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Few phrases in environmental law have occasioned as much controversy and perennial hand-wringing as the "valid existing rights" (VER) provision in Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[1] It has undergone an eleven-year history of regulatory definitions and redefinitions, court struggles, and political maneuvering.

This 1990 symposium on VER is a worthwhile attempt by the Office of Surface Mining and others interested in the environment and the coal industry to determine whether this hot potato is edible, or will occasion yet another decade of indigestion. It's clear that we'd better keep the bicarbonate of soda on hand.

As everyone even remotely interested in the question knows, Section 522(e) was Congress' proscription of "surface coal mining operations" after August 3, 1977 on certain lands affected with particular environmental or public health and safety interests. These lands were:

> (1) "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], ... and National Recreation Areas."
> (2) "Federal lands" within the boundaries of National Forests. (However, underground mines and some surface mining may be authorized if certain determinations are made by the Sec-

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[1] Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

retaries of Interior and Agriculture.)
(3) "any publicly owned park or places included in the National Register of Historic Sites" that would be "adversely" affected, unless approved by the regulatory authority and the agency with jurisdiction over the site.
(4) within 100 feet of a public road (subject to waiver).
(5) within 300 feet of an occupied dwelling (unless waived by the owner), within 300 feet of a public building, school, church, community, or institutional building, or public park, or within 100 feet of a cemetery.[2]

The proscription of surface coal mining in these areas does not apply to operations in existence on August 3, 1977, and is "subject to valid existing rights." Congress did not define the term.

SO WHAT DID CONGRESS MEAN?

Despite scholarly attempts to elucidate a VER definition from various fragments of SMCRA's legislative history, it is most likely that Congress didn't really know what it meant by the term. "Valid existing rights" (VER) was a term used in public land statutes throughout the 20th century. It was ordinarily used when Congress changed the statutory management policies applicable to federal lands, but wanted to protect the holders of certain private interests therein.

In enacting SMCRA Section 522(e), Congress clearly wanted to eliminate surface coal mining in specific areas. Indeed, this Section is the remnant of what had begun as a bill designed to ban "strip mining" altogether. In enacting the limited ban, however, Congress deemed it wise to "grandfather" some mineral interests in the interest of justice. Congress used a phrase it had used before.

Mineral Leasing Act VER

One early use of the phrase was Section 37 of the Mineral Land Leasing Act (MLA) of 1920.[3] Under the MLA, certain minerals were designated as no longer "locatable" under the Mining Law of 1872. Thus, prospectors could no longer go forth on the public lands and establish mining claims for these min-

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[2] SMCRA § 522(e), 30 U.S.C. § 1272(e) (1988).
[3] Act of 1920, 41 Stat. 437 (codified at 30 U.S.C. § 201 (1988)).

erals through location of valuable deposits. In extinguishing this opportunity, Section 37 preserved "valid claims existent" on the date of the MLA. In 1970, the Supreme Court held that in order to maintain the continuing validity of claims—as against the government's contention that these had been extinguished—the owners of these claims had to have performed annual "assessment work."[4] The decision showed that given a statutory policy to recapture lands to government use—in this case, for disposition through leasing—the holder of a claim had to take active steps to maintain the interest.

FCLAA and FLPMA VER

Congress used the term VER several times in the 1970s—not only in SMCRA (enacted in 1977 after two earlier tries in 1974 and 1975), but also in the Federal Coal Leasing Amendments Act of 1975 (actually enacted in 1976) (FCLAA), and the Federal Land Policy and Management Act of 1976 (FLPMA).[5]

Section 4 of FCLAA amended Section 2(b) of the Mineral Leasing Act,[6] to abolish preference right leasing of coal "subject to valid existing rights." The courts have interpreted this phrase to find VER in instances where the Secretary lacked "discretion" under prior law to deny a lease because the holder of the interest had satisfied the statutory conditions for action.[7] Thus, under FCLAA, VER was a right against the Secretary created by the activities of the person in possession under previous law.

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[4] Hickel v. Oil Shale Corp., 400 U.S. 48 (1970). Previously, a failure to perform the required annual assessment work had resulted only in the invalidity of a claim as to a subsequent re-locator of the mineral; the claim remained valid as against the government. *See, e.g.*, Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1935).

