Volume 5
Issue 3 *Journal of Mineral Law & Policy, volume 5, issue 3*

Article 17

January 1990

"Valid Existing Rights" Under SMCRA: A Hard Look at the Regulatory Choices

John A. Macleod
Crowell & Moring

J. Michael Klise
Crowell & Moring

Stephen D. Goldman
Crowell & Moring

"Valid Existing Rights" Under SMCRA: A Hard Look at the Regulatory Choices

JOHN A. MACLEOD*
J. MICHAEL KLISE**
STEPHEN D. GOLDMAN***

TABLE OF CONTENTS

---

* B.B.A. 1963, J.D. 1969, University of Notre Dame. Mr. Macleod is a partner at Crowell & Moring, Washington, D.C. Since 1979 he has represented industry in the rulemaking litigation under SMCRA.

** B.A. 1969, Catholic University of America; M.A. 1971, University of Virginia; J.D. 1986, Catholic University of America. Mr. Klise is an associate at Crowell & Moring, Washington, D.C., where he practices natural resources and labor law.

*** B.A. 1982, Case Western Reserve University; M.A. 1985, Johns Hopkins University; J.D. 1988, New York University. Mr. Goldman is an associate at Crowell & Moring, Washington, D.C.

Many years ago, two avid followers of the Surface Mining Control and Reclamation Act of 1977[1] ("the Act" or "SMCRA") observed that the status of the valid existing rights ("VER") exemption "remains murky and uncertain as the fifth anniversary of the Act approaches—and promises to remain so for some months after that date."[2] Little did they know how correct their prognostication was.

Today, as the thirteenth anniversary of the Act nears, that assessment remains true. During SMCRA's lifetime, the Office of Surface Mining Reclamation and Enforcement ("OSM" or "the agency") has promulgated two regulations defining VER,[3] only to see one remanded for revision and the other invalidated

---

[1] Pub. L. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

[2] Macleod and Means, *When It Is Suitable to Be Unsuitable: An Analysis of the Exemptions From the Surface Mining Act's Prohibitions on Mining*, 3 EASTERN MIN. L. INST. § 7.03[4], at 7-24 (1982).

[3] 30 C.F.R. § 761.5 (1979); 30 C.F.R. § 761.5 (1983).

for inadequate notice and opportunity to comment.[4] Most recently, a third definition was proposed[5] and then withdrawn.[6] There has been much movement, but no progress, as the agency has grappled with competing interests, the legislative history of the Act and the constitutional prohibition against takings without just compensation.[7]

The three words that have caused so much trouble are part of Section 522(e) of the Act,[8] which designates certain areas as *per se* unsuitable for surface coal mining operations. Included are certain lands that are protected for the benefit of all citizens, such as lands within national parks,[9] wilderness areas,[10] and federal lands within national forests.[11] Also included are certain lands that are protected for the benefit of individual citizens, such as lands in "buffer zone" areas around public roads,[12] occupied dwellings,[13] and public buildings.[14] Those prohibitions

---

[4] *In Re* Permanent Surface Mining Regulation Litig., 14 Env't Rep. Cas. (BNA) 1083 (D. D.C. 1980) ("PSMRL I"); *In Re* Permanent Surface Mining Regulation Litig., 22 Env't Rep. Cas. (BNA) 1557 (D. D.C. 1985) ("PSMRL II"), *aff'd in part, rev'd in part sub nom.* National Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988) ("NWF v. Hodel").

[5] 53 Fed. Reg. 52,374 (1988).

[6] 54 Fed. Reg. 30,557 (1989).

[7] U.S. CONST. amend. V.

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

[9] SMCRA § 522(e)(1), 30 U.S.C. § 1272(e)(1) (1988).

[10] *Id.*

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

[12] SMCRA § 522(e)(4), 30 U.S.C. § 1272(e)(4) (1988).

[13] SMCRA § 522(e)(5), 30 U.S.C. § 1272(e)(5) (1988).

[14] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988). In its entirety, this section of the Act provides as follows:

> (e) After the enactment of this Act and subject to valid existing rights no 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 Systems, 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: 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—
>
> (A) surface operations and impacts are incident to an underground coal mine; or

on mining, however, are expressly made "subject to valid existing rights."[15]

But what do those words mean? What is the scope of the exemption they provide? The Act does not define them and they have now eluded successful regulatory definition for nearly thirteen years.

I. AN OVERVIEW OF THE ISSUES AND THE REGULATORY CHOICES

In analyzing Section 522(e), there is an evident tension between the protection of property rights and protection of the environment. As we have moved from regulatory attempt to regulatory attempt over the years, the meaning of VER has swung back and forth between those extremes, getting closer to the one in this Administration and closer to the other in that. Those who favor protection of the environment without regard to business interests have naturally favored a very narrow exemption. Those who are engaged in mining and would stand to lose their mineral interests under the prohibitions have naturally favored a broader exemption. But the fact is that Congress provided for both environmental and property rights protection,

---

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960, 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) 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 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; 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.

[15] *Id.*

through the prohibitions and the VER exemption from those prohibitions. Any regulatory definition of VER must accommodate, in the proper balance, both of those congressional objectives.

The regulatory effort should begin with an assessment of what the regulation is intended to accomplish. First and foremost, it must carry out the will of Congress. In this case, that means striking the proper balance between the polar extremes. If the regulation does not do that, at least within acceptable limits,[16] it will likely be invalidated on judicial review as "inconsistent with law."[17] The regulation must comply not only with SMCRA but also with all other laws, including, of course, the Constitution.[18]

These are necessary attributes of any regulatory definition of VER. In addition, particularly given the complexities of SMCRA with its varying federal and state administration, it would be desirable to have a regulation that is reasonably easy to administer. It would be desirable that the regulatory formula produce predictable and consistent results. And it would be important that the regulation have some promise of general finality, so that its implementation will not normally generate additional litigation and impose recurrent and very large costs on the governments and citizens of the United States and the several states.

In reality, it is not likely that any regulatory definition of VER will achieve all of these objectives as fully as OSM and the affected public would like. Compliance with SMCRA and the Constitution is mandatory; the question is where to make compromises among the remaining objectives. It appears to be that difficulty which has caused the long regulatory paralysis.

There are a number of major and minor regulatory options that have been advanced, or at least considered, to date. The three major choices, each of which has progressed to some level of rulemaking, are (a) the modified all permits test, (b) the takings test, and (c) the ownership and authority test. Two other

---

[16] In formulating a regulation, an agency is entitled to reasonable latitude in interpreting the statute it is administering. *See* NWF v. Hodel, 839 F.2d at 734-35, 741.

[17] Regulations promulgated by the Secretary are subject to judicial review in the United States District Court for the District of Columbia. SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1988). They will be upheld unless the court finds them "arbitrary, capricious, or otherwise inconsistent with law." *Id.*

[18] *Id.*

regulatory options should also be considered, to give perspective to the major choices if for no other reason. Those are (d) the ownership test, and (e) the making of case-by-case VER determinations, either with or without a guiding regulation. Our purpose in this article is to analyze these regulatory choices, noting the strengths and weaknesses of each and the compromises it would entail. We will do so against the background of certain necessary guideposts for the interpretation of Section 522(e). But first, a history lesson must be provided.

II. THE HISTORY OF VER REGULATION UNDER SMCRA

A. *The First Definition: The "All Permits" Test*

1. *Regulatory Requirements*

In March 1979, the Secretary of the Interior promulgated the voluminous first permanent program regulations under Section 501(b) of the Act.[19] The regulations included a restrictive definition of VER for purposes of Section 522(e). Under that definition, VER was to preserve only those property rights in existence on August 3, 1977 that authorized the applicant to mine, and then only if the applicant had either obtained all of the necessary state and federal permits as of that date or could demonstrate that the coal in question was both needed for and immediately adjacent to an ongoing operation for which he possessed all permits as of that date.[20] Lest there be any doubt about the definition's narrow scope, the regulation expressly ruled out other less perfected rights, such as "coal exploration permits or licenses, applications for bids on leases, or where a person has only applied for a state or federal permit."[21]

The Secretary based the definition on a threefold rationale. First, he felt compelled to distinguish the VER exemption in Section 522(e) from the "substantial legal and financial com-

---

[19] 44 Fed. Reg. 14,901 (1979). In all, the regulations and preamble spanned 562 pages in the Federal Register.

[20] 30 C.F.R. § 761.5 (1979), 44 Fed. Reg. at 15,342 (1979).

[21] *Id.* The same regulation also contained a generic disclaimer that VER "does not mean mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining." *Id.*

mitments" ("SLFC") exemption in Section 522(a)(6), which describes the exemption applicable to unsuitability designations sought by petition.[22] In the Secretary's view, the prohibitions of Section 522(e) were mandated directly by Congress rather than left up to private petition, thus implying the need for a greater property interest to qualify for Section 522(e) VER than for the Section 522(a)(6) SLFC exemption.[23]

Second, the Secretary identified legislative history to the effect that the VER provision was intended to avoid constitutional takings and the attendant compensation requirement of the Fifth Amendment. The Secretary claimed that he had defined VER in terms of "those rights which cannot be affected without paying compensation."[24] He also stated that the definition incorporated the notion that the conveyance creating the property interest must have contemplated mining by the intended mining method if it is to create VER for that method.[25]

Third, the Secretary elaborated on the law of takings, noting that the relevant cases fell into two interrelated categories—diminution of value, and noxious use. The former finds a taking only if there is no remaining use for the property—a result the Secretary claimed justified defining VER differently for ongoing mines and potential new mines. The latter category involves the use of the government's police power to prevent some harmful use of property, and in the Secretary's view could justify interference with property interests even if the loss of value were 100 percent.[26]

The delineation of the Secretary's rationale in this preamble has proven important beyond its immediate purpose of justifying the first VER definition. Indeed, in the short term the rationale

---

[22] Section 522(a)(6), 30 U.S.C. § 1272(a)(6), provides:

> The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act or under a permit issued pursuant to this Act, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

[23] *See* 44 Fed. Reg. 14,991-92.

[24] 44 Fed. Reg. at 14,992 (1979) (discussing 123 CONG. REC. H12,878 (daily ed. Apr. 29, 1977) (statement of Rep. Udall) (incorrectly cited as the Apr. 20 ed. in the Federal Register notice).

[25] 44 Fed. Reg. at 14,992 (1979) (citing United States v. Polino, [131] F. Supp. 722 (N.D. W. Va. 1955)) (incorrectly cited as vol. 133 of F. Supp. in the Federal Register notice).

[26] 44 Fed. Reg. at 14,992 (1979) (discussing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)).

failed, because the district court found the definition too restrictive.[27] But over the years the rationale has laid the groundwork for the debate over VER that remains alive to this day.

2. *Judicial Response*

Both industry and environmental groups challenged the regulatory definition of VER under Section 526(a)(1) of the Act.[28] The National Coal Association and American Mining Congress ("NCA/AMC") argued that the Secretary had narrowed the VER exemption to the point of negation. NCA/AMC urged that VER be redefined so as not to require all permits as a precondition to VER, but rather to carry out Congress' intent of recognizing property rights that were valid and existing under state law interpreting mining rights. The industry contended that the Secretary had misinterpreted existing case law on VER, which made clear that "VER" is a statutory shorthand for preserving all property rights established under prior laws from destruction upon the enactment of a new statutory scheme. The industry also maintained that the Secretary should have interpreted VER less restrictively in order to avoid constitutional problems under the takings clause of the Fifth Amendment.[29]

Notwithstanding the definition's narrowness, the National Wildlife Federation and a coalition of environmentalist groups ("NWF") challenged it as overbroad. In NWF's view, the regulation would permit greater avoidance of the prohibitions than Congress had intended. In particular, NWF attacked the "need and adjacent" element of the definition, arguing that an operator who satisfied it must still have possessed all permits in order to qualify for VER.[30]

Before the court announced its decision, the Secretary conceded industry's point that state law should control the interpretation of any documents relied on to establish VER. The court noted that the Secretary had agreed to revise the regulation to

---

[27] *See PSMRL I*, 14 Env't Rep. Cas. (BNA) at 1090-92 (D.D.C. 1980).

