

THE STEARNS CO.

IBLA 87-262

Decided September 14, 1989

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, finding that appellant had not shown valid existing rights to engage in surface coal mining operations on land within the Daniel Boone National Forest in Kentucky.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

Under the provisions of the regulation at 30 CFR 740.11(a)(3) the definition of valid existing rights found in the approved Kentucky State regulatory program is properly applied by OSMRE officials to adjudicate an application for valid existing rights to mine reserved coal deposits on Federal lands within the Daniel Boone National Forest. A decision rejecting such an application will be affirmed where the applicant has acknowledged not having applied for the necessary permits to mine the coal as of the Aug. 3, 1977, enactment of the Surface Mining Control and Reclamation Act of 1977.

APPEARANCES: Winfrey P. Blackburn, Esq., Bruce F. Clark, Esq., and Elizabeth K. Broyles, Esq., Frankfort, Kentucky, for appellant; Joseph M. Oglander, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by The Stearns Company (Stearns) from a decision of the Office of Surface Mining Reclamation and Enforcement (OSMRE) rejecting its application for a ruling that it holds "valid existing rights" (VER) to mine the coal deposit under Federal lands situated within the Daniel Boone National Forest in McCreary County, Kentucky. The decision was issued pursuant to section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e) (1982), restricting surface coal mining operations on national forest lands subject to VER.

Appellant is the holder of the rights to the coal "in, upon and under" the subject lands pursuant to a reservation in the deed dated December 18, 1937, by which the United States acquired the lands. By letter application dated March 24, 1986, appellant sought recognition of VER to mine the coal by "underground mining operations (including the creation of 'surface effects of underground mining')." 1/

In his decision dated December 3, 1986, the Director, OSMRE, found that the applicable regulations for determining VER on Federal lands in Kentucky are the regulations found in the approved state regulatory program. Specifically, the Director held that, under the relevant regulation at 405 Ky. Admin. Reg. (KAR) 24:040 section 4, the applicant must establish that it has property rights pursuant to a legally enforceable instrument to produce coal by surface mining methods and, further, that the applicant had, prior to August 3, 1977, obtained or made a good faith effort to obtain the permits necessary to conduct such operations. Noting that Stearns had indicated in a followup letter to its application that as of 1977 the applicant had not applied for mining permits on the acreage in question, the Director found that appellant had not met the regulatory requirements for establishing VER. 2/

In the statement of reasons for appeal, Stearns argues that application of the State regulations to deny VER in the absence of a pending application for all necessary permits as of August 3, 1977, constitutes an unconstitutional taking of property rights and is inconsistent with the clear language and intent of section 522(e) of SMCRA recognizing an exception for VER. Appellant further contends that reliance upon the State regulation in denying the VER application constitutes an improper delegation of the authority to determine VER for surface mining operations on Federal lands in violation of the terms of 30 CFR 745.13(o). Appellant argues that in the absence of a valid Federal regulation governing the VER ruling, the Board should apply the "taking" test to avoid an unconstitutional application of the statute. Further, appellant asserts that application of disparate state regulatory standards to VER determinations for Federal lands in different states as opposed to a uniform Federal standard violates constitutional requirements of equal protection of the law made applicable to the Federal Government through the due process clause of the Fifth Amendment. Finally, appellant contends that the denial of the VER application on the basis of the failure to apply for all necessary permits prior to August 3, 1977, is inconsistent

1/ The definition of surface coal mining operations includes "surface operations and surface impacts incident to an underground coal mine." SMCRA, section 701(28), 30 U.S.C. § 1291(28) (1982).

2/ The Director also noted in his decision that the regulations at 405 KAR 24:040 section 4(1)(b) further recognize the existence of VER where the coal which the applicant has the legal right to surface mine is located immediately adjacent to an ongoing surface coal mining operation for which all permits were obtained prior to Aug. 3, 1977. The Director held that appellant had failed to submit evidence that the national forest lands were immediately adjacent to such an ongoing mining operation and, hence, found that VER were not established on this basis.

with the position taken by the Federal Government in prior litigation over Stearn's rights in these lands ^{3/} and OSMRE is properly estopped from taking this position.