[5] Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub.L.No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 181 (1988)); Federal Land Policy and Management Act of 1976 (FLPMA), Pub.L.No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. § 1701 (1988)). Congress also used "valid existing mineral rights" in the 1976 Mining in the Parks Act, but not to preserve rights. Rather, the phrase defined which interests were subject to regulation under the Act. Mining in the Parks Act of 1976, Pub. L. No. 94-429, 90 Stat. 1342 (codified as 16 U.S.C. § 1901 (1988)).

[6] Pub.L No. 94-377, § 4, 90 Stat. 1083 (amending, subject to VER, The Mineral Lands Leasing Act, § 2(b), codified at 30 U.S.C. § 201(b) (1988)).

[7] American Nuclear Corp. v. Andrus, 434 F. Supp. 1035 (W.D. Wyo. 1977)(VER requires prospecting permit, not just application for prospecting permit); Peabody Coal Co. v. Andrus, 477 F. Supp. 120 (W.D. Wyo. 1979) (prospecting permit plus pending application for preference right lease is VER). *Cf.* Peterson v. Department of Interior, 510 F. Supp. 777 (D. Utah 1981) (application for extension of prospecting permit can create VER where such permits had been routinely extended prior to FCLAA).

VER also appeared in Section 701(h) of FLPMA.[8] The Interior Department's Solicitor defined VER under FLPMA as "those rights short of vested rights that are immune from denial or extinguishment by Secretarial discretion."[9] Apart from possible quibbles over whether such rights are "vested" or not, this is a substantially correct statement. At least one case under FLPMA has suggested that VER under that Act may be coextensive with interests protected by the Fifth Amendment.[10] However, otherwise valid claims can be extinguished without compensation because of the contingent nature of the right.[11] VER requires action by the holder to maintain it.

VER AS AN EQUITABLE RIGHT

In each instance, VER has been identified as an equitable right enforceable against the government, not as a type of real property. As used by Congress prior to SMCRA, VER was always:

(1) less than an absolute property right;[12] that
(2) required active exploitation for its maintenance.

The difficulty in applying this traditional type of VER to SMCRA arises because under Section 522(e), regulators must deal with some mineral interests that:

(1) are property rights; that
(2) were not actively exploited as of August 3, 1977.

If, in the traditional use of the term VER, the active exploitation component were merely a substitute for "property," then VER should exist wherever coal is owned or leased by anyone

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[8] FLMPA § 701 (h), 43 U.S.C. 1701 note (1988).

[9] Solicitor's Opinion M-36910 (Supp.), 88 I.D. 909, 912 (1981).

[10] Sierra Club v. Watt, 608 F. Supp. 305, 327 (E.D. Cal. 1985): "[E]ither the interest is a valid existing right protected by the property provision of the due process clause and unaffected by this litigation or it is not, and thus is not subject to due process protection."

[11] United States v. Locke, 471 U.S. 84 (1985) (claims extinguished for untimely annual notice).

[12] Unlike fee interests, invalid claims were subject to contest and cancellation. The government always retained the ability to determine the validity or the invalidity of the right. *See* Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963) (condemnation of mining claims to build government dam properly addressed only possession; validity of claims deferred to administrative determination).

(viz.—where property exists). However, this construction is not satisfactory for at least three reasons:

First, requirements of exploitation were not simply a guarantee of property interests, but rather were a positive social goal of prior law. This is not only true of mining claims. Indeed, even mineral leases—clearly property interests—have diligence requirements to ensure their exploitation.

Second, exploitation is properly understood as the "condition" for government recognition of the private "equitable" right. VER has always been based on what discretion the government had with respect to an interest, not on the law of real property. Thus, it is a contingent right.

Third, if ownership were the entire test, the Section 522(e) prohibition would bar no activity whatsoever in 522(e) areas—except outright theft of coal. This was clearly not the purpose of this section.

It is more likely that both elements recognized in prior VER law—the right, and the attempt to exploit it—remain at the core of VER as used in SMCRA.