[28] SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1988), provides for judicial review of the Secretary's national rules or regulations in the U.S. District Court for the District of Columbia. The Secretary's action is to be affirmed unless the court concludes that it was "arbitrary, capricious, or otherwise inconsistent with law." *Id.*

[29] *PSMRL I*, 14 Env't Rep. Cas. (BNA) at 1090-91.

[30] *See Id.* at 1091.

provide that state law governed, not the more anomalous "usage and custom" standard specified in the regulation.[31]

The court rejected NWF's claim that the need and adjacent test impermissibly expanded the concept of VER, holding that the regulation in this respect was a rational method of avoiding takings. The court found that this test was consistent with Supreme Court declarations regarding taking of property, in that it recognized a VER exemption when necessary to maintain, as a whole, the value of the property to the VER applicant.[32]

The court was similarly unreceptive to most of industry's remaining arguments. It declined to reach the merits of what it perceived to be NCA/AMC's constitutional challenge to the regulation, holding that the issue was premature because there were no specific facts enabling the court to adjudicate the takings question.[33] In reality, the industry had merely argued that the statute should be construed to avoid the constitutional question, and that VER should therefore be defined more broadly to avoid violating the takings clause. That argument went unaddressed in the court's opinion.

As to the crucial "all permits test," the court accepted the premise that VER could be defined with reference to permits, but remanded the regulation for modification. It rejected as "self-defeating" OSM's position that the operator must actually have obtained all permits in order to have VER. Recognizing that an operator who has applied for the permits but fails to receive one or more through governmental delay possesses the same expectations and has made the same investments as one who timely receives all permits, the court remanded the all permits test to the Secretary, holding "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."[34]

---

[31] *See Id.* at 1090; 44 Fed. Reg. at 15,342 (1979).

[32] *PSMRL I*, 14 Env't Rep. Cas. (BNA) at 1091 (citing Penn Central Transportation Co., 438 U.S. at 130-31; Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

[33] *PSMRL I*, 14 Env't Rep. Cas. (BNA) at 1091.

[34] *Id.* VER and other issues were appealed to the United States Court of Appeals for the District of Columbia Circuit. That court never ruled on the issues because while the appeals were pending, the Reagan Administration took office and embarked on a wide-ranging program of regulatory reform. Then Interior Secretary James Watt announced his intention to repromulgate the SMCRA permanent program regulations. Therefore, the entire case was remanded to the Secretary, because it was expected that the new regulations would largely moot the issues on appeal. *See* NWF v. Hodel, 839 F.2d at 702.

Contemporaneous with *PSMRL I*, the Act was the subject of a separate constitutional challenge in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[35] That case presented the question whether SMCRA violated the Fifth Amendment prohibition against governmental takings of private property without payment of just compensation. In the absence of a specific factual situation, the Supreme Court concluded that the "mere enactment" of SMCRA did not constitute a taking.[36]

Though the Court did not reach the substantive issue of VER, it noted the district court's remand of the all permits test in *PSMRL I*, and observed that the all permits "interpretation of the exception is not compelled by either the statutory language or its legislative history."[37]

3. *The Secretary's Interpretations and Representations*

The Secretary's representations during this rulemaking and litigation were not a model of consistency. The all permits regulation on its face left no room for alternative methods of finding VER, other than the need and adjacent test. Yet even while promulgating this regulation, OSM hinted that VER might exist where the all permits test could not be met. The Secretary explained in the rulemaking preamble that VER is a site-specific concept that must take each applicant's particular circumstances into account. In his view, the regulation meant that VER must be applied case-by-case, but with no doubt about the presence of VER where an applicant had all permits for the area as of August 3, 1977.[38]

Later, in the appeal of *PSMRL I*, the Secretary again attempted to expand the facial restrictiveness of the VER definition. He stated that while one of the purposes of the all permits test was to make clear that there are valid existing rights where all permits have been obtained by August 3, 1977, in the absence of all permits, the agency would look for the presence of VER

---

[35] 452 U.S. 264 (1981).

[36] *Id.* at 295-6.

[37] *Id.* at 296, n. 37. In a later ruling in the permanent program litigation, the D.C. Circuit reiterated this point. *NWF v. Hodel*, 839 F.2d at 750 n. 86. Through an apparently inadvertent error, the Secretary subsequently misquoted the D.C. Circuit as reaching the opposite conclusion. *See* 53 Fed. Reg. 52,374 (1988).

[38] 44 Fed. Reg. at 14,993 (1979).

on a case-by-case basis.[39] Still later, with the benefit of several years' hindsight, the Secretary explained that the 1979 rule, like the rule the Secretary was then proposing, "did not attempt to specify all situations where VER exists." Instead, under the 1979 rules, VER could also be found "if under all the facts, a taking would occur, but for VER."[40]

The Secretary made similar representations to the Supreme Court. In his reply brief in *Hodel v. Virginia Surface Mining and Reclamation Association*, the Secretary informed the Court that the all permits VER definition "was intended to provide only that one way in which a mine operator could conclusively establish his 'valid existing rights' was to show that all necessary permits had been obtained before the passage of the Act."[41] Any regulation to the contrary, the Secretary continued, would not be in accord with Congress' intent.

These explanations, however, do not comport with still other statements made in the 1979 final rulemaking. At that time, OSM stated that Congress' purpose in passing the VER exception was to avoid any takings that would require compensation under the Constitution. Accordingly, OSM claimed that the all permits definition of VER would give full effect to this requirement, rather than simply being one way of implementing it.[42] Thus, what OSM really meant in 1979 remains unclear to this day.

4. *Suspension of the Regulation*

The court's remand of the VER definition had the legal effect of invalidating the regulation insofar as it required the operator to have obtained all permits prior to the date of SMCRA's enactment. Six months later, the Secretary published a notice of suspension of that aspect of the definition, noting that pending further rulemaking, the Secretary would interpret the regulation as "requiring a good faith effort to obtain all permits."[43] Still later, after the change of Administrations in

---

[39] Macleod and Means, *supra* note 2, at 7-24.

[40] Defendant's Memorandum in Support of Their Cross-Motion for Summary Judgment (Oct. 19, 1984) at 6-7.

[41] Reply Brief for the Acting Secretary of the Interior at 5-6, Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981), quoted in Macleod and Means, *supra* note 2, at 7-19.

[42] 44 Fed. Reg. at 14,992 (1979).

[43] 45 Fed. Reg. at 51,548 (1980).

January 1981, the new Administration announced its intention to repromulgate the SMCRA permanent program regulations. The pending appeal of the all permits standard was thus "overtaken by events" and was never decided by the D.C. Circuit.[44]

B. *The Second Definition: The "Takings" Test*

1. *Regulatory Requirements*

In June 1982, OSM proposed revised regulations with the overall goal of "removing burdensome or counterproductive rules" and giving the states flexibility to implement the unsuitability process for federal lands more efficiently.[45] OSM proposed three options for VER. The first option essentially took the previous definition and added "good faith efforts." Under the proposed definition, VER would exist if the applicant had made good faith efforts to obtain, on or before August 3, 1977, all permits necessary to conduct coal mining operations. The agency admitted that this would be the most restrictive of the three options.[46]

The second option was at the opposite end of the spectrum. All that would be needed to find VER under this definition was ownership of the coal. In explaining this option, the Secretary rejected the agency's earlier rationale that the SLFC exemption from discretionary prohibitions in Section 522(a) implied the need for even greater property interests to qualify for the VER exemption from the congressionally mandated prohibitions in Section 522(e).[47] The Secretary explained, correctly, that the legislative history did not support a connection between VER and SLFC, but rather showed only that Congress meant VER to be defined based on previous court decisions, which of course vary from state to state.[48] To ensure consistency of treatment,

---

[44] *See* NWF v. Hodel, 839 F.2d at 702.

[45] 47 Fed. Reg. 25,278 (1982). The proposal covered not only VER, but the broader issue of designating lands as unsuitable for mining under Section 522 of the Act.

[46] *Id.* at 27,279-80. This option would also define "needed for," in the needed for and adjacent to test, to mean mining necessary to make the operation, as a whole, economically feasible. *Id.*

[47] *See supra* notes 22-23 and accompanying text.

[48] 47 Fed. Reg. 25,280 (citing H. REP. No. 218, 95th Cong., 1st Sess. 95 (1977)[*reprinted in* 1977 U.S. CODE CONG. ADMIN. NEWS 593, 631]; H. REP. No. 1445, 94th Cong., 2d Sess. 47 (1976); S. REP. No. 28, 94th Cong., 2d Sess. 220 (1976); S. REP. No. 128, 95th Cong., 1st Sess. 94 (1977)).

the Secretary proposed to make ownership of coal on August 3, 1977 dispositive of VER. OSM expected this definition to create a "significant expansion in the number of areas having VER."[49]

The third option took a middle position. To establish VER, the applicant would have to show that it both owned the coal and had the right to mine it by the "method intended."[50] OSM claimed that this definition was based on *United States v. Polino*,[51] which the legislative history cited as an example of how VER should be subject to previous court interpretations.[52] In *Polino*, the court faced the question whether a coal company had properly reserved the right to conduct surface mining operations on land that it had conveyed to the United States. In 1917, the Davis Land Company had conveyed land to the government subject to the restriction that the company, and its successors and assignees, had the right to mine and remove minerals from the land. After several conveyances, Bowden Coal Company began mining the area, in part by surface mining a 16.3 acre location.[53] The United States then brought suit.

After concluding that West Virginia law applied by reason of *Erie Railroad Co. v. Tompkins*[54] and analyzing several West Virginia cases, the court held that the company did not have the right to conduct surface mining. Its decision was based on two rationales: first, both parties were aware that the United States planned to use the land for forestry purposes, a usage that the court without any analysis concluded was incompatible with surface mining; and second, because surface mining was not in use in that area of West Virginia when the land was conveyed to the United States, the parties could not have intended the reservation of rights to encompass surface mining, but only underground mining.[55]

---

[49] 47 Fed. Reg. at 25,280.

[50] *Id.*

[51] 131 F. Supp. 772 (N.D. W. Va. 1955).

[52] H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted in* 1977 U.S. CONG. ADMIN. NEWS 593, 631. That report incorrectly cited the case as 133 F.Supp. 722 (D.W.V. 1955), an error which has been repeated in the regulatory preambles. *E.g.*, 47 Fed. Reg. at 25,280 (1982).

[53] *Polino*, 131 F. Supp. at 772-74.

[54] 304 U.S. 64 (1938).

[55] *Polino*, 131 F. Supp. at 775-77. There is no indication that the court was ever presented with, or considered, the possibility that following the surface mining the land could be restored.

