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INTRODUCTION

In Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 [hereinafter SMCRA or the Act][1], Congress prohibited surface coal mining operations[2] within specifically designated lands and prescribed distances of certain structures.[3] Yet, Congress provided in the same section two generally applicable exceptions to these otherwise *per se* proscriptions on mining: operations in existence as of August 3, 1977, the date of enactment; and, property interests constituting "valid existing rights." For various reasons, not the least being the absence of a statutory definition, the valid existing rights caveat to these prohibitions has eluded a simple and accepted meaning under SMCRA's regulatory regime.

This paper discusses the administrative history associated with prior attempts to "flesh out" the meaning of valid existing rights [hereinafter "VER"]. It re-examines the premise that underlies those earlier regulatory excursions, and suggests some considerations for the policy makers in their next attempt to get their arms around this "elusive" term as it applies to private property interests.

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

[2] The Act defines "surface coal mining operations" at § 701(28), 30 U.S.C. § 1291(28), and as a general matter includes activities conducted on the surface of lands in connection with a surface or underground coal mine.

[3] SMCRA § 522(e), 30 U.S.C. § 1272(e)(1)-(5) lists a variety of public and private areas which "subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act will be permitted . . .". 30 C.F.R. § 761.5 (1988) defines "surface coal mine operations which exist on the date of enactment" as all operations "which were being conducted on August 3, 1977."

I. PROTECTED AREAS AND STRUCTURES

Beyond the regulation of coal mining activities, Congress also decided in SMCRA to protect a wide range of interests through prohibitions on mining in Sections 522(e)(1)-(5). Because of unique qualities, recreation or resource values, the Act sets aside from surface mining the following public areas:

1. Any lands within the boundaries of the National Park System; National Wildlife Refuge System; National System of Trails; National Wilderness Preservation System; Wild and Scenic Rivers System; and National Recreational Areas;[4]

2. Any Federal lands within a national forest; and,[5]

3. Operations which will adversely affect public parks and publicly or privately owned places listed in the National Register.[6]

Because of the potential threat to public health and safety from surface mining activities, Congress prohibited mining within:

1. 100 feet of a public road; and[7]

2. 300 feet of any occupied dwelling, public building, school, church or institutional building; and, 100 feet of a cemetery.[8]

In addition to the two generic exemptions for VER and existing operations, other circumstances may exist which preclude the application of what otherwise appear as *per se* proscriptions on mining. In some instances, the prohibitions simply do not apply. Private holdings within the boundaries of a national forest do not fall within the proscriptions found in Section 522(e)(2).[9] Moreover, the prohibition on mining which adversely affects historic places applies only to those actually listed, and not places potentially eligible for listing in the National Register.[10]

When the prohibitions apply and a potential mine operation cannot avail itself of either the grandfather or VER clause,

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

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

[6] SMCRA § 522(e)(3), 30 U.S.C. § 1272(e)(3).

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

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

[9] *Compare* SMCRA § 522(e)(1), 30 U.S.C. § 1272(e)(1) (Any lands within the National Park System) *with* SMCRA § 522(e)(2), 30 U.S.C. § 1272(e)(2)(Any *federal* lands within national forest) (emphasis added). *See* Meridian Land and Mineral Co. v. Hodel, 843 F.2d 340, 344 (9th Cir. 1988).

[10] 30 C.F.R. § 761.11(c) (1988); *See also In Re*: Permanent Surface Mining Regulation Litig. 620 F. Supp. 1519, 1554 (D.D.C. 1985).

discretionary authority exists to allow mining within or nearby some Section 522(e) areas. For example, the Secretary of the Interior may allow mining on national forest lands that do not possess significant recreational, timber or economic values incompatible with mining, if the proposed operation is either an underground mine or a western surface mine on lands without significant forest cover.[11] Mining may occur near publicly owned parks or historic sites with the joint approval of the regulatory authority and the agency with jurisdiction over the area.[12] The prohibition on mining near a public road may be avoided by closing or relocating the road, with the approval of the agency responsible for the road.[13] Finally, an operator may obtain, from the owner, a waiver of the 300-foot buffer zone around a dwelling.[14]

The absolute nature of the statutory proscriptions on mining is more apparent than real. Moreover, in some cases, VER will present neither the initial nor last consideration in deciding whether mining will proceed.