VER REQUIRES BOTH A POSSESSORY INTEREST AND EXPLOITATION

This excursion through VER definitions is one that OSMRE did not take in 1979. At that time, OSMRE gave up any attempt to reconcile prior VER law with SMCRA, citing two reasons:

First, SMCRA involved private property interests in both surface and minerals. There was no precedent in prior VER law for this circumstance. As noted above, such law had always dealt with federal lands, and involved less than a fee interest in the minerals.

Second, OSMRE found Section 522(e) VER different because the Act had changed the nature of coal "ownership." Specifically, OSMRE noted that ownership of coal—even on private property in a non-522(e) area—no longer guaranteed the owner a right to mine it. In fact, mining was prohibited if reclamation could not be accomplished successfully.[13]

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[13] This pillar of OSMRE's rationale has, with some justification, been criticized in the literature. *See* Note, "*Regulation and Land Withdrawals: Defining 'Valid Existing Rights'*," 3 J. MIN. LAW & POL'Y. 517, 543-545 (1988) (rather than determining the nature of the right under prior law, and then determining the effect of new regulation thereon, OSMRE looked to the regulation to determine the existence of the right).

Thus, OSMRE reasoned, the meaning of VER as used in Section 522(e) would have to be determined without reference to prior usage. OSMRE was wrong. While somewhat different in application, SMCRA's use of the term VER can be interpreted consistently with prior usage. Such prior usage suggests a two-element test: (1) a possessory interest, and (2) an attempt to exploit it.

This test means that the person seeking to establish VER must have a possessory interest (fee ownership, a lease, etc.) *and* have made some effort to exploit that interest as of the time the Section 522(e) prohibition went into effect.

Although not basing its 1979 rule on prior usage of the term VER, OSMRE's solution was consistent with the foregoing analysis. The "all permits" and "needed for and adjacent to" formulations contain both elements.[14] The judicial amendment of the standard to a "good faith" attempt to obtain "all permits," is also consistent with this analysis.[15]

These are not the only possible approaches. It may be that other investments of resources and efforts to bring coal property into production could satisfy the second prong of the test. However, the second prong cannot be ignored. Mere ownership is not enough.

CAN VER BE ALIENATED?

Based on prior usage, it appears that VER can be alienated. Just as mining claims could be sold, and permits transferred, so could the VER those conferred. Indeed, in *Hickel v. Oil Shale Corp.*,[16] the 1970 Supreme Court case dealing with the issue, the claimants were not the original locators, but rather purchasers who had acquired the claims after the Mineral Leasing Act had cut off further locations.

However, VER must be maintained according to the two-element test. If the prior owner has failed to maintain the right,

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[14] OSMRE arrived at these tests through reasoning by analogy that if a Section 522(a) administrative designation of lands unsuitable for surface coal mining could be prevented only by "substantial legal and financial commitments," a congressional designation under Section 522(e) demanded no less a showing for VER. *See* 44 Fed. Reg. 14991-14992 (1979).

[15] *In re* Permanent Surface Mining Regulation Litig. I, 14 Env't Rep. Cas. 1083 (D. D.C., 1980).

[16] 400 U.S. 48 (1970).

then there is no right against the federal government to transfer—although the real property interest may, of course, be transferred.

BUT ISN'T THIS ALL A TAKING UNDER THE FIFTH AMENDMENT?

In its historic uses, VER was primarily a "fairness" concept dealing with government recognition of rights, rather than a "taking" concept. However, *any* formulation of VER obviously remains subject to the Fifth Amendment to the Constitution.

Concern over takings, however, does not mean that Congress did not intend in Section 522(e) to impair private property rights. It is absolutely clear that it did.

For example, subsections (e)(1) and (2) reflect the application of the ban to federal land management units. Yet, while surface coal mining is excluded from "*federal* lands within the boundaries of any national forest" in (2), it is excluded from "*any* lands within the boundaries" of national parks and other units in (1). (emphasis added). This distinction shows that Congress intended Section 522(e) to impair the exploitation of some wholly private property interests. For example, areas within a National Park boundary not yet acquired by purchase are clearly included in the ban. If VER saved "all" such rights, the distinction between (1) and (2) would have been rendered meaningless.

A proper definition of VER need not avoid all takings. Section 522(e) apparently goes at least *as* far as the takings limitation in prohibiting mining in designated areas, but the takings clause is not the outer boundary of the definition.