Ultimately, OSM rejected all three options. Instead, under the definition promulgated, an applicant would be found to possess valid existing rights:

> for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date 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.[56]

OSM reached this decision after reviewing the extensive comments it had received on the proposed options, which caused it to conclude that none of the proposed definitions "adequately define[d]" VER.[57] According to OSM, commenters had criticized each option as overinclusive or underinclusive, and many commenters raised the issue of a taking without just compensation. Since judicial precedents on takings did not present a bright line test to determine when compensation was necessary for a regulatory taking, the agency believed it was impossible to delineate a class of circumstances with any assurance that it would accurately track all potential takings. Therefore, the agency adopted a definition that would permit it to use a case-by-case approach.[58]

2. *Judicial Response*

Several environmental organizations as well as the Pennsylvania Department of Environmental Resources challenged this

---

[56] 30 C.F.R. § 761.5 (1983); 48 Fed. Reg. at 41,349 (1983). This test is less protective of property rights than the proposed ownership test. Under the takings test, VER would only be found if denial of VER would result in a taking. Under the ownership test, all that the applicant needed to show was that it owned the coal.

[57] 48 Fed. Reg. at 41,313 (1983).

[58] *Id.* at 41,314. In addition to the three options, the agency also announced that it was considering three additional options. In the first, all that would be needed to establish VER was ownership of the coal as of August 3, 1977. However, unlike the primary ownership test, valid existing rights could not be transferred to subsequent owners of the coal. Alternatively, VER could be defined to exist when the applicant possessed ownership of the coal and the right to mine the coal by any method, rather than the right to mine it by the method the applicant intended to use. In the third variation, VER would be found when the applicant had ownership of the coal, the right to mine the coal by the method intended to be used, and the intent to mine. 47 Fed. Reg. 25,281 (1982).

regulation on procedural grounds.[59] They claimed that its promulgation violated the Administrative Procedure Act, because the final regulation was so different from the proposed options that a new notice and comment period was necessary.[60] The government, supported by industry intervenors, argued that the regulation was a logical outgrowth of the proposals, that the 1979 rule included a takings component, that another portion of the proposed regulations provided reasonable notice of the definition adopted, and that the plaintiffs had actual notice of the definition ultimately selected.[61]

The court sided with the plaintiffs and remanded the regulation without reaching any substantive issues.[62] In the court's view, a new notice and comment period would provide the first occasion for the public to criticize the regulation as promulgated. The court disagreed that the 1979 rulemaking put plaintiffs on notice of the takings component, because the all permits rule as then promulgated contained "*no such alternate method* of obtaining VER."[63] It also disagreed that proposed Section 761.5(d), which provided that VER would exist where no reasonable use of the property other than surface coal mining existed, foreshadowed the takings rule. In the court's view, that proposal merely illustrated one instance in which courts have found takings; it did not alert the parties that a takings standard was among OSM's proposed options.[64]

Following the court's decision, the Secretary suspended the regulation, indicating that it would once again revert to using the 1979 all permits definition, with the "good faith" language the court had earlier suggested.[65] Ironically, this policy decision effectively replaced a definition of VER that had been overturned solely on procedural grounds with one that had been severely criticized in the comments to the 1982 proposal.

---

[59] *See PSMRL II*, 22 Env't Rep. Cas. (BNA) 1557 (D. D.C. 1985).

[60] *Id.* at 1558-64.

[61] *Id.* at 1559-62.

[62] *Id.* at 1564.

[63] *Id.* at 1561 (emphasis in original). The court thus effectively nullified the Secretary's earlier waffling on the exclusivity of the all permits test under the 1979 regulations. See *supra* notes 38-42 and accompanying text.

[64] 22 Env't Rep. Cas. (BNA) at 1562. In particular, the court noted that industry's comments during rulemaking had all addressed one or more of the mechanical tests OSM had proposed, not a takings test, and that OSM's responses to comments did not address commenters' objections to the takings test, but only their objections to the specific proposed options. *Id.* at 1562-64.

[65] 51 Fed. Reg. at 41,954 (1986).

C. *"Continually Created VER"*

1. *The Regulatory Provision*

At the same time that the agency proposed the three options for VER in 1982, it also proposed a regulation that would permit VER to be "continually created" as new land became subject to the *per se* rule against coal mining operations.[66] Unlike with VER, however, the agency adopted the exact regulation it had proposed.[67] Under the regulation, VER would be found if, on the date the land became protected under Section 522(e) of the Act, either (1) a "validly authorized surface coal mining operation" was already present on the land, or (2) the Section 522(e) prohibition, if applied to the property interest existing on that date, would create a compensible taking.[68]

In other words, an applicant would no longer need to possess VER as of August 3, 1977, the date SMCRA was enacted. Rather, it would be sufficient that the applicant possess VER as of the later date on which the land at issue became subject to protection.[69]

2. *The Judicial Response*

NWF challenged the continually created VER regulation, claiming it was inconsistent with the language and legislative history of SMCRA.[70] It argued that Section 522(e)'s use of the term "existing" precluded the creation of VER after the date the Act became law.[71] The court rejected this argument, agreeing with the government that because the Act was silent as to VER

---

[66] 47 Fed. Reg. at 25,281 (1982).

[67] 48 Fed. Reg. at 41,314-15 (1983).

[68] 30 C.F.R. § 761.5 (1983); 48 Fed. Reg. at 41,349 (1983).

[69] For example, if a town were now to build a public school, Section 522(e) would prohibit mining within 300 feet of the new building, absent VER. However, if the school were built within 300 feet of an existing mining operation, then the operation could continue under the concept of continually created VER even if the mining operation came into existence after August 3, 1977. Without the continually created VER regulation, the mine operator would have to cease operations in that area.

[70] *See PSMRL II*, 22 Env't Rep. Cas. (BNA) at 1564. Initially they also claimed that the concept of continually created VER was inconsistent with the court's decision in the challenge to the all permits test. At oral argument, however, they admitted that continually created VER was never an issue in that decision. *Id.* at 1564 n. 7.

[71] *Id.* at 1564.

for those areas that became protected after the date of enactment, the rule was "in accord with the Congress' desire to avoid takings."[72] Although it approved the concept of continually created VER, the court remanded the portion of the regulation that incorporated the procedurally defective takings test. It left intact the provision that VER would be found to exist if, on the date the land became subject to the prohibition on mining, a validly authorized surface coal mining operation was already present.[73]

NWF appealed the district court's ruling.[74] It argued that a "continually-created valid existing right is an oxymoron," and therefore arbitrary and contrary to Congress' intent. But the district court's decision was affirmed. The D.C. Circuit looked to the legislative history of the Act and concluded that, "the House committee made clear that operating mines should not be shut down: 'The designation process is not intended to be used as a process to close existing mine operations, although the area in which such operations are located may be designated with respect to future mines.'"[75] Significantly, it added that "the legislative history . . . does suggest that Congress did not intend to infringe on valid property rights or effect takings through [Section] 522(e)."[76]

D. *The Proposed Rules of December 1988*

1. *The Regulatory Provision*

At the close of the Reagan Administration, OSM came to bat for a third time in an attempt to promulgate a regulatory definition of VER.[77] OSM proposed two options—a "good faith-all permits" test, and an "ownership and authority" test. Under either test, as an initial hurdle, an applicant would have to show that it had a legal right to the coal under some document such

---

[72] *Id.*

[73] *Id.* at 1564-65.

[74] *See* NWF v. Hodel, 839 F.2d 694 (D.C. Cir. 1988). The lower court's decision to remand that part of the continually created VER regulation that incorporated the takings test was not appealed.

[75] *Id.* at 750 (quoting H.R. REP. NO. 218, 95th Cong., 1st Sess. 94 *reprinted* in 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 631).

[76] *Id.*

[77] 53 Fed. Reg. 52,374 (1988).

as a deed, conveyance, lease or contract.[78] The right must have existed as of either August 3, 1977 or the date the land in question became subject to Section 522(e), whichever was later.[79] The documents used to prove the existence of the right would be interpreted according to state law.

After establishing that it had the legal right to the coal, the applicant would have to show that it could satisfy either the good faith all permits test or the ownership and authority test, whichever was ultimately adopted.[80] Under the former test, the agency would look at whether the operator had applied for all the permits necessary to commence mining prior to the date that use of the land had been restricted.[81] Under the ownership and authority test, the applicant would have to show that as of the date the Section 522(e) prohibitions became effective, it possessed the property right necessary for it to conduct mining by the method the applicant intended to use.[82] In proposing the regulations, OSM acknowledged that the ownership and authority test would give effect to Congress' concern that takings be avoided.[83]

2. *The Public Response*

The proposed regulations generated a flood of comments to the agency. Paradoxically, that flood lacked much real water. Out of the approximately 4,500 comments that OSM received during the four month comment period, more than 4,400 were notes and letters from private citizens, many of which responded to an orchestrated campaign by NWF.[84] The vast majority of these "comments" made no attempt to address the substance of the proposals. Rather, in response to NWF's plea, they expressed

---

[78] *Id.* at 52,376.

[79] In this respect, the proposal reflected the concept of continually created VER that the courts had previously approved. See *supra* notes 70-76 and accompanying text; 53 Fed. Reg. at 52,376 (1988).

[80] Alternatively, the applicant could show that it satisfied the needed for and adjacent to test. 53 Fed. Reg. at 52,376 (1988).

[81] *Id.* at 52,378.

[82] *Id.* at 52,377. The meaning of "method" is not entirely free from doubt. OSM used the term to distinguish surface mining methods from underground mining methods. *Id.* But "method" might also be construed to refer to a specific mining technique within one of the two broad categories.

[83] *Id.*

[84] OSM, *Public Comments on VER Proposal* at 1 (Feb. 14, 1990).

opposition to all coal mining in areas subject to Section 522(e) of the Act, or expressed opposition to all of the proposals then on the table.[85]

The substantive comments broke down along fairly predictable lines, the only wild cards being the states and state and federal agencies. Twenty-eight industry commenters, along with several states and federal agencies, supported the ownership and authority test, concluding that it gave effect to the congressional intent to prevent takings. Most of the comments by industry also asked OSM to confirm that in requiring an applicant to have the authority to mine by the method intended, it was referring not to specific mining techniques, but only to the distinction between surface mining and underground mining. Among the commenters opposing the ownership and authority test were NWF and one state.

Twenty-nine commenters, including a handful of states and several environmental organizations, supported the good faith-all permits test.[86] Nine parties, including two states, opposed this test because it would result in regulatory takings for which compensation would have to be paid. Among the miscellaneous comments were one from Illinois supporting a takings test for VER and two, both from Ohio, suggesting that OSM adopt a case-by-case approach in lieu of either of the proposed regulations.[87]

3. *Withdrawal of the Proposal*

The third attempt to define VER never reached the eyes of a court. Instead, following the change in Administrations in 1989, OSM first extended the comment period, and then withdrew the proposals from consideration altogether.[88]

In extending the comment period, OSM stated that the Secretary of the Interior was "very concerned about the complex

---

[85] This tactic may foreshadow what we would regard as an unfortunate trend toward the "politicization" of the rulemaking function. With a staff of 550 and a budget of $70 million, NWF is a big business. 1 BUREK, KOEK & NOVALLO, ENCYCLOPEDIA OF ASSOCIATIONS 425 (24th ed. 1990). If it should make a practice of allocating its resources to efforts of this sort, agencies and reviewing courts will become buried by administrative records, and important legal issues will be obscured.

[86] OSM, *Public Comments on VER Proposal* at 2 (Feb. 14, 1990).

[87] *Id.* at 3.