II. ADMINISTRATIVE HISTORY OF VER

The applicability of the prohibitions themselves has been gradually fleshed out over time. The grandfather clause which exempts operations in existence as of SMCRA's enactment, appears straightforward enough, and thus, never engendered much controversy. The most prominent caveat to the mining prohibitions, VER, has eluded an accepted and simple meaning under SMCRA. The Office of Surface Mining [hereinafter "OSM"] twice promulgated final rules to define VER. Each attempt, like many of the proposed rules under SMCRA, became a fertile ground for litigation. The last proposal, in 1988, however, was summarily withdrawn.

The two final rules focused upon avoidance of Fifth Amendment takings, and thereby, any constitutional infirmity to the application of the statutory prohibitions on mining. The administrative history of these rules discloses that the point of depar-

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

[12] SMCRA § 522(e)(3), 30 U.S.C § 1272(e)(3); *See also* 30 C.F.R. § 761.12(f)(1988).

[13] SMCRA § 522(e)(4), 30 U.S.C. § 1272(e)(4); *See also* 30 C.F.R. §§ 761.11(e) and 762.12(d)(1988).

[14] SMCRA § 522(e)(5), 30 U.S.C. § 1272(e)(5); *See also* 30 C.F.R. § 761.12(e) (1988) (Valid waivers and effect on subsequent purchaser).

ture for the two efforts begins with defining the threshold that regulatory action must exceed to constitute a "taking", as well as the nature of property rights entitled to such constitutional protection.

In 1979, OSM's first attempt to define this threshold produced a simple "mechanical test." This apparently limited the VER exception to those owners of mining rights who had obtained "all necessary permits" as of August 3, 1977, the enactment date of SMCRA.[15] The second attempt at regulatory guidance in 1983 sought to obviate any constitutional infirmity to the mining prohibitions through a "generic takings" test, which allows continued conformance with developing takings jurisprudence.[16] While the "all permits" and "generic takings" tests would deliver different practical results in the application of the Section 522(e) prohibitions, both appear to start from the common premise that the avoidance of "takings" was the sole intent behind the VER caveat.

The last, and short-lived, attempt to define VER appeared as a proposal with two divergent options: the "good faith-all permits" and the "right to mine" tests.[17] Both options share a common mechanical approach as compared to the "generic takings" test of 1983. Yet, the "right to mine" test also signals a departure from the premise, found in the two prior attempts, that takings concerns present the sole statutory objective behind VER. In fact, the "right to mine" test appears more akin to the VER concept embodied in other federal statutes.

A. *The First Attempt: All Permits Test*

OSM's first attempt to define VER excepted from the prohibitions on mining those proposed operations which demonstrated the right to mine coal as of August 3, 1977 and either: (1) had obtained all necessary mining permits; or (2) could demonstrate that the coal was needed for, and adjacent to, an existing and permitted coal mining operation.[18] In determining the nature of the property right in existence as of August 3, 1977, the applicant had to demonstrate that the parties to the

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[15] 44 Fed. Reg. 15,342 (1983).

[16] 48 Fed. Reg. 41,349 (1983).

[17] 53 Fed. Reg. 52,383 (1988). OSM withdrew the proposal on July 21, 1989 (54 Fed. Reg. 30,557).