A look at "takings" implications does, however, further illustrate the weakness in the "ownership" plus "right to mine by the method proposed" test proposed by OSMRE in December 1988.[17] That test would have stopped OSMRE from prohibiting mining in a significant number of Section 522(e) areas where the prohibition of mining would clearly *not* be a taking, *i.e.*, within 300 feet of occupied dwellings, within 100 feet of a public road, etc. In these areas mining can be readily prohibited under the "police power" with no taking whatsoever.[18] Thus, any VER

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[17] 53 Fed. Reg. 53347 (1988).

[18] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictus, 480 U.S. 470 (1987). The areas identified in Section 522(e) (3), (4), and (5) are the sort of interests frequently protected by police power regulation.

definition that guarantees a right to mine in these areas clearly exceeds the protection offered by the Fifth Amendment. Section 522(e) reflects Congress' intent to exercise all of its prohibitory powers; an ownership and right-to-mine test conflicts with this intent.

Section 522(e) may impair private property rights in many instances with no takings. However, a bright-line VER standard may, as applied, sometimes occasion a taking. The courts are capable of fashioning appropriate relief in such instances. In some circumstances, compensation may be the appropriate remedy. In others, the prohibition may be held invalid as applied.

CONCLUSION

The use of the term "VER" in SMCRA presents some puzzles in interpretation, but these may be resolved consistent with Congress' previous uses of the term. VER is contingent upon both a possessory interest and an attempt to exploit the coal. While in some instances, the denial of VER may produce a "taking," the mere occurrence of a taking does not require a finding of VER. Rather, it presents a case for a judicial remedy.

APPENDIX A
RECOMMENDATIONS

Should OSMRE attempt a redefinition of VER incorporating the two-prong test, it should recognize several additional considerations:

(1) Ownership of coal and possession of the "right to mine" it by a particular method cannot constitute VER. If this were the case, Section 522(e) would bar only (1) theft of coal and (2) use of methods not authorized by deed or contract. Neither of these appears to have been a primary goal of Congress in either SMCRA as a whole or in Section 522(e) in particular.
(2) Section 522(e) is best understood as the legislative remnant of a multi-year legislative process that had begun as an attempt to ban strip mining altogether in all locations. We may infer that Congress intended to go as far as legislatively possible in prohibiting mining in the specifically enumerated areas.
(3) A bright-line test is easiest to apply administratively.

APPENDIX B
TAKINGS IMPLICATIONS OF COMMON VER DENIAL SCENARIOS

This appendix illustrates takings determinations that may be necessary where VER is not established. It assumes the continued use of the "good faith-all permits" test (or a similar test). All of the fact patterns assume private ownership of the coal and the right to mine it by the method proposed.

Illustration 1. Private surface and private coal within the boundaries of a wild and scenic river; no attempt to exploit coal prior to 1977 (or prior to creation unit boundaries)—

Denial of VER under this fact pattern would not result in a taking if the resource could be exploited through conventional underground mining. Nor would it result in a taking if remaining valuable uses of the surface prevented the prohibition from substantially destroying the value of the property. However, if the coal were a separate estate and could only be extracted through surface mining or subsidence-causing underground mining,[19] the courts could determine that Section 522(e),

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[19] This paper is not intended to address the issue of the applicability of Section 522(e) to subsidence. However, it appears that subsidence is a "surface impact of an underground mine" within the meaning of Section 701(28) [see 516(b)(1)] and is thus covered by the prohibition. The most common conflict is the undermining of occupied dwellings. As Keystone, 480 U.S. at 470, has demonstrated, such undermining can be prohibited without causing a "taking."

as applied, would cause a taking. Compensation is an appropriate remedy. If compensation is unavailable, then the court may order the regulatory authority to allow the mining to occur.

Illustration 2. Public building or occupied dwelling, private coal; no attempt to exploit coal prior to 1977—

Prohibition is not a taking because of police power. *Keystone*.[20]

Illustration 3. Private coal on federal lands within a national forest; no attempt to exploit coal prior to 1977—

Mining may be authorized by Secretary under Section 522(e)(2). If not authorized, the prohibition may be a taking (if coal cannot be exploited by underground mining).

[20] 480 U.S. 470.