[88] 54 Fed. Reg. at 9,848 and 30,557 (1989).

and difficult problem of valid existing rights to mine in areas otherwise protected from mining by the Act."[89] The Secretary hoped that with additional time to comment, "interested parties [would] . . . suggest additional options . . . . If other viable options are suggested, the Secretary may decide to repropose the rules and solicit additional comments on those suggestions."[90]

The withdrawal notice was short on explanation, stating only that "[a]fter further consideration of the proposed rule and the comments on the proposal, the Department of the Interior decided . . . that the proposed rule should be withdrawn for further study."[91] Thus, after twelve years, three proposed definitions, several court challenges, and much hand-wringing and posturing, there was still no regulatory definition of VER.

E. *The Present Situation*

The lack of a judicially validated regulatory definition of VER has not prevented OSM from acting as if one exists. Time and again OSM has stated that it would apply the all permits test, which it had initially proposed as the definition of VER, along with the additional "good faith efforts" modification suggested by the district court.[92]

OSM's rationale for continuing to favor the good faith-all permits test harkens back to Judge Flannery's decision ten years ago. The agency apparently has felt compelled by the district court's decision in *PSMRL I* to modify the all permits test to incorporate the court's remand for inclusion of a good faith

---

[89] *Id.* at 9,848.

[90] *Id.*

[91] *Id.* at 30,557.

[92] In fact, OSM applies the good faith-all permits test only on Indian lands and in federal program states, while tests promulgated by individual states are applied to federal lands in state program states. 51 Fed. Reg. 41,954 (1986); 53 Fed. Reg. 52,375 (1988). To date, many if not all of the VER determinations made in the absence of a federal definition have been made on federal lands in state program states. *E.g.*, 55 Fed. Reg. 1,288 (1990) (applying Ohio's all permits test); 54 Fed. Reg. 51,083 (1989) (applying West Virginia's takings test). This practice creates a whole new set of legal issues, because many state statutes and regulations were based on OSM's definitions of VER that the courts later invalidated. *See, e.g.*, Sunday Creek Coal Co. v. Hodel, NO. C-2-88-0416, slip op. (S.D. Ohio June 2, 1988) (holding that even though applicant did not have VER under Ohio "all permits" and "need and adjacent" tests, OSM's denial of VER violated SMCRA and constituted compensible taking because it deprived applicant of all economically feasible use of property interest).

provision.[93] Neither case law nor the agency's own admissions, however, support this position.

A court cannot modify an agency's regulation. In *Federal Power Commission v. Idaho Power Co.*,[94] for example, the Federal Power Commission ("FPC") had issued an order authorizing a hydroelectric project to go forward, subject to certain restrictions. The court of appeals initially ordered the agency to modify its order and remanded the action so it could make the modification. After the FPC sought a clarification of the court's decision, the court of appeals modified the agency's order itself and then summarily affirmed the order as modified. The Supreme Court struck down the modification on the ground that the court had "usurped an administrative function."[95] Noting that "the function of the reviewing court ends when an error of law is laid bare," the Court held that only the first appellate court order, directing the agency to modify its action, was valid.[96]

Judge Flannery had no power in the VER cases to modify the all permits test promulgated by OSM, nor did he do so. His only power, which he exercised, was to nullify the regulations under the applicable standard of review.[97] The court's authority ended when it remanded the all permits test. What OSM subsequently treated as the court's "approval" merely reflected the court's view that the all permits test could not survive judicial scrutiny without at least containing a good faith provision. The court did not rule out the possibility that the agency might adopt some other test in the proper exercise of its administrative discretion.

Moreover, the Secretary of Interior himself has stated that *PSMRL I* did not modify the all permits test. In challenging

---

[93] *E.g.*, 45 Fed. Reg. 51,548 (1980) (withdrawing 1979 rule and substituting good faith-all permits test); 51 Fed. Reg. 41,954 (1986) (withdrawing takings test and substituting good faith-all permits test); 53 Fed. Reg. at 52,375 (1988) (proposing good faith-all permits option).

[94] 344 U.S. 17 (1952).

[95] *Id.* at 20.

[96] *Id. See also* Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982). The Interstate Commerce Commission had, over a period of time, established three different rates for rail shipment of coal. The court of appeals vacated the last two rates and concluded that this had the effect of reviving the first rate. The Supreme Court held that while the appellate court could invalidate a rate established by the ICC, it could not then reinstate a previous rate, since it had expired when the second rate was passed by the Commission. *Id.* at 143.

[97] SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1).

industry's right to appeal the decision in *PSMRL I*, the government admitted that "[t]he district court unmistakably remanded" the regulation.[98] As the Secretary correctly pointed out, the definition of VER was remanded, not modified, by *PSMRL I*. Acknowledging that remand, in fact, the Secretary suspended the regulation.[99]

An additional reason that OSM cannot use the good faith-all permits test, as a matter of regulation and not policy, stems from the method by which it has been imposed. Never has it been set out for notice and comment and then adopted after agency analysis of the comments, as required by the Administrative Procedure Act.[100] Not surprisingly, therefore, at least one Administrative Law Judge for the Department of Interior has already indicated that the 1986 suspension notice "reinstating" the good faith-all permits test violated that Act's notice and comment provisions.[101]

III. GUIDEPOSTS FOR REGULATORY ACTION

A. *The Language of the Act*

The starting point for judicial review of regulatory action under SMCRA, as with all administrative regulations, is the language of the statute.[102] On its face, Section 522(e) is straightforward. It provides that "[a]fter the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted" on certain categories of lands.[103]

The individual words in the phrase "valid existing rights" seem clear enough. In normal parlance, we understand "valid" to mean lawful, or having legal force. "Existing" quite evidently means "in being" in this case on August 3, 1977 or at some subsequent date when a particular prohibition took effect.

---

[98] Brief of the Secretary of the Interior (Dec. 1980) at 114.

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

[100] *See* 5 U.S.C. § 553 (1988). Indeed, the Secretary has promised that "[i]ndustry will have the opportunity to comment upon and ultimately challenge whatever new test, if any, the Secretary may promulgate." Brief of the Secretary of the Interior (Dec. 1980) at 115.

[101] The Stearns Co., 110 I.B.L.A. 345, 354 (Burski, ALJ concurring).

[102] *See* NWF v. Hodel, 839 F.2d at 764.

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

"Rights" is perhaps the most difficult component, but few would argue that it describes that to which a person has a just claim. Although it is an inherently broad term, one would understand from the Section 522(e) context that it referred to property rights.[104] Certainly it is not otherwise limited.

Congress apparently was comfortable enough with the plain meaning of the words that it felt no need to define them. Its discussions in the legislative history confirm their reference to property rights, however, for Congress said over and over again that the very purpose of the VER exemption was to preserve "property rights"[105] and to avoid "paying compensation under the Fifth Amendment."[106] There are no contrary indications in the words themselves or in the legislative history to suggest that any other meaning was intended. On their face, then, the words of exemption mean that the Section 522(e) prohibitions are to apply only insofar as they do not disturb lawful property rights that were in being when the prohibitions took effect. They demonstrate that Congress was prepared to and did make accommodations in the legislative plan for environmental protection in recognition of the need to preserve and protect other important interests.

The balanced view routinely ignored by those who see in SMCRA only the protection of the environment, to the exclusion of all other interests, is confirmed by accommodations that Congress made throughout the Act and elsewhere in the prohibitions themselves. In addition to protecting property rights, for instance, Congress clearly and repeatedly weighed its approach to environmental protection against the Nation's crucial energy needs. To meet those needs, Congress found it essential to make legislative compromises "to insure the existence of an expanding and economically healthy underground coal mining industry."[107] Indeed, one of the express purposes of SMCRA is to: "[A]ssure 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

---

[104] So natural is this reading that the D.C. Circuit inadvertently referred to "valid property rights," instead of "valid existing rights," in its decision on continually created VER. NWF v. Hodel, 839 F.2d at 750.

[105] *E.g.*, 121 CONG. REC. H6,679 (1975) (remarks of Rep. Udall).

[106] 123 CONG. REC. H12,787 (1977) (remarks of Rep. Udall). For a fuller discussion of the legislative history, *see infra* notes 185-98 and accompanying text.

[107] SMCRA § 101(b), 30 U.S.C. § 1201(b)(1988).

agricultural productivity and the Nation's need for coal as an essential source of energy . . . ."[108]

Several components of Section 522(e) itself reflect this conscious and continued accommodation of interests. To begin with, the opening language contains not one but two exceptions to the prohibitions: an exception for "surface coal mining operations . . . which exist on the date of enactment of this Act," and the VER exemption itself. Under general norms of statutory construction, Congress' inclusion of both exceptions cautions against any interpretation that would equate the two by limiting VER to mining operations that actually existed on August 3, 1977.[109]

In addition to these exceptions, Congress repeatedly put limitations on the prohibitions themselves. For instance, it provided for government agency waivers of the prohibitions against mining within a national forest and mining that affects historic sites.[110] The buffer zones around roads are subject to avoidance or modification in several ways.[111] Also the protection accorded occupied dwellings is waivable by the owner of the dwelling.[112]

The language of the statute clearly identifies the legislative result, the regulatory accommodation of competing environmental interests and other important interests, with which any definition of "valid existing rights" must harmonize. The need to reach this result, and thus to achieve essential consistency with the Act's grant of legislative authority,[113] necessarily influences

---

[108] SMCRA § 102(f), 30 U.S.C. § 1202(f) (1988).

[109] *See* 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1984) (if possible, each word of a statute must be given effect).

[110] The Secretary of the Interior can permit mining on lands within national forest boundaries if he finds there are no significant recreational, timber, economic, or other values incompatible with surface mining operations and either (1) the surface operations are incident to an underground mine, or (2) the Secretary of Agriculture determines, with respect to certain areas, that the surface mining complies with SMCRA and other designated statutes. SMCRA § 522(e)(2), 30 U.S.C. § 1272(e)(2) (1988). Exceptions to the historic sites prohibition are available with the joint approval of the regulatory authority and the agency with jurisdiction over the site. SMCRA § 522(e)(3), 30 U.S.C. § 1272(e)(3) (1988).

[111] An outright exception exists if mine access roads or haulage roads join the right-of-way line of the protected area. Further, the regulatory authority may permit affected roads to be relocated and may allow mining within the 100-foot buffer zone if the interests of the public and affected landowners will be protected. SMCRA § 522(e)(4), 30 U.S.C. § 1272(e)(4) (1988).

[112] SMCRA § 522(e)(5), 30 U.S.C. § 1272(e)(5) (1988).

[113] The Act's standard of judicial review requires affirmance of the regulations unless they are "arbitrary, capricious, or otherwise inconsistent with law." SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1988).

the assessment of the other traditional guideposts for regulatory action.

B. *The Historical Use And Meaning Of "Valid Existing Rights"*

1. *Other Statutes*

The past usage of a term is a valid guide to its present meaning.[114] Past usage is particularly crucial to interpreting Section 522(e), which, unlike other provisions of SMCRA, was self-executing and effective on the day it was enacted. Moreover, since this past usage of the term also reflects its ordinary meaning, there is a strong inference that Congress intended the ordinary meaning to apply, not a hedged and qualified meaning developed by a regulatory agency attempting to restrike the balance of interests Congress already set in the statute.[115]

The concept of valid existing rights is not unique to SMCRA, nor is it a doctrine of recent vintage. It dates back to the Mining Law of 1872, in which Congress opened federal lands to mineral development but disclaimed any impairments of "rights or interests in mining property acquired under existing laws."[116] Since then, VER has become a staple of federal land legislation. Congress has used it as a shorthand to create exemptions in such diverse statutes as the Alaska Native Claims Settlement Act,[117] the Alaska Railroad Transfer Act of 1982,[118] the Revised Organic Act of the Virgin Islands,[119] the Territorial Submerged Lands Act of 1974,[120] and numerous provisions concerning the resto-

---

[114] Sea-Land Service, Inc. v. Federal Maritime Comm'n, 404 F.2d 824, 828 (D.C. Cir. 1968).