[18] 44 Fed. Reg. 15,342 (1979).

conveyance document actually contemplated a right to conduct the type of mining activity proposed by the applicant.[19]

The preamble explaining the 1979 rule discloses that OSM viewed avoidance of any taking under the Fifth Amendment of the Constitution as the exclusive statutory intent behind VER.[20] From this premise, OSM gleaned two "theories" from its review of takings jurisprudence: noxious use, and diminution in value. OSM then made a conscious policy choice to apply the noxious use to potential mines through the "all permits test," and diminution in value to ongoing operations through the "need for and adjacent to" test. In OSM's view, "[t]he takings cases reflect less sympathy for property owners who are denied some future opportunity to exploit their property interest based on prior beliefs that the property would be available for development."[21] In other words, OSM apparently deemed the destruction of an undeveloped mineral estate as within the proscriptions of the Fifth Amendment. Yet, the agency believed that grave diminutions in value of an ongoing operation contravened the takings clause of the Fifth Amendment. One can only speculate how OSM reconciled cases which upheld the government's prohibition of the continuation of ongoing commercial activities, and their creation of a rule which destroys completely the value of an undeveloped mineral estate, while tolerating the expansion of an ongoing enterprise of the same nature.[22]

There was more to the 1979 rule than simply the "all permits" test. The preamble mentioned the need for a case-by-case application of the VER definition. Moreover, had the "all permits test" comprised the exclusive meaning of VER for new mines, the agency would not have needed to explain, as it did in 30 C.F.R. Section 761.11(d)(1979), what VER "did not mean".[23] Thus, in 1979, OSM established a case-by-case approach for VER, with the avoidance of uncompensated takings remaining the objective. Satisfaction of the "all permits test" clearly placed the applicant over this constitutional threshold.[24]

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[19] *Id.* (codified at 30 C.F.R. § 761.5(c)(1979)).

[20] 44 Fed. Reg. 14,992 (1979).

[21] *Id.*

[22] *See eg.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

[23] 44 Fed. Reg. 14,992 (1979) (The mere expectation to mine does not constitute VER, *e.g.* coal exploration licenses, application or bids for leases).

[24] *Id.* at 14,994.

B. *The Second Attempt: Generic Takings Test*

OSM embarked upon its second attempt to provide regulatory guidance for VER in the wake of litigation over the 1979 "all permits test." In *In Re Permanent Surface Mining Regulation Litigation*,[25] the district court remanded the "all permits test" so the agency could revise the definitions of the test. The court wanted the definitions to reflect that the all permits test encompassed property rights recognized as valid under state law;[26] and, that a good faith attempt to obtain all permits before August 3, 1977 would satisfy the test.[27] Some may contend that the court's modification of the "all permits test" demonstrates judicial approbation of a permit test. Yet, the context of the challenge militates against such a reading. As conceded by the agency, the coal industry contended that the rule failed to protect property rights recognized as valid under state law.[28] Moreover, the agency's defense to the 1979 rule amplified the preamble explanation that VER determinations occur on a case-by-case approach, with the "all permits test" as merely the unequivocal qualification for VER.

Apparently OSM did not view the court decision as judicial approbation for equating VER with a permits test. In 1982, OSM proposed for public consideration the following three mechanical type tests: (1) modified permits test as suggested by the court; (2) ownership of the coal; and (3) right to mine.[29] In apparent reluctance to adopt an underinclusive or overinclusive standard with respect to potential takings considerations, OSM abandoned the mechanical tests. Instead, the agency promulgated the "generic takings" standard which established takings jurisprudence as the *sine qua non* for VER. In other words, a person possesses VER if the application of any of the prohibitions in Section 522(e) would effect an uncompensated taking of a property interest that existed as of August 3, 1977.[30]

Again, OSM's rule started from the same premise as the 1979 rule that "Congress created the valid existing rights exemp-

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[25] 14 Env't Rep. Cas. (BNA) 1083 (D. D.C. 1980).

[26] *Id.* at 1090.

[27] *Id.* at 1091.

[28] *Id.* at 1090.

[29] 47 Fed. Reg. 25,279-82 (1982).

[30] 48 Fed. Reg. 41,349 (1983) (Codified at 30 C.F.R. § 761.5 (1988)).

tion . . . to avoid potential legislative takings . . . "[31] The generic test followed from an enhanced appreciation of the case-by-case approach evinced in takings jurisprudence. OSM concluded, with some modesty, that the agency was no more capable than the Supreme Court of establishing a specific formula to avoid takings for a broad array of circumstances.[32] Furthermore, the agency saw some benefit in a definition that "allow(s) the agency to conform the determination of valid existing rights to the continuing development of takings law in the courts."[33]

Similar to its predecessor, the "generic takings" test also failed to survive judicial scrutiny. In *In Re: Permanent Surface Mining Regulation Litigation (II)*,[34]the district court remanded the definition on procedural grounds. The court found that the Administrative Procedure Act required a new notice and comment period[35]since the final rule departed so substantially from all three options published in the proposal.

