[33] This test was revived through OSM administrative policy decisions after the "takings test" was remanded in November of 1986.[34]

D. *The "Ownership and Authority Test"*

The "ownership and authority test" was proposed as one of the options for a VER definition in the December, 1988 rulemaking.[35] Under this test, an applicant would be required to prove that it possessed the right to mine by the method proposed under the laws of the state in which the property was located. As was previously noted, this test has not been implemented as a final rule, since the proposed rule was withdrawn by OSM.[36]

II. ANALYSIS OF THE VER TESTS

With the exception of the "all permits test," each of the VER definitions previously mentioned could resurface as a proposed rule in the future. Thus, each of these tests should be

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[32] *In Re*: Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) 1083 (D. D.C. 1980). OSM fashioned this test from Judge Flannery's statement that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test. *Id.* at 1091.

[33] 45 Fed. Reg. 51,547 (1980).

[34] The notice which suspended the "takings test" contained a statement by OSM that it would again use the "good faith-all permits test" to make VER determinations on federal lands pending completion of another rulemaking. 48 Fed. Reg. 41,952 (1986). Additionally, the "good faith-all permits test" was implemented to make VER determinations on federal lands located in states whose regulations contained the "all permits test." *Id.* This policy was subsequently extended by a series of "Temporary Directives" issued by the director of OSM. OSM Temporary Directive 88-1 (January 25, 1988); OSM Temporary Directive 89-16 (March 8, 1989); OSM Temporary Directive 90-03 (November 30, 1989).

[35] 53 Fed. Reg. 52,374 (1988).

[36] 54 Fed. Reg. 30,557 (1988).

analyzed in light of the legislative history pertaining to VER and the cases which have dealt with VER determinations.

A. *Analysis of the "Good Faith-All Permits Test"*

Given the language contained in Judge Flannery's 1980 opinion regarding the "all permits test,"[37] some have reached the conclusion that the use of the "good faith-all permits test" is mandated by the language of that opinion. Such a conclusion is clearly not warranted when the court's language is read in context, and when the applicable law is considered.[38]

Additional problems inherent in the use of the "good faith-all permits test" were pointed out by the United States District Court for the Southern District of Ohio in the *Sunday Creek Coal Co. v. Hodel* decision.[39] In that case, OSM had denied a VER application using the "good faith-all permits test" under Ohio law.[40] The VER applicant had not made a "good faith effort" to obtain all permits by August 3, 1977, but the deed

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[37] *See supra* note 28 and accompanying text.

[38] What the court in fact said was that the government's argument in support of the 1979 "all permits test" was inconsistent with the rule itself. That is, since the government's rationale that the "all permits test" was in "consonance with the takings cases" was incorrect, the regulation itself must be remanded, as it was based on an erroneous and overly restrictive interpretation of the takings cases by OSMRE. Thus, the court reasoned, the government's argument proved by its own terms that the rule promulgated was arbitrary and capricious.

Significantly, the court expressed no disagreement with the government's underlyimg premise in 1979, that the definition of VER should ensure "consonance with the taking cases." However, since the court was not briefed on the issue of what would constitute a "taking," and since it was not necessary for the court to reach this issue to render its decision to strike down the "all permits test," the question of what VER definition would ensure "consonance with the taking cases" was remanded to the Secretary for further rulemaking.

The court's discussion of a "good faith effort to obtain all permits" amounted to dictum, and as such, "is not binding as authority or precedent within the stare decisis rule, even on courts inferior to the court from which the expression emanated, no matter how often it may be repeated." 21 C.J.S. *Courts* § 190 (1940). Further, the statements in an opinion "which constitute merely the reasoning, arguments, illustrations, and analogies are generally not precedents." *Id.* It should also be noted that courts are not rulemaking entities, and any such attempt by a court to impose such a rule would be contrary to the division of power inherent in the U.S. Constitution. *See* Colorado Public Interest Research Group, Inc. v. Hills, 420 F.Supp. 582 (D.C. Colo. 1976); Public Service Comm'n. of the State of New York v. Federal Power Comm'n., 543 F.2d 757 (D.C. Cir. 1974) (a court may not compel an administrative agency to take a particular course of action when another is open to it); Southport Rand & Commercial Co. v. Udall, 244 F.Supp. 172 (D. C. Cal. 1965).

[39] Sunday Creek Coal Co. v. Hodel, No. C-2-88-0416 slip op. (S.D. Oh. June 2, 1988).

