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Valid Existing Rights: Pennsylvania’s Experience

MARC A. RODA*

INTRODUCTION

On August 3, 1977, the United States Congress enacted the Surface Mining Control and Reclamation Act of 1977,1 ("SMCRA"). The prohibition against surface coal mining operations contained in Section 522(e) of SMCRA2 does not apply to surface coal mining operations which are subject to "valid existing rights." However, SMCRA does not provide a definition for "valid existing rights.”

To date, the Department of the Interior, Office of Surface Mining Reclamation and Enforcement ("OSMRE"), has been unable to promulgate a regulation defining valid existing rights. Presently, three definitions are under consideration. These definitions are referred to as:

1. The modified all permits test;
2. The takings test; and
3. The ownership and control test.

My discussion as to the appropriate test for defining valid existing rights is from the perspective of a state which, pursuant to Section 503 of SMCRA,3 has obtained jurisdiction to enforce SMCRA. Before analyzing the tests for defining valid existing rights, it is necessary to consider what functions a regulation implementing SMCRA must possess.4

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The views and opinions in this paper are those of the author and do not represent the official position of the Commonwealth of Pennsylvania.

4 In order to obtain and retain jurisdiction to enforce SMCRA a state must adopt a coal mining program which implements the requirements of SMCRA and its regulations, SMCRA § 503, 30 U.S.C. § 1253 (1988); and 30 C.F.R. §§ 723 and 733 (1988).
In general, regulations clarify and implement the requirements of a statute. SMCRA also contains some specific provisions relating to the purpose of implementing regulations. Congress found that national "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." Furthermore, the purposes for which SMCRA was enacted include:

1. The establishment "of a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."  
2. Assisting "the States in developing and implementing a program to achieve the purposes of this Act."

Thus, any regulation promulgated by OSMRE must establish a consistent national standard for defining valid existing rights and assist the states in developing and implementing their own definitions for valid existing rights.

From a state's perspective, any regulation implementing SMCRA should be as clear and unambiguous as possible. In addition, any rules concerning the decision to issue a permit should minimize the need for legal assistance.

When the language of a regulation implementing SMCRA is ambiguous, a state's regulatory authority is uncertain as to the appropriate requirements to be included in its program for implementing SMCRA. The greater the degree of ambiguity in the SMCRA regulation, the greater the uncertainty for the state's regulatory authority. Where the SMCRA regulation is ambiguous, it is doubtful that a national standard for implementing SMCRA will be established, or perceived to exist. As a result, states are confronted with the argument that unless they adopt a less restrictive—usually environmentally less protective—inter-

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3 SMCRA § 102(g), 30 U.S.C. § 1202(g) (1988).
4 This information is derived from my experience as a legal counselor to the coal mining program, as well as conversations with individuals responsible for administering Pennsylvania's coal mining program.
5 Obviously few—if any—regulations are completely free from ambiguity, especially given the creativity of lawyers.
interpretation of the SMCRA regulation, the coal industry within that state's jurisdiction is likely to move to other states which have adopted a less restrictive interpretation of the SMCRA regulation.

In addition, the individuals who determine whether to issue a permit are not trained lawyers. A permitting decision requiring a legal determination, e.g., whether a taking has occurred, is beyond their area of expertise. As a result, a regulation including a legal determination could significantly delay the permit review process and possibly lead to inconsistent decisions. Theoretically, this problem could be cured by each state establishing specific criteria for its permit reviewers to apply. However, this approach could result in each state establishing a different rule and thus preventing the establishment of a national standard.

II. DEFINING VALID EXISTING RIGHTS

SMCRA does not contain a definition for valid existing rights. Absent a clear definition the next best source is an examination of the statute as a whole.

A. The Purpose of SMCRA

While SMCRA is the leading federal statute protecting the public's health, safety and welfare\(^{10}\) from the adverse environmental impacts of surface coal mining operations,\(^{11}\) the statute does not include any findings that surface coal mining operations are a nuisance.

SMCRA includes a finding that "coal mining operations presently contribute significantly to the Nation's energy requirements," and that it is essential to ensure a growing and healthy underground coal industry.\(^{12}\) One purpose of SMCRA is to assure that the nation's energy needs are provided for while

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\(^{10}\) All coal mine point source discharges are subject to the requirements of the National Pollutant Discharge Elimination System established by the Clean Water Act, 33 U.S.C. §1251 et seq. (1988).

\(^{11}\) Surface coal mining operations are defined broadly to include surface mine, coal refuse disposal areas, coal preparation facilities, all surface activities conducted in connection with a surface or underground coal mine, and the areas upon which these activities are conducted or disturb the surface land, see SMCRA § 701 (28), 30 U.S.C. § 1291 (1988).

striking a balance with a need to protect the environment and agricultural productivity.\textsuperscript{13}

While coal mining operations are not declared to be a nuisance under SMCRA, coal mining operations are, at best, a suspect activity and a necessary evil. SMCRA includes the following findings concerning the impact of mining activities.