It is readily apparent from the administrative history that OSM's endeavors to define VER in the context of a "takings" standard has left little in the way of certainty. One might debate endlessly the appropriate application of taking jurisprudence to the coal industry in the context of the prohibitions it confronts in Section 522(e). Nonetheless, the all permits formula, which equates a coal owner's reasonable investment backed expectation to participation in a regulatory regime prior to SMCRA's date of enactment, falls short of the task of avoiding a taking.[36] However, a more fundamental issue still remains unresolved. Is legislative takings the *sine qua non* for VER under SMCRA? If not, then what other guidance does the statute, its legislative history and, perhaps, other statutes provide the agency?

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[31] *Id.* at 41,313.

[32] *Id.* at 41,314.

[33] *Id.* It remains unclear whether OSM meant that it would conform its own internal decision making on VER to the developing jurisprudence, or merely pass the more difficult cases to the courts through applicant appeals. The generic standard also raises serious implications for administrative review since the Interior Board of Land Appeals, the administrative review body of the Department of the Interior, has held that it lacks jurisdiction to consider constitutional objections to decisions of the agency. *See* The Stearns Co., 110 IBLA 345, 350 (1989).

[34] 22 Env't Rep. Cas. (BNA) 1557 (D. D.C. 1985).

[35] *Id.* at 1564.

[36] *See* Macleod & Means, *When Is It Suitable to Be Unsuitable: An Analysis of the Exemptions From the Surface Mining Act's Prohibition on Mining*, 3 E. MIN. L. INST. § 7.03[5][b] (1982); *See also* Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 296 n. 37 (1981).

III. TAKINGS OR PRESERVATION OF THE STATUS QUO

The 1979 and 1983 policies which view the avoidance of legislative takings as the sole purpose of VER rest upon a selective reading of the statute's structure and history.[37] Despite the voluminous legislative history associated with SMCRA, the 1979 rule relies upon a single passage to support the premise that Congress intended nothing more than avoidance of takings when it inserted the VER caveat in Section 522(e).[38] The one passage relates to Congressmen Udall's (D-Az.) opposition to an amendment to delete the VER caveat from the legislation.[39] According to Congressman Udall, deletion of this general exception to the otherwise *per se* mining prohibitions would require "paying compensation under the Fifth Amendment to the Constitution."[40] Even in the absence of other legislative history, this admonition does not necessarily mean that Congress simply intended to avoid payment of compensation. Rather, Congressman Udall identified one readily apparent consequence to follow from the deletion of the VER exception to Section 522(e). Significantly, the provision at issue in the amendment did not involve Section 522(e), but rather, the petition process to designate non-coal lands unsuitable for mining under Section 601 of the Act.[41]

A. *A Reassessment Of The Legislative History*

Fortunately, the legislative history offers more pertinent passages which address VER and issues related to private property rights. In contrast to the isolated "takings" passage cited by OSM, other passages evince a pervasive theme of maintaining the status quo for existing property rights under state law.

Legislation considered in the Ninety-third Congress discloses two distinct approaches to the *per se* prohibitions. The 1973 Senate Bill, S. 425, provision for the designation of lands unsuitable for mining, proscribed mining within only those areas now set forth in Sections 522(e)(1) and (3) of the 1977 Act, with

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[37] The agency has not been entirely resolute in their conviction. *See* 47 Fed. Reg. 25,278 (1982) and 53 Fed. Reg. 52,374 (1988) (Proposed rules with "right to mine" tests).

[38] 44 Fed. Reg. 14,992 (1979); The 1983 rule, without citation, simply reaffirmed this reading of the statute and its history. 48 Fed. Reg. 41,313 (1983).