[115] United States v. Locke, 471 U.S. 84 (1985); Richards v. United States, 363 U.S. 1, 9 (1962).

[116] Act of May 10, 1872, ch. 152, § 16, 17 Stat. 96 (codified at 30 U.S.C. § 47 (1988)).

[117] Pub. L. 92-203, § 14(g), 85 Stat. 702 (1971) (codified at 43 U.S.C. § 1613(g) (1988)).

[118] Pub. L. 97-456, §§ 603(3), 613(e), 96 Stat. 2556, 2577 (1983) (codified at 45 U.S.C. §§ 1202(3), 1212(e) (1988)).

[119] Act of July 22, 1954, ch. 558, § 31 (codified at 48 U.S.C. § 1545 (1982)).

[120] Pub. L. 93-435, § 1(a), 88 Stat. 1210 (1974) (codified at 48 U.S.C. § 1705(a) (1982)).

ration of land to Indian tribal ownership,[121] as well as in the federal government's most comprehensive land management statute, the Federal Land Policy and Management Act of 1976 ("FLPMA").[122] The term is used repeatedly throughout title 16 of the United States Code as a limitation on the authority of the Secretary of the Interior to acquire and oversee land for national parks, monuments, seashores, and forests.[123] All these provisions share the common goal of preserving property rights obtained under prior law from destruction upon the enactment of a new statutory scheme that would otherwise impair or eradicate them, much as the unsuitability provisions of SMCRA would otherwise impair or eradicate such rights absent the VER exemption.

Title 16's national parks and related provisions highlight an important feature of VER: that the VER inquiry usually precedes, and is independent of, whatever regulatory restrictions the agency may impose on the exercise of the existing rights. The 1980 statute creating the Steese National Conservation Area is typical.[124] First, it states that the Interior Secretary's administration of the area is "[s]ubject to valid existing rights."[125] Then, again subject to VER, it withdraws the minerals within the area from location, entry, and patent under federal mining laws.[126] Finally, with yet another reference to VER, it provides that all mining claims within the area shall be subject to such reasonable regulations as the Secretary may prescribe to assure that the mining will be consistent with the protected values of

---

[121] *See, e.g.*, pertaining to various Indian Tribes, 25 U.S.C. §§ 463(a), 566d, 575, 621, 766(a), 903d(b), (c),. 1300i-1(c)(2) (1988)). These provisions typically transfer land to the Secretary of the Interior to be held in trust for a tribe, "subject to all valid existing rights including liens, outstanding taxes (local and State), and mortgages." *Id.* at § 566d.

[122] Pub. L. 94-579, § 701(h), 90 Stat. 2786 (1976) (codified at 43 U.S.C. § 1701 note (1988)) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights").

[123] *See*, from various acts pertaining to National Parkways, 16 U.S.C. §§ 47e, 80a, 90, 90a, 90a-1, 90c-1, 90e, 90e-1, 110c, 111c, 123, 228b, 251n, 271, 272, 273, 350, 350a, 398c, 403-3, 403k-1, 405, 406d-1, 408e, 410bb, 410hh-2, 410hh-5, 410ii, 410mm-1, 431, 447, 450y, 450y-2, 450z, 450oo, 460q, 460q-5, 460u-5, 460v, 460v-4, 460y-5, 460z, 460z-8, 460aa-9, 460dd-2, 460gg-8, 460ll-1, 460mm-1, 460mm-2, 460mm-4, 460nn-3, 460oo, 460qq, 460rr-2, 460uu-32, 460uu-46, 460vv-3, 460xx-1, 460yy-1, 539, 539a, 539g (1988).

[124] Alaska National Interest Lands Conservation Act (ANILC Act), Pub. L. 96-487, § 403, 94 Stat. 2371, 2396 (1980) (codified at 16 U.S.C. § 460mm-1 (1988)).

[125] ANILC Act § 402(a), 16 U.S.C. § 460mm-1(a) (1988).

[126] ANILC Act § 402(b), 16 U.S.C. § 460mm-1(b) (1988).

the area.[127] The regulations merely follow VER, they do not determine it—a point underscored by the remainder of the statute, which enables even holders of unperfected mining claims to avoid the withdrawal of the area from further mining.[128] The relevant inquiry is simply whether the claimant has taken steps to maintain the claim as a matter of property law, not whether he has applied for (let alone obtained) the myriad regulatory permits he may later need to commence mining.[129]

The Alaska Native Claims Settlement Act ("ANCSA") is also instructive. It authorizes the withdrawal of certain public lands by the Secretary of the Interior, subject to VER.[130] It further provides, however, that holders of prior patents shall be protected if their occupancy has been maintained "in accordance with appropriate public land law,"[131] and that claimants asserting prior valid mining claims are protected in their possessory rights if they comply with all requirements of the general mining laws.[132] The provision suggests that when Congress intended to limit VER by requiring compliance with other laws, it so stated. There is no such limiting language in Section 522(e) of SMCRA.

One more statutory guidepost is significant. Two years before SMCRA, Congress included a VER exception in the Federal Coal Leasing Amendments Act.[133] That Act sought to diminish the concentration of coal leaseholds among a small number of companies by mechanisms such as eliminating the existing system of exclusive prospecting rights and preferential rights to lease,

---

[127] ANILC Act § 402(c), 16 U.S.C. § 460mm-1(c) (1988). The severance of VER from the regulatory determinations occurs in both pre-SMCRA and post-SMCRA provisions. *See, e.g.*, Pub. L. No. 90-540, § 5, 82 Stat. 904 (1968) (codified at 16 U.S.C. § 460v-4 (1988), establishing Flaming Gorge National Recreation Area) and Pub. L. No. 92-593, § 3, 86 Stat. 1312 (1972) (codified at 16 U.S.C. § 460dd-2, relating to the Glen Canyon National Recreation Area), both pre-SMCRA, and the Pennsylvania Wilderness Act of 1984, Pub. L. No. 98-585 § 6(c), 98 Stat. 3101 (codified at 16 U.S.C. § 460qq(c) (1988)) and the ANILC Act § 502, 16 U.S.C. § 539a (1988), both post-SMCRA.

[128] ANILC Act § 404, 16 U.S.C. § 460mm-3 (1988).

[129] *See* ANILC Act § 404(b), 16 U.S.C. § 460mm-3(b) (1988).

[130] Pub. L. No. 92-203, § 14(g), 85 Stat. 702 (codified at 43 U.S.C. § 1613(g) (1982)) (ANCSA).

[131] ANCSA § 22(b), 43 U.S.C. § 1621(b) (1982).

[132] ANCSA § 22(c), 43 U.S.C. § 1621(c) (1982). *See* Alaska Miners v. Andrus, 662 F.2d 577, 579 (9th Cir. 1981) (no valid existing right to patent exists outside time restrictions of § 1621(c)).

[133] Pub. L. 94-377, § 4, 90 Stat. 1085 (1976) (codified at 30 U.S.C. § 201 note) (amending, subject to valid existing rights, section 2(b) of the Mineral Lands Leasing Act (codified at 30 U.S.C. § 201(b) (1988)).

and substituting instead a system of nonexclusive exploratory licenses.[134] Congress used the VER exception to stress that the amendments were "not intended to affect any valid prospecting permit outstanding at the time of enactment of the amendments."[135] The Secretary of the Interior recognized that by reason of VER, holders of outstanding prospecting permits were not bound by the new statutory restrictions, but instead continued to be subject to the superseded permit system despite Congress' express dissatisfaction with many aspects of that system.[136] The ease with which the Secretary interpreted the plain language of this VER exemption to preserve operators' existing rights in the face of the statute's arguably countervailing policies makes all the more puzzling his failure for the past thirteen years to define with equal candor the identically worded exemption in Section 522(e) of SMCRA.

2. *Judicial and Administrative Interpretations*

Courts and administrative bodies regularly emphasize the broad scope of the statutory VER exemptions, which express "recognition that established property rights are to be deferred to."[137] The deference entails not only recognizing the presence of VER, but also interpreting other provisions of the statute consistently with the congressionally mandated exemption.[138]

Courts determining VER often must also consider the extent to which the applicant has perfected his property rights and otherwise assumed their validity. Over 80 years ago, in *East Central Eureka Mining v. Central Eureka Mining Co.*, Justice Holmes wrote:

> The provision that the act shall not impair existing rights is, perhaps, some indication that it extends to inchoate rights

---

[134] *See* H.R. REP. No. 681, 94th Cong., 1st Sess. 18, 22-23 (1975).

[135] S. REP. No. 296, 94th Cong., 1st Sess. 15 (1975).

[136] 43 C.F.R. § 3430.0-7 (1988). *See* Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558 (D.C. Cir. 1980). Congress criticized the permit system for encouraging speculation rather than mineral development, concentrating leases in a few large operators, depriving the public of a fair return for its coal resources, failing to control environmental effects, and imposing onerous restrictions on the return of monies to the states from the sale of federal leases within their borders. H.R. REP. No. 681, 94th Cong., 1st Sess. 14-20 (1975).

[137] Henry H. Wilson, 35 I.B.L.A. 349, 352 (1978).

[138] *See* East Central Eureka Mining Co. v. Central Eureka Mining Co., 204 U.S. 266, 270 (1907)(Holmes, J.)(harmonizing existing rights exemption of Mining Law of 1872 with other provisions of that Act).

> which constitutionally it might have impaired. At all events it should be taken in a liberal sense . . . . We believe that Congress used the word in a somewhat popular sense, . . . without considering what injustice might be within its constitutional power to commit.[139]

Later cases have reiterated that time-honored view. In a case under the Mineral Lands Leasing Act,[140] the D.C. Circuit recognized that the VER exception was intended to protect the rights of existing lessees, although it could not exempt from the statute a lease applicant whose application was merely pending at the time of statutory enactment.[141] Similarly, a decision under the Alaska Native Claims Settlement Act ("ANCSA") makes clear that VER does not necessarily mean vested rights, present possessory rights, or even a future interest that becomes possessory upon the expiration of earlier estates.[142] Even though rights of a municipality in that case would not have vested until the municipality sought and obtained approval of a subdivisional survey of the property, they were VER for purposes of protecting the property from conveyance to Alaskan native corporations under the ANCSA.[143]

If an applicant need not possess vested property rights in order to have VER, common sense dictates that VER should also protect an applicant who does possess a vested property right but has yet to take other steps necessary to utilize it in the manner he plans. Under SMCRA, a mining operator's ownership of mineral rights may have been perfected long before he intends to commence mining; these cases say that is enough to give him VER even though he may not have obtained the permits necessary to begin operations.

A recent decision by the United States Court of Appeals for the Third Circuit under the Territorial Submerged Lands Act, which contains a VER provision, confirms this view.[144] The

---

[139] 204 U.S. at 270-71. To like effect, *see* Stockley v. United States, 260 U.S. 532, 544 (1923) (statutory exemption for "existing valid claims" means "something less than a vested right, . . . since such a right would require no exception to insure its preservation").

[140] Act of Feb. 25, 1920, ch. 85, 41 Stat. 443 (codified at 30 U.S.C. § 226 (1988)).

[141] Miller v. Udall, 317 F.2d 573, 576 (D.C. Cir. 1963).

[142] Aleknagik Natives Ltd. v. United States, 806 F.2d 924, 926-27 (9th Cir. 1986).