[That] many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water and other natural resources.\textsuperscript{14}

[That] the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.\textsuperscript{15}

[That] surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this [Act] is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations.\textsuperscript{16}

In addition, SMCRA was enacted for the following purposes:

[To] assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations.\textsuperscript{17}
[To] assure that surface mining operations are not conducted where reclamation as required by this [Act] is not feasible.\textsuperscript{18}

\textsuperscript{13} SMCRA § 102(f), 30 U.S.C. § 1202(f) (1988).
\textsuperscript{14} SMCRA § 101(c), 30 U.S.C. § 1201(c) (1988).
\textsuperscript{17} SMCRA § 102(b), 30 U.S.C. § 1202(b) (1988).
\textsuperscript{18} SMCRA § 102(c), 30 U.S.C. § 1202(c) (1988).
[To] assure that surface coal mining operations are so conducted as to protect the environment.\textsuperscript{19}

[To] assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations.\textsuperscript{20}

B. The Regulation of Surface Coal Mining Operations

In general, the above-cited findings and purposes of SMCRA are implemented through the requirements contained in Sections 506, 507, 508, 510, 515, and 516 of SMCRA.\textsuperscript{21} For example, within eight months of when a state obtains jurisdiction to enforce SMCRA, all mining activity within that state must be authorized by a permit issued pursuant to the new program.\textsuperscript{22}

All individuals with an ownership interest in the coal seam to be mined and the surface lands to be affected by the proposed mining activity must be identified in the permit application.\textsuperscript{23}

The application shall also identify the surface lands which the applicant has the right to enter and commence surface mining operations thereon and the documents upon which the applicant bases its right to conduct the surface mining operations.\textsuperscript{24} The permit application must also contain detailed information on the proposed mining activity, the hydrogeology of the area to be mined, the climatology of the area to be mined, and a determination of the probable hydrologic consequences of the mining and reclamation operations both on and off the site.

A reclamation plan must be submitted as part of the permit application.\textsuperscript{25} In essence, the reclamation plan demonstrates how the applicant will restore the affected land to a condition capable of supporting its pre-mining uses.\textsuperscript{26}

Before a permit can be issued the applicant has the burden of demonstrating that the proposed mining and reclamation activities will comply with all the requirements of SMCRA.\textsuperscript{27}

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\textsuperscript{19} SMCRA § 102(d), 30 U.S.C. § 1202(d) (1988).
\textsuperscript{20} SMCRA § 102(e), 30 U.S.C. § 1202(e) (1988).
\textsuperscript{21} 30 U.S.C. §§ 1256, 1257, 1258, 1260, 1265 and 1266.
\textsuperscript{23} See SMCRA § 507(b), 30 U.S.C. § 1257(b) (1988).
\textsuperscript{25} See SMCRA § 508(a), 30 U.S.C. § 1258(a) (1988).
\textsuperscript{27} SMCRA § 510(a), 30 U.S.C. § 1260(a) (1988).
Where the applicant only owns the mineral estate, the applicant must demonstrate that it has the right to extract the coal by surface mining methods.\textsuperscript{28} To make this demonstration, the applicant can submit either the surface landowner's written consent to the extraction of coal by the surface mining method, or a legally binding conveyance which gives the applicant this right.\textsuperscript{29}

Finally, all permitted surface coal mining operations must comply with the performance standards contained in Sections 515 and 516 of SMCRA.\textsuperscript{30} By adhering to these performance standards, the authorized coal mining activity will presumably be conducted in a manner which protects the environment and agricultural productivity.

C. Areas Unsuitable for Mining Activity

Even though a proposed mining operation complies with all of the technical requirements of Sections 506, 508, 510, 515 and 516 of SMCRA,\textsuperscript{31} any portion of that proposed mining activity may not be permitted if it is on lands which are declared unsuitable for mining activity. All state programs implementing SMCRA must include a process enabling the state to determine which lands within its jurisdiction are unsuitable for all or certain types of surface coal mining operations.\textsuperscript{32} Lands may be declared unsuitable for surface coal mining operations where the mining will be incompatible with existing land use programs, could damage significant cultural, historic, scientific or aesthetic values or natural systems, could affect water supplies or the production of food or fiber products, or could affect natural hazard lands and thereby endanger life and property.\textsuperscript{33}

The prohibition against mining in lands declared unsuitable for mining is not absolute. The prohibition does not apply to coal exploration activities.\textsuperscript{34} In addition, this prohibition does not apply to lands where the mining operation was in existence on August 3, 1977, where the mining operation was issued a permit under SMCRA prior to designating the land unsuitable.