[39] 44 Fed. Reg. 14,992 (1979).

[40] 123 CONG. REC. H12,878 (daily ed. April 29, 1977) (statement of Rep. Udall).

[41] SMCRA § 601(d), 30 U.S.C. § 1281(d).

an exemption for existing mine operations.[42] The 1974 House Bill, H.R. 11500, provision for permit review sought to protect a broader array of public and private interest by barring permit approval for any application which included the same areas and structures listed in Sections 522(e) of the 1977 Act.[43] The Bill did not provide a general exemption. It did exempt existing operations, as well as those with substantial legal and financial commitments, which were mining within the areas the 1977 Act designates in Section 522(e)(1) and (2).[44] With little discussion, the House Conference Report for the 1974 legislation reorganized these prohibitions into the unsuitability provision of Section 522(e), and inserted both of the generally applicable exemptions found today: existing operations and VER.[45]

The Conference Committee's discussion of valid existing rights explains that "the language of Section 522(e) is in no way intended to affect or abrogate previous state court decisions".[46] The passage proceeds to explain the need to construe the language of deeds in accordance with local custom, usage and state law. If anything, the Conference Report leaves an impression that the VER caveat neither diminishes nor expands existing property rights under state laws, but simply preserves the status quo.[47] A similar tone was echoed in subsequent discussions of substantially identical legislation considered in later Congresses, as well as the legislation actually enacted.[48]

Much of the discussion on valid existing rights appeared in the context of split mineral and surface estates, particularly on

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[42] S. 425, 93d Cong., 1st Sess. (1978); *see* S. REP. No. 402, 93d Cong., 1st Sess. 20 (1973).

[43] H.R. 11,500, 93d Cong., 2d Sess. (1974); *see* H.R. REP. No. 1072, 93d Cong., 2d Sess. 11-12 (1974).

[44] H.R. 11,500 also contained separate provisions for surface owner consent and pre-existing waivers for severed surface and mineral estates. H.R. Rep. No. 1072, *supra* note 43 at 46. It would appear from the structure and history of H.R. 11,500 that consent or a prior waiver would save an operator from the ban on permit approval only with respect to the 300-foot buffer zone around an occupied dwelling.

[45] H.R. CONF. REP. No. 1522, 93d Cong., 2d Sess. 53-54 (1974).

[46] *Id.* at 85.

[47] *Id.* (VER not intended to open "lands to strip mining where previous precedents have prohibited stripping").

[48] *See e.g.* H.R. REP. No. 218, 95th Cong., 1st Sess. 95, reprinted in 1977 U.S. CODE CONG. ADMIN. NEWS 593, 631; H.R. REP. No. 896, 94th Cong., 2d Sess. 48 (1976); S. CONF. REP. No. 101, 94th Cong., 1st Sess. 85 (1975). *See also* H.R. REP. No. 218 at 189 (separate views of Rep. Lujan)(It would be contrary to the intent of the Act for anyone to argue that Section 522(e) modifies the relationship between the owners of the surface and subsurface rights).

public lands. To this end, Congress' treatment of the issue in other provisions of SMCRA provides additional guidance on its intent for VER. Recall that the House version of the 1974 legislation, H.R. 11,500, embodied the *per se* prohibitions within the provisions for permit approval, and had separate provisions for surface owner consent.[49] Both the House and Senate resolved to place the *per se* prohibitions in Section 522(e), and limit the surface owner consent provision to federal coal.[50] However, in 1977, the House revived the surface owner protection concept for private lands in the permit approval provisions of H.R. 2.[51] The Committee Report explains that the provision:

> [I]includes a new condition for permit approval designed to assure that coal rights which have been severed from the surface estates will not be surface mined unless the parties to the severance, or the surfaceowner or his assignee, contemplated that the coal would be extracted by surface mining methods."[52]

The Senate's treatment of split estates left to state law:

> [t]he resolution of any disputes about property rights which might arise from such separations, and this Act does not attempt to tamper with such state laws. The Committee firmly believes that all valid existing property rights must be preserved, and has no intention whatsoever, by any provision of this bill, to change such rights."[53]