In answer to the statement of reasons for appeal, OSMRE contends that it was proper to apply the definition of VER found in the Kentucky State regulatory program. Noting that the national forest lands involved are Federal lands, OSMRE points out that pursuant to the Federal lands program regulation at 30 CFR 740.11(a), subsequent to approval of a state regulatory program, surface mining operations on lands where either the coal or the surface is owned by the United States are governed by the state regulatory program. But see 54 FR 23388 (May 31, 1989). Further, OSMRE contends that even if the definition of VER contained in the regulation at 30 CFR 761.5

in effect at the time Stearn's application was adjudicated is to be applied to appellant's application, this standard is substantially similar to the definition contained in the approved Kentucky State program because the "takings test" formerly embodied in the regulation was suspended by the Secretary in response to judicial invalidation of this rulemaking. OSMRE contends the suspension, which provided that the state regulatory program definition of VER will be used for rulings involving Federal lands, is binding upon the Board.

The issue before us is framed by the terms of section 522(e) of SMCRA which provides in part that: "After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted * * * (2) on any Federal lands within the boundaries of any national forest." 30 U.S.C. § 1272(e) (1982). ^{4/} The term "VER" is not defined in the provisions of SMCRA itself. Accordingly, an understanding of the context of this

^{3/} Appellant's lessee filed suit seeking recognition of its right to mine the coal under the national forest lands asserting in part that section 522(e) of SMCRA pertains only to Federal lands and does not apply to severed privately owned coal reserves where only the surface has been acquired as national forest lands. This argument was rejected by the court which found the proposal to mine beneath national forest lands with resulting effects on the surface of those lands falls within the meaning of mining on Federal lands under section 522(e). Rumex Mining Corp. v. Watt, 753 F.2d 521, 523 (6th Cir. 1985), cert. denied, 474 U.S. 900 (1986). Appellant predicates its estoppel claim on a statement in the Government brief in opposition to certiorari to the effect that: "If the operators do possess the rights that petitioners claim are granted mineral owners under Kentucky law, they need only demonstrate their valid existing right to mine under state law prior to conducting their proposed mining operations" (Appellant's Brief at 4-5 (emphasis added by appellant)).

^{4/} Section 522(e)(2) regarding surface mining on national forest lands qualifies the restriction with a potentially significant proviso: "Provided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and * * * surface operations and impacts are

appeal is facilitated by a review of the sequence of rulemaking to implement section 522(e) of SMCRA.

The initial regulation promulgated by the Department to define "VER" required the concurrent existence of two factors as of August 3, 1977: the existence of property rights created by a legally binding instrument which authorizes production of coal by surface mining operations and the issuance of all "State and Federal permits necessary to conduct such operations on those lands" (referred to as the "all permits" test). 30 CFR 761.5, 44 FR 15342 (Mar. 13, 1979). This regulation was the subject of judicial review and was remanded by the district court for revision to the extent it failed to recognize the rights of an operator who made a good faith attempt to obtain all permits prior to August 3, 1977. In Re: Permanent Surface Mining Regulation Litigation, 14 E.R.C. 1083, 1091 (D.D.C. 1980). ^{5/} On remand this definition of VER was suspended in a published notice indicating that "[p]ending further rulemaking, the Secretary will interpret this regulation as requiring a good faith effort to obtain all permits." 45 FR 51548 (Aug. 4, 1980).

Thereafter, a new regulatory definition of VER was promulgated effective October 14, 1983, which provided that:

[A] person possesses valid existing rights for an area protected under section 522(e) of the Act on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution * * *.

30 CFR 761.5, 48 FR 41348-49 (Sept. 14, 1983). This standard has been referred to as the "taking" test. This regulatory definition was also the subject of judicial review. The "taking" test regulation was remanded to the Department by the district court on the ground that the regulation was so different from the terms of the proposed regulations published in the

fn. 4 (continued)

incident to an underground coal mine * * *." 30 U.S.C. § 1272(e)(2) (1982). The Director's decision referred to this proviso in noting that a negative finding on a VER application "does not prohibit underground mining in a National Forest" (Decision at 4). The Director concluded in his decision that: "Based on our knowledge of mining in the Daniel Boone National Forest, such a plan could probably be developed." Id. Stearns indicated its awareness of the availability of compatibility determinations for individual mine sites in its VER application filed with OSMRE, but requested a blanket VER determination for "all of the property covered by the Deed" (Application at 6) in lieu of such compatibility determinations.

^{5/} The court declined to rule on the issue of whether the "all permits" test represented an unconstitutional taking under the Fifth Amendment on the ground the question was premature in view of the absence of concrete facts which rendered any such claim hypothetical. 14 E.R.C. at 1090-91.