[143] *Id.*

[144] West Indian Co., Ltd. v. Government of the Virgin Islands, 844 F.2d 1007 (3d Cir.), *cert. denied*, ____ U.S. ____, 109 S.Ct. 31 (1988).

proponent of VER asserted a claim dating from 1913 to certain submerged harbor lands. Following early development of a small portion of the parcel in 1914, the rest of the land remained submerged and undeveloped for over fifty years, until the government sought to quiet title over it and the owner proposed dredging and other development.[145] Litigation and a series of agreements followed, with the owner settling for thirty of the original forty-two acres. Later, when a public outcry arose over the dredging, opponents argued that the Territorial Submerged Lands Act conveyed all submerged lands (including the thirty acres) to the Virgin Islands in trust, and that the Virgin Islands had no authority to convey the land out of trust.

The court upheld the owner's assertion of VER, even though the owner at the time of enactment of the VER provision had not applied for the permits he would eventually need in order to dredge and fill the land.[146] The decision implicitly recognizes that the focus of the VER inquiry is on the existence of property rights, not on the satisfaction of regulatory constraints on intended property use.[147] It also reflects the realities of doing business in a heavily regulated industry that is tied to interests in land. For entirely legitimate business reasons, a company may acquire the land long before developing it. While the company might be deemed to bear the risk of future regulatory constraints on development, the very purpose of the VER exemption is to protect the company against regulation that is so vigorous as to foreclose any use of the property rights.

3. *Public Lands v. Private Lands*

Many, but certainly not all, of the statutes recognizing VER concern interests in public property rather than private property. The VER provision of SMCRA concerns both: it extends not only to rights in public lands such as national parks and forests, but also to rights to mine on private lands. Those who urge a narrow exemption advance the argument that the historical

---

[145] *Id.* at 1009-10.

[146] *See Id.* at 1011 and n.4.

[147] *See also* Utah International, Inc. v. Andrus, 488 F. Supp. 976, 986 (D. Colo. 1980).

meaning of VER under public lands statutes is therefore irrelevant to the interpretation of VER under SMCRA.[148]

The argument suffers from a serious lack of logical appeal. As we have seen, the statutes dealing exclusively with public lands embrace a broad definition of VER to preserve existing property interests.[149] Courts not only have construed these VER exemptions broadly, but have prevented the administrative agencies from circumventing them by imposing harsh regulations that would effectively nullify the protected rights.[150] If VER thus creates broad protections as to public lands, it should apply with all the more force to purely private lands, where the government has at most a regulatory interest, not a proprietary one.

Moreover, the argument disregards the fact that the VER provision of SMCRA draws no distinction based on public or private ownership of the land.[151] The statutory silence is significant because elsewhere in SMCRA, Congress expressly differentiated between public and private lands, creating separate program implementation and permit application requirements for them.[152] Under general norms of statutory interpretation,[153] the absence of the distinction in the VER provision of Section 522(e) reflects Congress' intention that no such distinction be drawn.

Finally, it is noteworthy that Congress enacted a comprehensive and expansive public lands statute, FLPMA, only one year before SMCRA. As we have seen,[154] it provided a VER exemption in that statute. It is inconceivable that Congress could contemporaneously have included the exact same provision in

---

[148] OSM used this distinction, on one occasion, to justify ignoring the entire body of pre-SMCRA statutory and case law. In the preamble to the 1979 definition of VER, the all permits test which effectively swallowed the exemption, OSM explained that the case law under other statutes was irrelevant because SMCRA: "changed the context of VER significantly . . . . OSM therefore believes that the definition of VER should take into account both the new regulatory framework created by the Act and the fact that the Act applies VER to both private and Federal lands." 44 Fed. Reg. 14,993 (1979).

[149] *See, e.g.*, the Federal Land Policy and Management Act and the Federal Coal Leasing Amendments Act, *supra* notes 122, 133.

[150] *See supra* notes 138-47 and accompanying text.

[151] Section 522 identifies both types of property interests and incorporates them all under a single umbrella VER provision. *See* SMCRA § 522, 30 U.S.C. § 1272 (1988).

[152] *See* SMCRA §§ 523, 715, 30 U.S.C. §§ 1273, 1305. The Secretary of the Interior devotes an entire subchapter of the regulations to surface coal mining and reclamation on federal lands. 30 C.F.R. Subchapter D.

[153] *See NWF v. Hodel*, 839 F.2d at 760 n.105.

[154] *See supra* note 122 and accompanying text.

SMCRA and intended it to have a different meaning without so much as a whimper of that intent in the legislative history.

C. *The Constitutional Prohibition Against "Takings"*

One goal of VER exemptions is to prevent "takings" of private property for public use and thus avoid the attendant constitutional obligation to pay "just compensation" for it.[155] The legislative history of SMCRA demonstrates that Congress intended the VER exemption to encompass the rights protected by the taking clause of the Fifth Amendment, and then some. The Secretary's interpretation should follow suit not only in the interest of accurately implementing the legislative intent, but also to comport with the principle that statutes should be construed and applied in a manner that will avoid constitutional problems.[156]

1. *Major Supreme Court Taking Cases*

It has often been said that there is no set formula for determining when a taking has occurred.[157] Nevertheless, an examination of several Supreme Court taking cases shows not only that the all permits test first promulgated by the agency would create large numbers of takings for which compensation would have to be paid, but also that the good faith-all permits test currently in use creates the same result.

The most germane cases in this area are *Pennsylvania Coal Co. v. Mahon*[158] and its progeny. There the plaintiff owned the surface rights of the land at issue. Prior to the state legislature's passage of restrictions on mining, he had granted the defendant coal company the right to remove the underlying coal and waived all damages that might have been caused by the mining. Following the conveyance, Pennsylvania enacted a statute prohibiting coal mining that would result in the subsidence of land under certain occupied dwellings.[159] The parties agreed that the statute

---

[155] U.S. CONST. amend. V.

[156] *See* United States v. Rumely, 345 U.S. 41, 45 (1953); United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).

[157] *E.g.*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

[158] 260 U.S. 393 (1922).

[159] The Pennsylvania statute was similar to § 522(e)(5) of the Act, which prevents mining, subject to VER, within 300 feet of occupied dwellings.

"destroy[ed] previously existing rights," and the coal company claimed that the destruction of rights was unconstitutional.[160] The Court concluded that the company could not mine the coal, because the statute made it economically impractical, and held that the statute constituted a taking.[161] Justice Holmes explained:

> It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved . . . . What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.[162]

Sixty-five years later, the Court revisited Pennsylvania mining law in *Keystone Bituminous Coal Association v. De Benedictis*,[163] which involved the constitutionality of a 1966 state law regulating mine subsidence.[164] The implementing regulations required that 50 percent of coal beneath protected structures be left in place to provide surface support. Relying on *Mahon*, the plaintiff coal association alleged that the statute violated the takings clause.[165] The Supreme Court disagreed, finding that the differences between the two cases were far more significant than the similarities.[166]

After characterizing Justice Holmes' discussion of the earlier statute's constitutionality as an "advisory opinion,"[167] the Court distinguished the instant suit because (1) the regulation of subsidence here represented the state's legitimate interest in combatting a "significant threat to the common welfare," and (2) there was no evidence that the requirement to leave 50 percent of the coal in place made it impossible for the coal companies to engage in their business profitably.[168] Thus, for purposes of determining "takings," *Keystone* reflects use of a balancing test

---

[160] *Pennsylvania Coal*, 260 U.S. at 413.

[161] *Id.* at 414-5.

[162] *Id.* (citation omitted).

[163] 480 U.S. 470 (1987).

[164] Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Stat. Ann. § 1406.1 (Purdon Supp. 1990).

[165] *Keystone*, 480 U.S. at 481.

[166] *Id.*

[167] *Id.* at 484.

[168] *Id.* at 485.

in which the extent of the regulatory impairment is weighed against the public interest advanced by the regulation. While not ruling out the possibility that onerous regulation of mining can amount to a taking, or that application of the statute in question in given circumstances might constitute a taking, *Keystone* appears to signal a high degree of deference to the public interest judgments of state legislatures and regulatory agencies.[169]

Outside the mining context, the leading case on regulatory takings is *Penn Central Transportation Co. v. City of New York ("Penn Central").*[170] In *Penn Central* the company attempted to gain approval for construction of an office building above Grand Central Terminal. Changes to the terminal were restricted pursuant to the city's Landmarks Preservation Law and, as a result, the company's requests for the necessary permit was denied. The company brought suit on the ground that this effected a taking. The Court disagreed. Balancing the character of the regulatory action with the nature and extent of the interference with existing property rights, the Court found that the city had a legitimate interest in regulating landmarks, that the regulation was substantially related to that interest, and that the regulation did not deprive the company of all use of its pre-existing air rights, which could be transferred to other parcels it owned in the city.[171]

Several factors distinguish *Penn Central* from the typical SMCRA takings scenario. The New York zoning ordinance did not interfere with the present use of the building as a railroad terminal and office and retail space. The company was able to obtain a reasonable return on its investment. Furthermore, use of the company's air rights was not absolutely forbidden.[172] For these reasons, the Court concluded that the facts before it did

---

[169] Some who favor the narrowest possible VER exemption would avoid takings as a meaningful or necessary guide to VER regulation, finding in Keystone and other cases an argument that mining fits within the "nuisance" exception to the takings doctrine. They argue, therefore, that takings is not a relevant issue in the consideration of VER regulation under SMCRA. The short answer is plain: if that were true, why did Congress seek to encourage and support mining in enacting SMCRA? *See* SMCRA §§ 101(b), 102(f), (k), 30 U.S.C. §§ 1201(b), 1202(f), (k). If that were true, why did Congress so expressly include the VER exemption for the purpose of avoiding takings and paying compensation under the Fifth Amendment? *See* discussion of legislative history *infra* at notes 185-98 and accompanying text.

[170] 438 U.S. 104 (1978).

[171] *Id.* at 136-38.

[172] *Id.* at 136.

not warrant the finding, under *Mahon*, that the law was so restrictive of property rights that it created a taking.

In contrast, if a highly restrictive definition of VER is promulgated, SMCRA dictates that with narrow exceptions, mining is absolutely prohibited. In such cases, takings would likely occur, contrary to the legislative intent. Operators that own only the right to mine, and not the surface rights, clearly would lose all their economic interests by reason of government regulation. Moreover, even where the mining company owned both surface and mineral rights, it might still receive no other reasonable return on its investment if the topography of the land or its location were such that it had no viable economic use except for mining.

The Supreme Court recently confirmed that deference to government's public interest judgments is not absolute, and that a regulation can be so onerous as to effect a taking. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[173] a county ordinance prohibited the reconstruction of any building in an area that was subject to periodic flooding. The ordinance barred the reconstruction of several of plaintiff's church buildings that had been destroyed in a previous flood. Quoting *Mahon*, the Court reaffirmed the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[174] The Court held that the ordinance amounted to a taking of the church's property in the flood area because it deprived the church of all use of the property, which had been a retreat center and recreational area for handicapped children prior to being destroyed by the flood.

2. *Taking Cases Under SMCRA*

A body of law on takings under SMCRA is beginning to emerge, with two courts recently holding that certain applications of SMCRA and OSM's regulations created compensible takings.

In *Sunday Creek Coal Co. v. Hodel*,[175] the United States District Court for the Southern District of Ohio ruled that denial of VER had effected a taking. In 1941, the company had sold

---

[173] 482 U.S. 304 (1987).

[174] *Id.* at 316.