The Conference resolved to maintain a "procedural requirement" for evaluating the split estate in the context of the permit applicant's showing a legal right to enter and mine by surface methods. However, the final legislation deleted the House Bill provision that silence in the severance instrument established a presumption to limit the authorization to mine "to methods customarily used in the state at the time the conveyance was executed".[54] If the conveyance instrument was silent on surface mining, the determination of the mineral right owner's, or successor in interest's, right to mine by surface methods would "be made in accordance with state law."[55]

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[49] *See supra* note 44 and accompanying text.
[50] *See supra* note 47 and accompanying text.
[51] H.R. REP. No. 218, *supra* note 48 at 26.
[52] *Id.* at 66.
[53] S. REP. No. 128, 95th Cong. 1st Sess. 56 (1977).
[54] H.R. REP. No. 218, *supra* note 48 at 26.
[55] H.R. CONF. REP. No. 493, 95th Cong., 1st Sess. 106 (1977).

This history of the legislation discloses an inextricable connection between the prohibitions on mining and the concern some members of Congress expressed with the dominant nature many state laws accorded the mineral estate over the surface estate under severance deeds.[56] The resolution of this issue, by the Conference Committee for the legislation finally enacted as SMCRA, provides ample guidance for both the meaning of VER and the appropriate context for its determination. Simply stated, VER means nothing more than the demonstration that the applicant possesses the "legal right to enter and commence surface mining operations on the area affected."[57] Additional procedural protections were inserted in Section 510(b)(6) of SMCRA[58]for determinations with respect to severed estates, where the applicant must demonstrate: surface owner consent; an express reservation or grant in the conveyance that authorizes surface mining; or, in the absence of an express grant, "legal authority under applicable state law that the language of [the conveyance] instrument gives the right to mine by surface methods."[59]

A construction of the VER clause as simply a preservation of established property rights also comports with the pervasive theme throughout SMCRA to defer to state law on such matters.[60] In addition to the standard for evaluation of an operator's right to mine,[61] the provisions in SMCRA for liability insurance coverage and the allocation of water rights likewise defer to state law.[62]

The permitting procedures give an especially appropriate context to evaluate VER through a concrete proposal to mine as set forth in a permit application. The permit information requirements supply precisely the information necessary to evaluate both the application of the statutory prohibitions and the validity of the proposed mining activity against the legal documents submitted to demonstrate the right to enter and commence min-

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[56] *See supra* notes 47-49 and accompanying text; *See also* 121 CONG. REC. H6679 (March 14, 1975) (Colloquy on mining prohibitions and surface owner protections).

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

[58] SMCRA § 510, 30 U.S.C. § 1260(b)(6).

[59] H.R. CONF. REP. No. 493, *supra* note 55, at 106.

[60] *Cf.* National Wildlife Federation v. Hodel, 839 F.2d 694, 750, 757 (D.C. Cir. 1988); Meridian Lands & Minerals Co. v. Hodel, 843 F.2d 340, 346 (9th Cir. 1988).

[61] SMCRA §§ 507(b)(9) and (b)(6), 30 U.S.C. §§ 1257(b)(9) and (b)(6).

[62] SMCRA §§ 507(f) and 717(a), 30 U.S.C. §§ 1257(f) and 1307(a).

ing.[63] On the other hand, the generic takings test invites requests for "advisory" determinations well before the submission of a specific proposal to mine.[64] Thus, in many instances, the VER determination under the "generic takings" test may comprise little more than a "facial," and not a "factual," inquiry into the economic impact attendant to the application of the Section 522(e) mining prohibitions.[65] In short, the "generic takings" approach fosters precisely the limited inquiry that takings jurisprudence advises against; one which requires a dispositive answer.[66]

B. *Collateral Guidance*

The historical application of VER in numerous other statutes may provide the Department of the Interior with the fortitude to abandon the past approach of simply avoiding uncompensated takings. Instead, this application defines the term more traditionally: preserving existing property rights. The term has extensive history under diverse statutory schemes for the disposition and development of public lands.[67]