\textsuperscript{29} Id.
for mining, or where substantial legal and financial commitments in the mining operation were made prior to January 4, 1977.\textsuperscript{35}

In addition to providing the discretionary authority to declare certain lands unsuitable for mining activity, SMCRA mandates that surface coal mining operations be prohibited upon certain lands. This prohibition applies to:

- Lands within national parks, national wildlife refuges, national trails, national wilderness preservation areas, wild and scenic river areas, and national recreation areas.
- Lands within any national forest.
- Any lands where the mining activity may adversely affect any publicly owned park or places included in the National Register of Historic Sites.
- Lands within 300 feet of any occupied dwelling, public building, school, church, community or institutional building or public park.
- Within 100 feet of a cemetery or the outer right-of-way line of any public road.\textsuperscript{36}

This prohibition does not apply where the operation was in existence on August 3, 1977 or the operation is subject to valid existing rights.

D. So What Are Valid Existing Rights?

A mining operation is subject to valid existing rights when the applicant's rights in the proposed mining operation are so significant that the applicant should be allowed to mine despite Section 522(e)'s prohibition against mining operations. Section 522(e)'s prohibitions override SMCRA's general authorization to mine under Sections 507-510. Therefore, the rights significant enough to authorize mining operations upon lands protected by Section 522(e) must be more significant than the rights necessary to obtain a permit under SMCRA, \textit{i.e.}, ownership of the coal seam and the right to mine it.

While the ownership and control test would be a fairly clear and unambiguous test, it has the effect of throwing the proverbial baby out with the bath water. Therefore, defining valid existing rights as the ownership of the coal seam and the right

\textsuperscript{36} SMCRA § 522(e), 30 U.S.C. 1272(e).
to mine it renders Section 522(e) meaningless because almost all lands will be subject to valid existing rights.

In contrast to the mandatory prohibitions of Section 522(e), a state may, at its discretion, declare lands unsuitable for mining activity. Therefore, valid existing rights must be more significant than the significant legal and financial commitments which override a state's discretionary authority under Section 522(a)(2) to prohibit mining. Since the prohibition against mining under Section 522(e) is mandatory, the rights sufficient to override this prohibition must be more significant than the economic rights which can override a prohibition that only comes into effect at the state's discretion.

Thus, valid existing rights are those rights which are so significant that applying Section 522(e)'s prohibition against mining operations will act as a taking of property in violation of the Fifth Amendment of the U.S. Constitution. Otherwise, in certain instances Section 522(e) could subject a state government to claims for the value of the coal seam being taken.

However, a regulation merely defining valid existing rights as an unconstitutional taking of property without compensation is unworkable. Such a regulation would fail to establish a national norm due to the wide variance in court decisions. Furthermore, due to the ambiguity in existing case law, this regulation provides little guidance to state administrators as to the appropriate rule to apply. Finally, no decision to issue a permit involving the valid existing rights issue could be made without legal assistance.

Therefore, OSMRE must publish a regulation attempting to define when a taking of property occurs. No regulation will be completely accurate. There will always be a chance that someone may successfully challenge a denial of valid existing rights on grounds that Section 522(e) acts as an unconstitutional taking of property. In developing a regulation, OSMRE must balance the need to implement the protections of Section 522(e) against the risk—including potential costs—that in specific instances the denial of valid existing rights may lead to a conclusion that Section 522(e) acts as a taking of property.

III. PENNSYLVANIA'S DEFINITION FOR VALID EXISTING RIGHTS

A. The Definition

Under Pennsylvania law, except for haul roads, valid existing rights are defined as:
[T]hose property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which authorizes the applicant to produce minerals by a surface mining operation; and provided further that the person proposing to conduct surface mining operations on such lands holds all current State and Federal permits necessary to conduct such operations on those lands and either held those permits on August 3, 1977 or had made by that date a complete application for the permits, variances, and approvals required by the Department.  

This definition is similar to the good faith-all permits test under consideration by OSMRE. There are two differences between Pennsylvania’s definition and OSMRE’s proposed definition.

Under OSMRE’s proposed definition, an applicant’s good faith effort to obtain all permits required on August 3, 1977 is an acceptable alternative to actually possessing all permits required on August 3, 1977. Pennsylvania’s regulation defines this good faith effort as the submission, by August 3, 1977, of a complete application for all permits, variances and approvals required by the Department.

Under OSMRE’s definition, valid existing rights exist even though the applicant did not make by August 3, 1977, a good faith effort to obtain all permits then required, if the coal is adjacent to and necessary for the continued operation of a coal mine which was in existence on August 3, 1977. Pennsylvania’s definition does not take into account whether the coal to be subject to valid existing rights is necessary for the continued operation of a mine.