[175] No. C-2-88-0416, slip op. (S.D. Ohio June 2, 1988).

the land in question but reserved the mineral rights. The surface rights were eventually conveyed to the United States, which incorporated the land in a national forest.[176] As a result, once SMCRA was passed the land became subject to the prohibition on mining in Section 522(e)(2). The company's request for a finding of VER was denied on the ground that the land did not meet either the all permits test or the necessary for and adjacent to test under Ohio law.[177] Almost any VER application in 1988 would be denied under those tests, the court found, because it "would have been unfeasible for any company to have applied for permits in 1977 and then have waited until 1988 to begin mining."[178] The court held that the use of those tests would eliminate the only economic benefit that the company could obtain from its property, contrary to both congressional policy under SMCRA and the constitutional prohibition against takings without just compensation.[179]

The second, and more widely known, takings case under SMCRA did not involve Section 522. In *Whitney Benefits, Inc. v. United States*,[180] the U.S. Claims Court awarded more than $60 million to the plaintiff, plus interest and attorneys' fees, after finding that the enactment of SMCRA had created a taking of plaintiff's coal rights.[181] Mining on the plaintiff's land had been barred under Section 510(b)(5)(A) of SMCRA, which prohibits surface mining that would interfere with farming on alluvial valley floors.[182]

After a close examination of the facts, the *Whitney* court ruled that "SMCRA effectively denied plaintiffs all economically viable use of their coal property."[183] Specifically, the court agreed with the plaintiff's contention that the prohibition interfered with its investment-backed expectations prior to the enactment of SMCRA. The court noted that while the plaintiff's rights in the property were technically not confined to surface mining,

---

[176] *Id.*, slip op. at 1-2.

[177] *Id.* at 3. OSM used the state definition of VER, which in turn was based on the since-rejected definitions OSM promulgated in 1979. *Id.*

[178] *Id.* at 4.

[179] *Id.* at 7-8.

[180] 18 Cl. Ct. 394 (Cl. Ct. 1989).

[181] *Whitney* thus presents another problem for those who claim that mining is a "nuisance" and that takings can therefore not occur under SMCRA.

[182] SMCRA § 510(b)(5)(A), 30 U.S.C. § 1260(b)(5)(A).

[183] 18 Cl. Ct. at 405.

the other uses alleged by the United States were illusory: underground mining at the site, which SMCRA did not ban, was economically and technologically unfeasible; plaintiffs held rights to mine other minerals besides coal, but there were no other minerals of value on the property; and it was irrelevant that the plaintiffs had a right to farm and ranch the surface property, because what plaintiffs sought to remedy was the loss of their coal rights.[184]

These cases point out the fundamental flaw in any VER definition based upon seeking or obtaining all permits by the date of SMCRA's enactment. Such definitions fail to take account of the fact that the acquisition of property rights and the commencement of mining operations are usually two separate and noncontemporaneous transactions. The cases come to grips with that reality, and also with the reality that the impairment of a property owner's specifically intended use of the property, i.e., for surface coal mining, is remediable even though it does not literally deprive him of all use of the land.

D. *The Legislative History*

The legislative history of SMCRA clearly demonstrates that Congress included the concept of VER to avoid takings for which compensation would have to be paid. During the House debate on the bill, Representative Roncalio offered an amendment that would have deleted the VER provision.[185] He recognized that without the VER exemption the Act would effect takings for which compensation would have to be paid.[186] The manager of the bill in the House, Representative Udall, opposed the change because without VER, the Act would not preserve rights whose impairment required compensation under the Fifth Amendment.[187] The amendment was rejected and the phrase was retained.

This colloquy reflects the "strongly held congressional purpose to limit the costs associated with the implementation of the Act by avoiding inverse condemnation of private rights that

---

[184] *Id.*

[185] 123 CONG. REC. H12,878 (daily ed. April 29, 1977) (statements of Rep. Roncalio and Rep. Udall).

[186] *Id.*

[187] *Id.*

would require the payment of just compensation."[188] The congressional intent to avoid takings has also been acknowledged by the Supreme Court[189] and by other federal courts construing SMCRA.[190]

The Secretary has concurred in this interpretation of the legislative history in his statements during rulemaking, even from the start of the ill-fated all permits test.[191] OSM more recently recognized this intent when it promulgated the takings test.[192]

While Congress intended that valid existing rights prevent takings under SMCRA, it went even further, a fact that OSM has yet to acknowledge. By using the phrase "valid existing rights," Congress selected a term of art that has appeared in statutes for more than a century, and stands for the broad preservation of existing property rights.[193] The legislative history of SMCRA gives no indication that Congress intended the term to mean anything different from what it meant previously. Thus, for instance, the Committee Reports do not discuss VER solely in terms of takings.[194] And thus, for another instance, the separate comments of then Representative Manuel Lujan recognize in VER a broad protector of existing property rights:

> [T]he bill's language . . . is not intended to preclude mining where the owner of the mineral has the legal right to extract the coal by surface mining method.
>
> . . .
>
> I believe, therefore, that it would be contrary to the intention of the Act, and a misuse of the Act, . . . [to] argue that [the Act] somehow modifies the relationship between the owner of the surface and subsurface rights. Clearly, alienation by sale, assignment, gift, or inheritance of the property right of the coal is not affected by the Act nor is the legal right to mine

---

[188] Meridian Land and Mineral Co. v. Hodel, 843 F.2d 340, 346-47 (9th Cir. 1988).

[189] Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. at 296 n.37.

[190] *See, e.g.*, NWF v. Hodel, 839 F.2d at 750 ("Congress did not intend to . . . effect takings through § 522(e)"); Ainsley v. United States, 8 Ct. Cl. 394, 401 (1985) (there is a "'virtual statutory command' from Congress that defendant avoid takings as a result of the Surface Mining Act"); *PSMRL II*, 22 Env't Rep. Cas. (BNA) at 1562-63 n. 6 (recognizing "Congress' wishes to avoid any takings").

[191] 44 Fed. Reg. at 14,992 (1979).

[192] 48 Fed. Reg. at 41,313 (1983).

[193] *See supra* notes 116-36 and accompanying text.

[194] H.R. REP. No. 218, 95th Cong., 1st Sess. 95, *reprinted at* 1977 U.S. CODE CONG. ADMIN. NEWS 593, 631; S. REP. No. 128, 95th Cong., 1st Sess. 94-95 (1977).

> the coal in any way modified if such right existed prior to enactment of the Act.[195]

Since Congress has had many opportunities to use the term "valid existing rights," the most reasonable conclusion, in lieu of any evidence to the contrary, is that no difference was intended between SMCRA and previous legislation.[196]

In short, the legislative history demonstrates that the Act was not intended to foster regulations that would impose new obligations before landowners could exercise their pre-existing rights. The Senate was clear that "all valid existing property rights must be preserved," and that it had "no intention whatsoever, by any provision of this bill, to change such rights."[197] In fact, as the D.C. Circuit has held, "throughout the SMCRA, Congress expressed a concern for preserving existing property rights, and for not interfering with state determination of those rights."[198] In contravention of this clear intent, both the all permits test and the good faith all permits test would eliminate existing property rights if operators did not take a separate step having to do with the regulation of those rights but not with the rights themselves.

IV. ANALYSIS OF THE REGULATORY CHOICES

Against the background of the regulatory history of VER, and the constraints and interpretive guides that of necessity channel its definition, we now turn to an analysis of the individual regulatory choices. We will begin by considering a case-by-case approach to VER determinations. We will then discuss each of the "fixed" options, proceeding from the most narrow exemption (the modified all permits test) to the most broad (the ownership test).

A. *Case-by-Case VER Determinations*

The essence of this approach is that it would provide flexibility and would involve a balancing of the factors involved. It

---

[195] H.R. REP. No. 218, 95th Cong., 1st Sess. 189 (1977) (separate views of Rep. Lujan).

[196] *See* Erlenbaugh v. United States, 409 U.S. 239, 243 (1972); Sea-Land Service, Inc. v. Federal Maritime Comm'n, 404 F.2d 824, 828 (D.C. Cir. 1968).

[197] S. REP. No. 128, 95th Cong., 1st Sess. 56 (1977).

[198] *NWF v. Hodel*, 839 F.2d at 757.

could be more or less formal, proceeding with no regulation at all or a reasonably detailed regulation. It would seem to make sense, however, that this approach be coupled with a regulation that at least generally described the process to be followed and identified the factors to be balanced by the regulatory authorities in making VER determinations. Additional levels of detail could be added, of course, such as an indication of the ranges of weight to be accorded each factor.

From the standpoint of a regulator, there would appear to be a number of attractions to this approach. Depending upon the level of detail involved in any accompanying regulation, a case-by-case approach would provide the flexibility to assess the individual circumstances and to "work around" the statutory constraints. It would enable the regulatory authority to consider, in specific terms, the environmental interest sought to be protected, which may range anywhere from Yosemite National Park to a seldom-used county road. It would enable the regulatory authority to consider the specific property rights at stake, including the clarity of the conveyancing documents and the size of the investment involved. It would enable the regulatory authority to assess the probable political fallout from any decision he might make, and the strength of any takings challenge that might be filed if VER were denied. And, again depending on the level of detail involved in any accompanying regulation, it may well assist the Secretary in getting past the initial judicial review hurdle.

But there are also clear downsides to this approach. Although it would provide flexibility, the fact is that there are statutory constraints. A case-by-case approach would permit the regulatory authority to grant a broader exemption, perhaps, where the environmental interests to be protected affect only a few, and to narrow the exemption where the interests to be protected are for the benefit of the many. In other words, the regulatory authority could effectively apply a double standard: VER would mean one thing under Sections 522(e)(1) and (2), and something else under Sections 522(e)(4) and (5). But the problem with this is that Congress made no such differentiation. It provided a single VER exemption for all of Section 522(e), with no indication that it was to be applied differently to the different protected categories.

This fundamental legal defect in the case-by-case approach could be more or less remedied by the degree of detail provided

in an accompanying regulation. Each added detail would have the benefit of reducing the potential defect, perhaps ultimately bringing it within a range of latitude that a reviewing court would find acceptable. The negative corollary, of course, is that each added detail would increase the likelihood that the regulation would be challenged in the first place.

A case-by-case approach presents other problems as well. It does not deliver the certainty, predictability or consistency that a regulation should provide. It does not provide a set of meaningful standards for the regulatory authority to apply, and to fall back on when his or her decision is challenged. As a result, it subjects the regulatory authority to considerable pressure before the decision is made and to considerable second-guessing after it is made. Once again, of course, each of these problems will occur in greater or lesser degree according to the level of detail included in any guiding regulation.

In short, the dilemma presented by the case-by-case approach is this: the more the regulator takes advantage of the flexibility that he or she wants in making VER determinations, the more he or she is subject to legitimate charges of not applying the law evenly. Maximum flexibility would probably mean that almost every VER determination would be judicially reviewed, a clearly unsatisfactory result for all concerned. Constraining the flexibility by sufficient regulation to avoid that problem and to survive judicial review of the regulation itself, on the other hand, would eliminate most or all of the attraction to this approach.

On balance, we believe that the negatives of this approach outweigh its benefits. In order to comply with SMCRA and to provide a much-needed predictability and consistency, the Secretary should opt for a "fixed" definition of VER.

B. *The Modified All Permits Test*

The arguments favoring this approach are that it is easy to use and produces consistent results. There is no doubt that this is true. But these benefits are overcome by the host of problems that this test would cause if it were adopted as the regulatory definition of VER.[199]

---

[199] The Secretary has repeatedly said that an all permits test, or some variant thereof, would not be an exclusive test but would simply be one way to establish VER. *See supra* notes 38-41 and accompanying text. While statements of that kind offer something of a life preserver in a reviewing court, they render the test meaningless absent something more which indicates how else VER may be established.