The absence of a statutory definition for VER in other statutes does not appear to have unduly hampered the Department's efforts to resolve its meaning.[68] Generally, on public

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[63] *See* SMCRA § 507(b)(1), 30 U.S.C. § 1257(b)(1) (Names of legal owner of surface and mineral); SMCRA § 507(b)(7), U.S.C, § 1257(b)(7)(Method of mining); SMCRA § 507(b)(a), 30 U.S.C. § 1257(b)(9)(Map of affected areas with legal documentation for right to mine); SMCRA § 507(b)(13), 30 U.S.C. § 1257(b)(13)(Map depicting man made features; and legal owners of lands adjacent to permit area); SMCRA § 510(b)(6), 30 U.S.C. § 1260(b)(6)(Severance information).

[64] 30 C.F.R. § 761.12(h) (1988); 48 Fed. Reg. 41,314 (1983); *See also* 55 Fed. Reg. 4,913 (1990) (VER request for mining within Daniel Boone National Forest); 55 Fed. Reg. 2,163 (1990) (VER request for Monongahela National Forest).

[65] *See* Hodel v. Virginia Surface Mining and Reclamation Assn., Inc., 452 U.S. at 295.

[66] *See e.g.* Ramex Mining Corp. v. Watt, 753 F.2d 521, 524 (6th Cir. 1985); Ainsley v. United States, 8 Cl. Ct. 394, 399-400 (1985). However, one must seriously question how the Interior Board of Land Appeals can provide, under 30 C.F.R. § 4.1390 (1989), meaningful administrative review of a VER determination under a "takings" test when it cannot entertain constitutional objections to the application of agency rules. *See* The Stearns Co., 110 IBLA 345, 350 (1989).

[67] *See e.g.* Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, § 701(h), 90 Stat. 2744, 43 U.S.C. § 1701 (note)(1982); Federal Coal Leasing Amendments Act of 1976, Pub. L. 94-377, §§ 4 and 13, 78 Stat. 710, 30 U.S.C. §§ 201 and 204 (note)(1982).

[68] For a discussion of the development of VER under public land statutes, *See* Note, *Regulation and Land Withdrawals: Defining "Valid Existing Rights"*, 3 J. MIN. L. & POL'Y 517, 526-537 (1988).

lands, the Department of the Interior has distinguished "vested rights" from "valid existing rights." Vested rights are those property interests sufficient to pass equitable or legal title.[69] Valid existing rights are property interests short of vested rights, which continue to remain immune from extinguishment by the exercise of agency discretion.[70] For example, some public lands statutes prescribe certain requirements, that once satisfied, create a valid existing right without the need for further discretionary approval by the agency.[71] In other circumstances, the exercise of discretion may create valid existing rights. For example, a mineral lease, once issued by the agency, creates a valid existing right in the lease.[72]

The property interests traditionally afforded protection under VER clauses in other statutes fall well short of those typically confronted under an applicant's right to mine under SMCRA. However, the severed estate, which preoccupied Congress in SMCRA, appears more akin to "vested rights" which fall well within the VER protection of other statutes. Moreover, the principles often discussed with VER under public land statutes strike the same chord sounded in the legislative history of SMCRA: equity, fairness and preservation of the status quo.[73]

When Congress enacted the Federal Coal Leasing Amendments Act[74] in 1976, it repealed, subject to VER, several provisions of the leasing program including the preference right leasing system for coal. The Senate Committee's explanation of the VER caveat sounds remarkably similar to the one it provided for SMCRA. The stated intent is "to maintain the status quo with respect to any such rights, and not to enlarge or diminish these in any way."[75]

The collateral guidance provided in other federal statutes supply a compelling reason to view the VER caveat under SMCRA as simply the preservation of existing property rights

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[69] Solicitor's Op. 88 I.D. 909, 912 (1981). *See also* E. BAYNARD, PUBLIC LAND LAW AND PROCEDURE § 2.23 (1986).

[70] Solicitor's Op., 88 I.D. 909, 912 (1981).

