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VER in Illinois

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I. STATUTORY AND REGULATORY PROVISIONS.

The Illinois Surface Coal Mining Land Conservation and Reclamation Act ("State Act"), designates specified categories of lands as unsuitable for mining.† Permanent program rules


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† Mining is prohibited as follows:

a. No person shall cause or allow any mining operations which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved by both the Department, in accordance with procedures of Article III of this Act, and the Federal, State, or local agency with jurisdiction over the park or the historic site.

b. No person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 100 horizontal 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. The Department may permit such roads to be relocated, or the area affected to lie within 100 horizontal 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.

c. No person shall cause or allow any surface mining operations or any surface impact of underground mining operations within 300 horizontal feet from any occupied dwelling, unless waived by the owner thereof, nor within 300 horizontal feet of any public building, school, church, community, or institutional building, public park, or within 100 horizontal feet of a cemetery.

d. No person shall cause or allow any mining operation on any land included within an area designated unsuitable for mining operations under this Article.

e. The prohibitions of this Section do not apply to mining operations which existed on August 3, 1977.

ILL. REV. STAT. ch. 96 1/2, para. 7907.01 (1987).
under the State Act further explain these categories and their relationship to valid existing rights (VER).²

² Subject to valid existing rights, no surface coal mining operations shall be conducted after August 3, 1977, unless those operations existed on the date of enactment:

a. On any lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System including, for study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act, a corridor extending not more than one-quarter (1/4) mile from each bank for the length of the segment being studied, and National Recreation Areas designated by Act of Congress;

b. 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 of the United States Department of the Interior (Secretary) finds that there are no significant recreational, timber, economic, or other values which may be incompatible with surface coal mining operations; and surface operations and impacts are incident to an underground coal mine;

c. On any lands which will adversely affect any publicly owned park or any publicly owned places included on the National Register of Historic Places, unless approved jointly by the Department and the Federal, State or local agency with jurisdiction over the park or places;

d. Within one hundred (100) feet measured horizontally of the outside right-of-way line of any public road, except:

1) Where mine access roads or haulage roads join such right of way lines; or

2) Where the Illinois Department of Mines and Minerals (Department) and the public road authority with jurisdiction over the road under Illinois law allow the public road to be relocated, closed, or the area affected, including surface areas impacted by planned subsidence, to be within one hundred (100) feet of such road, after:

   A) Public notice and opportunity for a public hearing in accordance with Section 1761.12(c); and

   B) Making a written finding that the interests of the affected public and landowners will be protected;

e. Within three hundred (300) feet measured horizontally, from any occupied dwelling in existence, under construction, or contracted for at the time of public notice, except when:

1) The owner thereof has provided a written waiver consenting to surface coal mining operations closer than three hundred (300) feet; or

2) The part of the mining operation which is within three hundred (300) feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling;

f. Within three hundred (300) feet measured horizontally of any public building, school, church, community or institutional building, or public park; or

g. Within one hundred (100) feet measured horizontally of a cemetery.

h. There will be no surface coal mining, permitting, licensing or exploration of Federal lands in the National Park System, National Wildlife
Absent valid existing rights, mining is prohibited in accordance with the program regulations. Illinois defines "valid existing rights" in its permanent program rules as follows:

Valid existing rights means:
Except for haul roads, that a person possesses valid existing rights for an area protected under Section 7.01 of the State 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 or Article I, Section 15 of the Illinois Constitution of 1970 or both.

The haul roads VER definition is more specific, recognizing certain recorded rights of way, easements or permits as VER, as well as operations for coal that is "needed for" pre-SMCRA mines.


Valid existing rights shall be found if:

1. On the date the protection comes into existence, a validly authorized surface coal mine operation exists on that area; or
2. The prohibition caused by Section 7.01 of the State Act, if applied
As is apparent from these program rules, Illinois' regulatory approach to VER is grounded upon the constitutional mandate that private property shall not be taken for public use without just compensation. Essentially, the Illinois Department of Mines and Minerals ("IDMM") applies a "takings test" in its determinations of whether VER exists in particular factual situations.