B. *Does Pennsylvania’s Definition for Valid Existing Rights Avoid Unconstitutional Takings of Property?*

There is only one case alleging that the prohibition against mining under Pennsylvania’s counterpart to Section 522(e) of SMCRA is an unconstitutional taking of property. In *Willowbrook Mining Company v. Commonwealth, DER*, 38 the Commonwealth Court of Pennsylvania held that the prohibition of mining within 300 feet of an occupied dwelling did not act as an unconstitutional taking of the mine operator’s property.

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However, this ruling was based upon a finding that the mine operator had failed to introduce any evidence on the taking issue. Therefore, *Willowbrook Mining Company* does not provide any guidance as to when the prohibition against mining pursuant to Pennsylvania's counterpart to Section 522(e) will constitute an unconstitutional taking of property.

In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Supreme Court held that the prohibitions against mining contained in Section 522(e) of SMCRA are not an uncompensated taking of private property in violation of the just compensation clause of the Fifth Amendment to the U.S. Constitution. *Hodel* was in response to a facial challenge to Section 522(e). Therefore, in specific instances prohibiting mining under Section 522(e) of SMCRA, or a state's counterpart to that section, valid existing rights may be held to be an unconstitutional taking of private property.

In determining whether an application of Section 522(e) is an unconstitutional taking of property the courts will engage in an ad hoc balancing of several factors. The courts usually examine the economic impact of the regulation, the regulation's interference with investment-backed expectations, and the character of the government's action.

Where the government's action can be characterized as an exercise of the police power to prevent a nuisance, courts are likely to conclude that the regulation was not a taking of property. In many of the cases cited, the Court has allowed rather significant reductions in the economic value of the property being regulated. However, the Court has never held that a regulation was not a taking of property in the face of a finding that the total economic value of the property has been taken.

As stated above, SMCRA makes surface coal mining operations a suspect activity. Section 522(e) of SMCRA goes beyond SMCRA's general restrictions and prohibits mining upon certain

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42 See *Keystone*, 480 U.S. at 470.
lands. For some of the protected lands, this prohibition may be waived by either a regulatory authority or the landowner. Thus, Congress has determined that mining upon lands protected by Section 522(e) is a nuisance.

Since mining within the lands protected by Section 522(e) is a nuisance, anyone claiming that an unconstitutional taking of property has occurred must demonstrate an almost complete elimination of the economic value of their property and/or complete interference with legitimate investment backed expectations. This will be a sliding scale. The more significant the nuisance being prevented, (e.g., prevention of damage to occupied dwellings or environmentally sensitive lands), then the greater the diminution in the economic value or the interference with investment backed expectations before an unconstitutional taking of property will be found.

Given the Supreme Court’s holdings in cases such as Goldblatt v. Hempstead, Hadacheck v. Sebastian, and Mugler v. Kansas, anyone claiming an unconstitutional taking of property must show an almost complete diminution in the economic value of their property due to Section 522(e). If the issue is the economically viable use of the coal then the claimant must show that the entire mine, actual or proposed—not just the coal lying within the lands protected by Section 522(e)—is rendered valueless. In addition, it is unlikely that the courts will find that a taking has occurred if either the claimant possesses any other economic interest in the surface land or other minerals lying within the lands covered by Section 522(e) or if there is the possibility that another mining method would be allowed under Section 522(e).

Under Pennsylvania’s definition for valid existing rights, a mine operator must both possess the right to mine the coal on August 3, 1977 and have either obtained or submitted a complete application for all permits required on August 3, 1977. It is difficult to see how Section 522(e) interferes with the mine operator’s legitimate investment-backed expectations, unless as

46 239 U.S. 394 (1915).
47 123 U.S. 623 (1887).
48 See Keystone, 480 U.S. at 470.
of August 3, 1977, that mine operator had obtained the ownership interests necessary to mine the coal and had attempted to obtain all permits then required for mining the coal.

**Conclusions**

Based upon Pennsylvania’s experience, the modified good faith-all permits test is a good definition for valid existing rights. In most applications this definition will exempt from Section 522(e) only those coal mining operations where the application of Section 522(e) would constitute an uncompensated taking of private property in violation of Fifth Amendment of the U.S. Constitution.

Pennsylvania’s rule might be overly restrictive in that valid existing rights do not exist just because the additional lands are adjacent to and essential for the continued operation of a surface coal mine operation which was in existence on August 3, 1977. Whether failing to grant valid existing rights in this situation results in Section 522(e) acting as an unconstitutional taking of property without compensation is highly speculative.

The other area of uncertainty is where most of the lands to be mined lie within 300 feet of a park. Pennsylvania is currently facing several cases involving this scenario. In addition to the factors described above, resolution of this type of case may turn on whether the park was established prior to the enactment of the prohibitions against mining.