[71] *Id.*

[72] *Id.* Even interests less than leaseholds may constitute a valid existing right. *See* N.R.D.C. v. Berklund, 609 F.2d 553 (D.C. Cir. 1979).

[73] *See* Peabody Coal v. Andrus, 477 F. Supp. 120 (D. Wyo. 1979); Williams v. Brening, 51 I.D. 225 (1925).

[74] 30 U.S.C. § 201(b).

[75] S. REP. No. 296, 94th Cong., 1st Sess. 14 (1975), *compare with*, S. REP. No. 128, *supra* note 53 and accompanying text.

from extinguishment by the application of the Section 522(e) mining prohibitions. Past usage should, if not control, at least provide persuasive weight for a definition that goes beyond the single premise of avoiding takings.[76] Furthermore, arriving at a definition by borrowing the meaning of a commonly used term from another statute has precedent under SMCRA.[77]

The apparent parallel between the VER caveat in SMCRA and other federal statutes did not completely bypass the Department of the Interior. However, in the 1979 rulemaking process, the Department simply dismissed the relevance of the historic interpretation of VER. In the agency's view:

> [SMCRA] changed the context of VER significantly because it makes clear that surface coal mining on any private or federal lands is not an absolute right, but is subject to approval after the regulatory authority has determined that reclamation to the standards of the Act can be achieved. Thus, at least as of enactment of the Act, landowners no longer have an unconditional right to mine.[78]

As several commentators have observed, this response embodies circular, if not backward, reasoning.[79] Rather than employing the traditional analysis which evaluates the extent of the property right or interest which existed prior to the enactment legislation, the Department instead used the extent of regulation under SMCRA to circumscribe the extent of the pre-existing right.[80] This approach turns the historical VER analysis on its head. The question of the extent of regulation is secondary to the first inquiry of determining the nature of the property right or interest itself. No one contends that VER also carries with it the unfettered right to mine without adherence to the exacting permit and environmental protection standards in SMCRA. Accordingly, a VER definition that preserves existing property rights under state law would not allow for the total impairment of the

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[76] *See* Macleod & Means, *supra* note 36 at § 7.03[5][c].

[77] *See* U.S. v. Dix Fork Coal Co., 692 F. 2d 436, 440 (6th Cir. 1982) (Applying for purposes of SMCRA the definition of "agent" under the Coal Mine Health and Safety Act, 30 U.S.C. § 802(e)).

[78] 44 Fed. Reg. 14,993 (1979).

[79] *See* 3 J. MIN. L. & POL'Y, *supra* note 68 at 544; Macleod & Means, *supra* note 36 at § 7.03[5].

[80] *Id.*

values protected in Section 522(e) of the Act, as some maintain.[81]

CONCLUSION

The obsession with legislative takings distinguishes the VER experience under SMCRA from that under other statutes which use the same term. The paucity of direct and collateral support for this singular premise compels a reassessment of the legislative history and the agency's prior repudiation of the historical formula developed under public lands statutes. A fresh look should disclose a distinction only in context because of SMCRA's application to private mineral interests. However, no such distinction exists in the intent to maintain the status quo of property rights in existence prior to enactment. The provisions for SMCRA permit approval give an appropriate procedural context, and substantive standard, to render VER determinations, particularly for severed surface and mineral estates. When confronted with the areas listed in Section 522(e), a VER determination comprises nothing more or less than the evaluation performed everyday by the regulatory authority. It is the determination of the permit applicant's legal right to enter and commence surface mining operations on the proposed permit area.

[81] Any impairment of the values protected under SMCRA Section 522(e)(1), 30 U.S.C. § 1272(e)(1), appears remote in view of the Department of Interior's "Statement of Policy" that the Department will preclude mining on any lands within the boundaries of these listed areas by the acquisition of any valid existing rights through exchange, purchase or condemnation. 53 Fed. Reg. 52,384 (1989). *See also* 30 C.F.R. § 761.11(h), *suspended*, 51 Fed. Reg. 41,961 (1986) (bar on mining, licensing or exploration on any federal lands listed in SMCRA § 522(e)(1)).