[40] Ohio Rev. Code Ann. § 1501:13-3-02 (1988).

under which the applicant sought to mine specifically permitted surface mining methods to be employed.[41] The court ruled that OSM had improperly limited the definition of VER to the "modified" or "good faith-all permits test," and that OSM was required under law to interpret VER in such a manner as would avoid a taking. As the court noted:

> The OSMRE's adoption of a state standard which results in the denial of virtually all applications for a determination of valid existing rights is inconsistent with the congressional policy under the SMCRA. The agency's action was not a reasonable means of implementing the SMCRA and was arbitrary and capricious.
> [T]he OSMRE's adoption of the State of Ohio's standards for the determination of valid existing rights deprived the plaintiff of its property without just compensation in violation of the Fifth Amendment to the United States Constitution.[42]

Given the problems inherent in the "good faith-all permits test," it is questionable whether such a test could withstand additional judicial scrutiny, should it be adopted by OSM.

B. *Analysis of The "Takings Test"*

The "takings test" would probably be more capable of withstanding a court challenge than the "good faith-all permits test," since it has the advantage of being in accord with discussions found in SMCRA's legislative history and, thus, appears to be more consistent with congressional intent. For example, the view that the purpose of the VER provision was to preclude interference with valid mining claims and, therefore, to insulate the government from paying compensation, was discussed by Congressman Udall and was reiterated by others.[43]

Additionally, the "takings test" would appear to be in consonance with the findings of the Bureau of Mines, reported during hearings on Senate Bill 7 and House Bill 2, which concluded that significant mining reserves would not be lost under

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[41] *Id.* at 1-2.

[42] *Id.* at 8.

[43] *See* 123 Cong. Rec. H12,878 (daily ed. April 29, 1977) (Remarks of Congressman Udall, Remarks of Congressman Roncalio); *Hearings Before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs on H.R.2*, 95th Cong., 1st Sess. 113-14, 500-01 (February 28 and March 4, 1977).

the unsuitability provisions of the proposed bills. This would not be the case if VER were defined in a more restrictive manner, such as the "good faith-all permits test."

The "takings test" was remanded to the Secretary by Judge Flannery because of a procedural defect, and not because the court found the test itself to be problematic.[44] Thus, the "takings test" does not suffer from the problems inherent in the "all permits" or "good faith-all permits" test. Additionally, the opinion of the court in *Sunday Creek*[45] appears to support the use of the "takings test" in the determination of the appropriate definition of VER. It would therefore appear that the "takings test" could be viewed as establishing the minimum standard, consonant with the legislative history, for allowing mining in Section 522(e) areas.

C. *Analysis of The "Ownership and Authority Test"*

The "ownership and authority test" seems to be in accord with the cases cited in the legislative history of SMCRA pertaining to VER.[46] Additional support for the adoption of this test is found in the statements of then-Congressman Manuel Lujan,[47] which are viewed as evidence of his support for the "ownership and authority test." During congressional debate on the surface mining bill in the 95th Congress, Lujan stated:

> Naturally, the bill's language is also subject to the corollary that it is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method.
> Concerns in this area are not merely hypothetical. For example,

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[44] *See supra* note 31, and accompanying text.

[45] *Sunday Creek*, *supra* note 39.

[46] The case of United States v. Polino, 131 F.Supp 722 (1955), was cited by the legislative history as follows:

> 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 courty 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 and custom at the time and place where the contract is to be executed and must show that such rights were contemplated by the parties.

H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 632 (1977).

[47] Congressman Lujan, now Secretary of the Interior, has the burden of attempting to formulate a defensible definition of VER.

> in the establishment of the national forest system in many areas of the country, grantors sold land to the United States government for inclusion in a national forest system in many areas of the country, but reserve mineral rights for themselves and deeds of conveyance for which the United States was a 'party.' The language of Section 522(e) itself . . . is that enactment of this legislation does not disrupt the relationship between the owner of the coal and the Federal Government. I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, for the Forest Service (or anyone else) to argue that the Surface Mining Control and Reclamation Act somehow modifies the relationship between the owner of the surface and subsurface rights.
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> . . .
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> Clearly alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right to mine the coal in any way modified if such right existed prior to enactment of the Act.[48]

III. THE UNSUITABILITY PROGRAM IN RELATION TO THE VER TESTS

A. *View of the VER Tests In Relation to the Section 522(e) Prohibitions*

Regardless of the seemingly endless debate over what Congress actually meant by including the phrase "valid existing rights" in SMCRA, the fact is that each interest group has attempted to fashion some sort of congressional support for their interpretation of VER from the legislative history. Those who favor fewer restrictions on the mining of affected mineral lands naturally advocate the VER tests which would allow such mining operations to occur, and cite portions of the legislative history to support their position. On the other hand, those who wish to see little or no mining occur in the Section 522(e) areas have pushed for regulations which would prohibit most surface coal mining, and also attempt to support their position through congressional intent.