II. UNDERPINNINGS OF THE ILLINOIS APPROACH.

Neither the State Act nor the Surface Mining Control and Reclamation Act of 1977 (SMCRA)\(^6\) defines VER. However, the legislative history of SMCRA illustrates that the VER concept arose out of congressional concern that the surface mining prohibitions created by Section 522(e) of SMCRA\(^7\) might create an inverse condemnation or "taking" under the Fifth Amendment. According to Congressman Udall, "if valid existing rights were deleted, the Act would not preserve valid legal rights which could not be done without paying compensation under the Fifth Amendment of the Constitution."\(^8\) In the course of its rule-making efforts in 1983, the Office of Surface Mining Reclamation and Enforcement (OSMRE) itself has indicated its awareness of this congressional intent.\(^9\) Thus, in its 1983 VER

to the property interest that exists on the date the protection comes into existence, 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 or Article 1, Section 15 of the Illinois Constitution of 1970 or both.

Interpretation of the terms of the document relied upon to establish valid existing rights shall be based either upon Illinois case law concerning interpretation of documents conveying mineral rights or, where Illinois case law is lacking, upon the usage and custom at the time and place where it came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

Id.


\(^{9}\) In the regulatory history pertaining to its 1983 VER rule: OSM has recognized from the outset that Congress created the valid existing rights exemption of Section 522(e) to avoid potential legislative takings of property interests through inverse condemnation which would require compensation under the Fifth and Fourteenth Amendments to the
rule, OSMRE relied upon the equivalency between "VER" and "takings" doctrine:

As a result of its examination of the case law on takings, OSM has determined that there is an insufficient legal basis for defining "valid existing rights" in terms of any class of circumstances. Because the courts refuse to prescribe set formulas for takings, OSM is convinced that it cannot specifically delineate a class of circumstances with the assurance that the class is neither overinclusive nor underinclusive of all potential takings which might result from Section 522(e) prohibitions. For this reason, OSM has adopted a definition of "valid existing rights" as those rights which, if affected by the prohibitions in Section 522(e), would entitle the owner to payment of just compensation under the fifth and fourteenth amendments. This definition permits OSM to approach the determination of valid existing rights in the same case-by-case manner in which the courts approach related takings questions under the fifth and fourteenth amendments.\(^\text{10}\)

The takings analysis that forms the core of the IDMM's VER analysis therefore finds support in the legislative history of SMCRA and the 1983 OSMRE rule. That is, in order to fully carry out congressional intent—the avoidance of all takings—the Illinois program equates VER determination with a "takings" doctrine analysis.

As indicated, Illinois' VER definition, with a few adjustments for Illinois law, tracks the language of OSMRE's 1983 VER definition that was effective October 14, 1983.\(^\text{11}\)

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U.S. Constitution. Congress recognized that the mining prohibitions established in Section 522(e), if applied to certain existing property interests, would deprive the property owner of all reasonable beneficial use of the property, and thus entitle the owner to just compensation. Congress chose not to define further the types of property rights which qualify as "valid existing rights." Thus, it falls to OSM to define valid existing rights in a manner which avoids all potential takings through inverse condemnations, but otherwise gives full force to the prohibitions contained in Section 522(e).

\(^\text{10}\) Id. at 41,314.
\(^\text{11}\) See 48 Fed. Reg. 41,312, 41,349 (September 14, 1983). Effective December 22, 1986, OSMRE suspended, by "final rule", the provisions of the 1983 VER rule remanded by Judge Flannery in In Re: Permanent Surface Mining Regulation Litigation II 22 Envtl. Rep. Cas. (BNA) 1557, 1567 (D.D.C. 1985). At the same time, OSMRE "reinstated" the portions of the 1979 VER definition identified as the "good faith all
continues to support this rule rather than the more recent "good faith-all permits test."

The IDMM submits that OSMRE's reinstated VER definition is a mechanical test which wholly ignores Congress' concern that Section 522(e) not create a "taking" under the Fifth Amendment. Allowing each regulatory authority to determine the existence or non-existence of valuable property rights based upon a subjective analysis of an applicant's "good faith" efforts to obtain permits is not an adequate safeguard against a taking, and is utterly at odds with the legislative history surrounding Section 522(e) of the SMCRA.

III. VER AND SUBSIDENCE.

Illinois considers subsidence caused by planned subsidence mining operations to be a surface impact of underground mining which triggers the Section 522(e) prohibitions. However, the IDMM neither flatly prohibits planned subsidence mining from causing a surface disturbance (subsidence) within the protected areas, nor allows planned subsidence in all cases even where VER is established. The IDMM's approach to regulating subsidence within the Section 522(e) buffer zones is dependent upon the type of structure or feature sought to be protected.