First, administrative convenience is desirable, but it is easily the most dispensable of the objectives for a VER regulation. Many courts and many cases have held that administrative convenience is insufficient to justify a regulation.[200] Only recently, in fact, in a case involving other issues under SMCRA, Judge Flannery—who has decided more SMCRA cases than any other federal judge—observed: "[T]he Secretary's argument boils down to: difficulty in enforcing the law is a good reason not to. Such a view ill becomes the Executive Branch, and it is not one that the Judicial Branch may adopt."[201]

More fundamentally, the modified all permits test is an irrational approach to achieving the statutory purpose. Perhaps because it fundamentally misunderstands the business of mining, it has virtually nothing to do with protecting the "valid existing rights" that the exemption was crafted to preserve. It is reminiscent of the old story about the man who was combing the sidewalk under a street light to find a quarter he had lost. A stranger, trying to be helpful, asked where he had lost it. When the man pointed to a spot about twenty feet away, the confused stranger asked why he was not looking for it there. "Because the light's better here," the man answered.

Mining companies make relatively long-term decisions involving large investments. Permits are regulatory approvals of relatively short duration,[202] and they are obtained when actual mining operations are to commence. Amassing the coal properties that will someday be a mine is a complicated and time-consuming process. It can and typically does involve a great many transactions, including acquiring contiguous blocks of coal, obtaining necessary consents, and arranging to finance the acquisitions. The decision to commence actual mining operations, however, involves a different set of considerations, notably including the existence of markets for the coal and the cost of capital. The investment involved in opening a mine is substantial, and is not prudently undertaken without a hard-headed business decision that the timing is right and that the operations will recover the investment and hopefully provide a return.

---

[200] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971).

[201] National Wildlife Fed'n v. Lujan, 733 F. Supp. 419, 438 (D. D.C. 1990).

[202] The maximum permit term under SMCRA is five years. SMCRA § 506(b), 30 U.S.C. § 1256(b) (1988).

It doesn't happen all at once. With all that is involved, you don't decide to commence mining operations without a buyer, or at least without strong assurances of an available market. But you can't line up a buyer until you have something to sell. And you don't have something to sell until you have amassed sufficient contiguous coal properties to make up a mining unit in which your investment can be justified. That process takes time, and the end result is never certain until it's done.

Because permits are of relatively short duration, they are not applied for until the decision is made to commence the mining operation. Indeed, they cannot be obtained until that time and well beyond, because their approval depends upon the submission of reasonably specific information about the mining operation.[203] So a mining company will not, and really cannot, have applied for the permits necessary for a specific mining operation until it has made a decision to commence that operation and has developed reasonably detailed plans for doing so.

It's a little bit like a savings bank. You can't withdraw money from it unless you've put money into it. You normally make deposits and build up your account over time, so that the money's there when you need it. And you don't fill out the withdrawal slip until you're ready to make the withdrawal.

Or imagine that you bought a chocolate bar. You take it home and put it in the refrigerator, partly because you like your chocolate bars cold and crispy and partly because you're waiting for the precise moment when your hunger is such that the chocolate bar will provide maximum enjoyment. Several days go by, and you look at the chocolate bar in your refrigerator and savor it, but the time is not right.

And then Congress passes a law finding that chocolate is bad for people and prohibiting its further consumption. But it makes that prohibition "subject to valid existing rights." The Office of Chocolate Management adopts a regulation which defines VER to exist when you have taken the wrapper off the chocolate bar. You say that's unfair—you bought the chocolate bar, you plan to eat it when the time is right, and in fact you look forward to eating it. Besides, you say that no one can qualify for the "exemption" because you don't take a wrapper off a chocolate bar until you're ready to eat it.

---

[203] *See, e.g.*, SMCRA §§ 507, 508, 30 U.S.C. §§ 1257, 1258; 30 C.F.R. Parts 778-80, 783-85.

You're right, of course. And you don't get your permits to mine until you're ready to mine. But that doesn't make the chocolate bar, or the coal properties, any less yours. This is a serious problem with the modified all permits test: it simply doesn't operate to protect the valid existing property rights that are involved.

A final problem with the modified all permits test is a direct result of this failure to address the real issues. Because it stops well short of providing any protection against unconstitutional "takings"—a protection Congress clearly intended[204]—it offers no finality. It will, in the normal case, simply be step one of a two-step process. The second step will be the takings claim and the ensuing court litigation, threatening federal and state governments and taxpayers with recurrent and substantial costs.

For these reasons, the modified all permits test is not acceptable as a definition of VER. There is no problem with it as far as it goes, but it doesn't go far enough because it doesn't address the real issues. The Secretary has recognized as much in his representations that this test is intended to be one way—but not the only way—to establish VER.[205] But that admission sounds the death knell. Since there are other ways to establish VER, the failure to pass the modified all permits test does not mean you don't have VER. You must then look to the other ways, which means they too must be defined. In short, by its failure to constitute an exclusive test for VER, the modified all permits test does not implement the exemption.

C. *The Takings Test*

This regulatory option has a clear, significant and twofold advantage. First, it absolutely avoids constitutional infirmity by expressly adopting the constitutional takings standard as its own. Second, it carries out the clear will of Congress that the VER exemption, at an irreducible minimum, be used to avoid takings.[206]

Despite these advantages, a takings test would be exceedingly difficult to administer. Takings analysis is complex, even for the courts. Passing that burden on to the regulatory authorities who

---

[204] *See supra* notes 185-98 and accompanying text.

[205] *See supra* notes 38-41 and accompanying text.

[206] *See supra* notes 185-98 and accompanying text.

must make VER determinations in the first instance would seem unfair and would almost certainly produce inconsistent results. Moreover, the difficulty of the issues and the likelihood of inconsistent results would almost certainly assure that most VER determinations made under a takings test would be appealed.

Importantly, a takings test would also fail to implement the VER exemption as fully as Congress intended. As we have seen, the mere application of the takings standard would not serve to protect all valid existing property rights.[207] The latter are a far larger universe.

For different reasons, therefore, the takings-based approach suffers the same fatal flaws as the modified all permits test—it fails to fully achieve the will of Congress or to provide the important goal of achieving reasonable finality. Its application is simply too difficult to make it the regulatory option of choice.

D. *Ownership and Authority Test*

This is the regulatory option that offers the greatest number of benefits and strikes the most appropriate balance between the congressionally-intended protection of the environment and protection of property rights. First, it is a test that is not particularly difficult to administer. It does not require a complicated takings analysis, but, like the modified all permits test, involves a review of documents. This test is somewhat more complex than the modified all permits test in that it involves some additional interpretation of the documents; however, that interpretation is easily within the competence of the regulatory authorities to provide, and to provide with substantial consistency.

Second, although this approach would not necessarily eliminate all takings claims, it would substantially limit the number of such claims. As such, it would provide a reasonable degree of finality to the administrative VER determination. It would be a one-step process (the VER determination) in most cases, unlike the modified all permits test, which will routinely be a two-step process (the VER determination and the follow-up taking claim).

Third, this regulatory approach is rational. It recognizes and protects valid existing property rights, as Congress intended. But it does so in a balanced and concessionary way, in that it focuses not on pure ownership (and therefore stops well short of pro-

---

[207] *See supra* notes 193-98 and accompanying text.

tecting all valid existing property rights) but on an ownership acquired with mining rights and expectations attached. Unlike the modified all permits approach, this option does pass the chocolate bar test[208]—it does address the real issues presented by the exemption.

Fourth, the ownership and authority test gives real meaning to Section 522(e) of the Act. It creates a significant difference between the universe of prohibitions on mining and the universe of exemptions from those prohibitions.

Misunderstanding about this last point provides the major argument launched against this test by those who oppose mining. They claim that an ownership and authority definition of VER would create an exemption so broad that it would effectively eliminate the prohibitions, and thus render Section 522(e) meaningless. Those charges may have some validity when made against a pure ownership test, but they fail in the context of an ownership and authority approach. For instance, VER would not exist under the ownership and authority test where there is ownership but no authority to mine or the authority to mine is unclear under applicable state law. For another instance, the federal government is by far the single largest owner of coal reserves in the United States. By not leasing coal in the critical Section 522(e) prohibition areas, it will avoid any application of VER under the ownership and authority test to that very substantial percentage of coal.

In addition to these specific and significant instances where the VER exemption would not apply from day one, it must be remembered that the legislative prohibitions are prospective. The ownership and authority test would freeze the universe of exemptions to those which met the test at a particular moment in time. As such, the already substantial difference that existed between the ban areas and the exemption areas when SMCRA was passed will become larger with each passing year. The claim that the ownership and authority test swallows the prohibitions and makes Section 522(e) meaningless, therefore, is simply not accurate.

E. *The Ownership Test*

This regulatory option, which is the one most favorable to the mining industry, is supportable based on the argument that

---

[208] *See supra* text following note 203.

it most fully protects property rights. In the view of the authors, however, it is not an acceptable option because it is legitimately subject to the charges made against the ownership and authority test: it is simply too broad to represent a fair or proper balance between the congressionally intended protection of the environment and protection of property rights.

The problem, in more specific terms, is that all coal is owned by someone. Without the substantial limitation imposed by the "authority" requirement of the ownership and authority test, and with no restriction on transferability, the exemption would be virtually universal. Such a result makes this an unacceptable option, because it opens the exemption too wide.

V. SOME CONCLUDING THOUGHTS

We earlier identified five critical objectives for a regulatory definition of VER. Two are non-negotiable: the regulation must properly implement Section 522(e), finding the congressionally intended distance between the prohibitions and the exemption, and it must otherwise comply with law, including the Fifth Amendment to the Constitution. The three remaining objectives are highly desirable: the regulation should be reasonably easy to administer, it should produce predictable and consistent results, and it should offer some promise that its application will produce reasonable finality.

We have identified and evaluated five regulatory options. None is perfect. But of the five, the ownership and authority test is easily the preferred alternative. Only that test meets both of the requirements and also substantially achieves the three remaining objectives.

Those who oppose mining not surprisingly favor the modified all permits test because that test would effectively eliminate the VER exemption. A preference for that test, however, finds no basis in an analysis of the objectives that a regulation should accomplish. It merely reflects a policy preference.

But it is for the Congress to establish the policy, and Congress has done so. It created a level playing field in Section 522(e): it included words of exemption just as much as words of prohibition.

Those who view SMCRA as a purely environmental statute would do well to remember that before Congress said the first word about environmental protection, it found that "coal mining operations presently contribute significantly to the Nation's en-

ergy requirements; . . . and it is . . . essential to the national interest to ensure the existence of an expanding and economically healthy underground coal mining industry . . . ."[209] Consistent with that finding, Congress made it a purpose of the Act to "encourage the full utilization of coal resources"[210] and to "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 the Nation's need for coal as an essential source of energy. . . ."[211]

In this way, as in its protection of property rights through the VER exemption, Congress gave unmistakable notice that its legislative program for environmental protection is not absolute. It must be balanced against other important objectives. That message must be heard. The proper balance between the prohibitions and the exemption must be struck. Of the alternatives conceived to date, the ownership and authority test represents the only workable option which achieves that result.

[209] SMCRA § 101(b), 30 U.S.C. § 1201(b) (1988).
[210] SMCRA § 102(k), 30 U.S.C. § 1202(k) (1988).
[211] SMCRA § 102(f), 30 U.S.C. § 1202(f) (1988).