The "ownership and authority test" is the VER test most favored by mineral owners in general. The test would recognize

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[48] H.R. REP. No. 218, 95th Cong., 1nd Sess. 189, *reprinted in* 1977 U.S. CODE CONG. ADMIN. NEWS 593, 718.

otherwise valid property rights, and would reflect the legislative history's apparent reliance on state property law, as in *U.S. v. Polino*.[49] The rationale under this analysis is that, if strip mining was being practiced in the area in which the land in question is located at the time of the severance, and if the acquiring federal authority (such as the U.S. Forest Service) chose to purchase the surface of the property without also purchasing the mineral rights, then both the government and the mineral owner would have had an expectation that strip mining might be practiced on the area in question. Additionally, this test would be in accordance with Congressman Udall's concern that takings of private property in violation of the Fifth Amendment should be avoided.[50]

On the other hand, the "ownership and authority test" could allow some mining within the boundaries of the National Park System, which is contradictory to a stated goal of the U.S. Department of the Interior.[51] Additionally, the "ownership and authority test," when considered alone, raises some questions regarding the applicability of the Section 522(e)(3), (4) and (5) prohibitions,[52] since this test could be construed to render these prohibitions to be moot in some instances.[53]

Application of the "good faith-all permits test" is generally advocated by those who wish to preclude all mining within any of the areas covered by the Section 522(e) prohibitions. It is generally recognized that virtually no mining operations could qualify for VER under the "good faith-all permits test."

However, the "good faith-all permits test" would virtually ensure that the Section 522(e) prohibitions would result in a number of takings of property in violation of the Fifth Amendment. The "good faith-all permits test" would also appear to be contrary to SMCRA's legislative history by precluding all

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[49] *See supra* note 46 and accompanying text.

[50] *See supra* note 43 and accompanying text.

[51] *See, e.g.*, 48 Fed. Reg. 6,912, 6,917 (1983) ("the inclusion of [a regulation regarding Secretarial responsibility for VER determinations on federal lands] reflects the Secretary's continuing commitment to carry out the Congressional mandate to protect these areas and to ensure that there will be no mining on Federal lands in national parks."); 51 Fed. Reg. 41,952 (1986) ("OSMRE will not process VER applications within units of the National Park System until a Federal rule is finalized.")

[52] SMCRA § 522(e)(3),(4),(5), 30 U.S.C. §§ 1272(e)(3), (4), and (5).

[53] For example, if the mineral owner could demonstrate the authority under state property law to exercise his property rights under a publicly owned park, there would apparently be no reason for such a plan to be "approved jointly" by the appropriate federal and state authorities under SMCRA § 522(e)(3), 30 U.S.C. § 1272(e)(3).

mining within the national forests, even where the property owner could meet the standards of *U.S. v. Polino*.[54]

The "takings test" is the test that appears to comport with the language found in SMCRA's legislative history. Implementation of the "takings test" would allow limited surface mining within the 522(e)(1) and (2) areas, but only after a showing that the property owner met the standards of the "ownership and authority test." Additionally, the applicant would be required to demonstrate that there were no alternative means of mineral recovery existing, such that a denial of the VER application would result in a takings. This test would also be favored by the mineral owners, but is not popular with those who wish to place maximum restrictions on any such operations.

Application of the "takings test" has been criticized by some state regulatory authorities, which feel that it would be difficult to administer on a practical and theoretical level.[55] Additionally, application of the "takings test" alone could also result in mining being allowed within the National Parks in violation of a stated objective of the Department of the Interior.[56]

B. *Is There a Definition of VER That Will Satisfy the Objectives of the Department and be in Compliance with SMCRA and its Legislative History?*

None of the tests for VER alone meet all of the stated objectives of the Department (e.g., precluding mining in the National Parks), while at the same time achieving compliance with the dictates of SMCRA as indicated through its legislative history.

This raises the question of whether a different definition of VER could be applied to each of the different Section 522(e) areas. The question is purely rhetorical, with the only reasonable answer being no. There is no indication that Congress intended different VER definitions for different types of lands. Thus, although the adoption of different standards for the individual Section 522(e) areas would be more likely to allow the policy objectives of the various interested parties to be met, such a

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[54] 131 F.Supp. 772 (N.D. W.Va. 1955).

[55] As proposed in 1983, the "takings test" would require that the regulatory authority make a case-by-case determination as to whether the application of the unsuitability provisions would result in a takings. 48 Fed. Reg. 41,312 (1983).

[56] *See supra* note 51 and accompanying text.

regulation would be unsupported by the legislative history, and thus could not withstand judicial scrutiny. It therefore appears that, to date, no definition of VER has been identified that will satisfy the objectives of the Department of the Interior and will be in compliance with SMCRA and its legislative history.