A. Underground coal mine operators with VER.

Underground mining operations are prohibited beneath or adjacent to 1) public buildings and facilities, 2) churches, schools and hospitals and 3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, if the protected feature were to be subject to damage from subsidence. The philosophy behind these prohibitions stems from obvious public safety concerns—subsidence damage to these structures or features cannot be allowed to occur. Underground mining activities will only be allowed under or adjacent to the above-enumerated areas if the operator can provide a technically detailed demonstration that permits' test. Under that definition, "[A demonstration of both property rights and that the person had made either a good faith attempt to obtain all permits necessary to mine or that the coal is needed for and adjacent to an ongoing surface coal mining operation is sufficient to establish VER.


the occurrence of subsidence, planned or otherwise, will not cause material damage to, or reduce the reasonably foreseeable use of, such structures or features. If warranted in order to minimize the potential for material damage, the IDMM may limit the percentage of coal extracted under or adjacent to these areas.\footnote{See ILL. ADMIN. CODE tit. 62, § 1817.121(d) (1989).}

Underground mine operators with VER are allowed to undermine and subside the occupied dwellings, roads, cemeteries and other features delineated in Section 522(e) of SMCRA. However, all underground mine operators, whether or not allowed by VER to undermine and subside within the Section 522(e) buffer zones, must comply with damage mitigation rules.\footnote{1. Correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence; and
2. Correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensating the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a noncancellable premium prepaid insurance policy payable to the surface owner in the full amount of the possible material damage. Nothing in subsection (c)(2) shall be deemed to grant or authorize an exercise of the power of condemnation or the right of eminent domain by any person engaged in underground activities. ILL. ADMIN. CODE tit. 62, § 1817.121(c) (1989).}

In essence, the operator must always mitigate the surface impacts of mine-related subsidence whether caused by planned subsidence operations or by unplanned subsidence.

B. \textit{Underground coal mine operators without VER}.

Mine-related subsidence generated by an operator without VER will be permitted within the Section 522(e) buffer zones if the projected subsidence will not cause any damage to the protected land surface, feature, facility or structure. For example, the IDMM will allow mine-related subsidence within 300 feet of an occupied dwelling if the IDMM is confident that this structure will not sustain cracks or other material damage to its walls, foundation, etc. In the absence of VER, the IDMM will not approve the issuance of an underground mine permit pro-
jected to cause any damage to an occupied dwelling, or to any other protected categories enumerated in Section 522(e) of SMCRA. Moreover, the IDMM will require the operator to mitigate the impacts of any inadvertent subsidence that does occur in accordance with Section 1817.121(c) of its rules.

IV. PROGRAM APPLICATION.

Determining whether an operator has VER begins with the permit application. All applicants must submit a description of the documents upon which the applicant bases the legal right to enter and begin surface coal mining and reclamation operations in the permit area and in the area above the underground mine workings ("shadow area"). This description must identify those documents by type and date of execution, identify the specific lands to which the documents pertain, and explain the legal rights claimed by the applicant, including the right to subside within the shadow area. These requirements may be satisfied by a notarized statement signed by an attorney licensed to practice law in the State of Illinois that the applicant has the legal right to enter and commence the operations proposed in the application. If the purported right of entry is a property right that is protected from a uncompensated "taking" and if such right is adequately documented, the operator has established VER. Absent such a showing by the applicant, a negative determination of VER will by made by the IDMM.

V. CONCLUSION.

Illinois believes that its approach to implementing VER is clearly more effective than a "good faith-all permits" test in carrying out the intent of Congress to eliminate any taking of property rights arising from the application of the mining prohibitions set forth in Section 522(e) of SMCRA. Additionally, Illinois has experienced little opposition to its application of VER in relation to regulating subsidence caused by underground coal mining operations. Illinois' approach to VER has resulted in a substantial increase in planned subsidence mining activities while stringently maintaining property owner protections relat-

ing to structures and land. The IDMM believes that this overall lack of opposition from landowners, industry and environmental groups clearly indicates that its practical approach to VER is working and working well. The Illinois program carries out the intent of Congress set forth in Section 522(e) of SMCRA, the intent of the Illinois General Assembly set forth in Section 7.01 of the State Act and the intent of the framers of the United States and Illinois Constitutions.