C. *Is There a View of the Unsuitability Program as a Whole That Will Satisfy the Objectives of the Department and be in Compliance with SMCRA and Its Legislative History?*

As noted, there seems to be no proposed VER test which would satisfy the objectives of the interested parties and which could withstand judicial scrutiny. However, it is possible to look beyond the confines of Section 522(e) and find alternative methods of satisfying these objectives. One example would be the discretionary designation process found in the remainder of Section 522.[57] The Department of the Interior could utilize the discretionary designation process of Sections 522(a)-(d) to fully designate the National Parks, and possibly other 522(e)(1) and (2) areas, as unsuitable for mining. Such discretionary designations are not subject to the VER exception of Section 522(e), thus avoiding the present controversy. The Director of the National Park Service, or the other appropriate agency, depending upon the particular lands involved, could petition to have particular lands designated unsuitable for mining. The comment period on such a discretionary designation could be held during the same time period which is used for a proposed rule on VER. This timetable would allow the Secretary to prohibit mining on the selected properties while avoiding the necessity for making any further VER determination on the designated areas.

Utilizing the discretionary designation process of Section 522(a)-(d) would alleviate the "political" pressure to adopt a definition of VER that would not be in accordance with SMCRA and its legislative history, but which would satisfy the objectives of whichever group exerts the most pressure. Additionally, defining VER as provided for under the "takings test" or "ownership and authority test," when combined with the discretionary designation of specific 522(e)(1) and (2) areas, would appear to be in accordance with SMCRA and its legislative history, while

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[57] *See supra* notes 6-13 and accompanying text.

at the same time allowing appropriate lands to avoid a positive VER determination.

It thus appears that a comprehensive view of the SMCRA unsuitability program as a whole, rather than a narrow view of the Section 522(e) VER provisions in a regulatory vacuum, could accomplish both the Department's policy objectives of precluding mining in certain areas, such as the National Parks, while acknowledging valid property rights that existed on August 3, 1977. Mineral owners of areas designated unsuitable for mining under the discretionary procedures of Section 522(a)-(d) would have all the rights of administrative and judicial review found in SMCRA, and would have certainty in relation to their mineral holdings.

IV. THE MINERAL OWNER'S PERSPECTIVE

A. *Mineral Owners Want Recognition of their Property Rights*

As has been noted, the VER dilemma places the regulatory authority in the position of being required to make tough decisions regarding mining in areas such as the National Parks in the face of pressure from interest groups. In turn, the regulatory authorities tend to deal with the problem by avoiding it; in other words, to preclude decisions regarding the mining of private holdings through bureaucratic delay tactics and through creative interpretation of deeds or regulations. Such tactics are intolerable to the mineral owners, and can most certainly be avoided. Mineral owners want to either be able to develop their property or have a clear prohibition in place which is capable of quick resolution by the regulatory agencies and the courts.

Most mineral owners believe that SMCRA should be read in consonance with the Fifth Amendment of the Constitution so that valid property rights are recognized. Accordingly, the "ownership and authority test" would appear to be the test most closely tracking the interpretation of SMCRA perceived to be most appropriate to the mineral owner.

B. *Mineral Owners Want VER to be Transferable*

It is the very essence of a property right that such a right must be capable of being transferred. If the owner of the mineral rights under a protected tract of property can receive a positive VER determination based upon his or her regulatory qualifica-

tions, but cannot transfer those mineral rights to another, along with the valid existing rights to mine that property, the property rights are meaningless. From the mineral owner's perspective, the proper test for VER must be whether a vested "right" to mine the coal resource existed on the date the prohibitions came into effect, and not whether the operator himself actually possessed those rights on that date.

Nontransferability of VER, which has been suggested by some, would lead to absurdities in application. For example, consider the case where a coal company's assets are sold in their entirety to a second coal company—a rather common situation in the coal business. If the VER to mine the purchased property could not be transferred to a new owner, the right to mine would be extinguished upon transfer. Thus, an operating mine would have to be closed solely because of the transfer. Such a result would clearly be absurd. Accordingly, whichever test for VER is adopted, the transferability of that VER must be clearly stated and recognized.

CONCLUSION

Given the confusion regarding the congressional intent as to the meaning of the phrase "valid existing rights" in SMCRA, as well as the political pressures placed on the Department of the Interior, it is perhaps not surprising that the VER question has not been resolved. In any case, however, the prolonged delay in the promulgation of a legally defensible definition of VER by OSM is most intolerable to mineral owners. OSM's failure to take some sort of definitive action to establish its position on the VER question places the mineral owner in a regulatory limbo from which he cannot escape. Given the current state of affairs, the mineral owner's property rights are effectively rendered valueless, since no one knows, at this point, whether or not they will be able to be exercised at some point in the future. It is essential that OSM proceed with the adoption of some rule, whether it be the tests favored by the mineral owners or another test, so that the process of judicial review and resolution of this troubling issue can proceed. It is critical that mineral owners be given some resolution to this regulatory void, and that a regulatory program be implemented that will specifically delineate the areas where mining will and will not be allowed. Quite simply, thirteen years is too long to wait for an answer to the VER question.