Federal Register as to fail to provide an adequate opportunity for public notice and comment under section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). In Re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (D.D.C. 1985).

In response to the court ruling, the Department published notice of the suspension of the "taking" test of VER:

Therefore, to comply with the court's order, OSMRE is suspending the definition of VER in 30 CFR 761.5(a) pending further rulemaking to define VER.

* * * * *

* * * Suspending the rule has the effect of undoing the improper promulgation and leaving in place the VER test in use before the 1983 definition was promulgated. That test was the 1979 test * * * as modified by the August 4, 1980 suspension notice which implemented the District Court's February 1980 opinion in In Re: Permanent (I) [14 E.R.C. 1083 (D.D.C. 1980)] (the 1980 test). The suspension notice stated that pending further rulemaking OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.

* * * * *

The Federal regulations at 30 CFR 740.11(a) which were adopted on February 16, 1983, provide that upon approval or promulgation of a regulatory program for a State, that program and the Federal lands rules, 30 CFR Subchapter D, shall apply to surface coal mining and reclamation operations on Federal lands. However, under 30 CFR 740.4(a)(4) and 745.13(o), the Secretary is responsible for making VER determinations on Federal lands within the boundaries of any areas specified in section 522(e)(1) or (e)(2) of the Act, which includes national parks and forests. The Secretary may not delegate that responsibility to a State.

During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands * * * using the VER definition contained in the appropriate State or Federal regulatory program.

51 FR 41954-55 (Nov. 20, 1986). 6/

6/ In response to appellant's most recent motion for expedited consideration of this appeal, the Board issued an order noting the recent publication by OSMRE of proposed rules governing valid existing rights incorporating two alternative standards for VER determinations. 53 FR 52374-83 (Dec. 27, 1988). Appellant has urged the Board to decide this appeal without awaiting any further rulemaking and OSMRE has concurred in this request, pointing out

It is recognized that the suspension notice published in the Federal Register on November 20, 1986, was made effective on December 22, 1986, after the decision from which appellant has appealed. Regardless, it is clear that after the March 22, 1985, decision of the court invalidating the regulation containing the "taking" test, the Department was without authority to apply that standard. Blackmore Co., 108 IBLA 1, 7 (1989).

[1] We note that the Kentucky State regulatory program was conditionally approved on May 18, 1982. 30 CFR 917.10. Under the regulations at 30 CFR Subchapter D regarding the Federal lands program, upon approval of a regulatory program for a state that program shall apply to "[s]urface coal mining and reclamation operations on lands where either the coal to be mined or the surface is owned by the United States." 30 CFR 740.11(a)(3). Pursuant to the provisions of this regulation the definition of VER existing in Kentucky's approved permanent State regulatory program is properly applied to appellant's VER application. Blackmore Co., *supra* at 7-8. Application by OSMRE officials of the definition of VER contained in the approved State regulatory program does not constitute an improper delegation of the authority to rule on VER applications. *Cf. Blackmore Co.*, *supra* (application of the state definition of VER upheld while recognizing that the state lacked authority to make the VER determination on Federal lands). In view of appellant's concession that applications were not pending for the necessary permits as of the enactment of SMCRA on August 3, 1977, we find the rejection of appellant's VER application must be affirmed.

With respect to appellant's argument that application of the State regulatory program definition of VER represents an unconstitutional taking of its property rights, it must be recognized that the Board is bound by the duly promulgated regulations of the Department and is not the proper forum to rule on the constitutionality of the regulation. *See Alternate Fuels, Inc. v. OSMRE*, 103 IBLA 187 (1988). However, it is noted that appellant's insistence on seeking a blanket VER determination for all of its coal interests in the Daniel Boone National Forest without having availed itself of the opportunity to apply for a compatibility determination for specific plans of mine operations as suggested by the Director in his decision raises precisely the kind of hypothetical situation in which the district court has declined to rule on the unconstitutional taking issue. *See In Re: Permanent Surface Mining Regulation Litigation*, 14 E.R.C. at 1090-91.

With respect to the question of estoppel, there is no basis for precluding OSMRE from applying the definition of VER set forth in the approved Kentucky State regulatory program. The issue implicit in the language quoted in support of the estoppel claim is the question of what rights the appellant has to mine the coal which it owns under Kentucky law. Based on the record before us, it does not appear that ownership of the coal, standing alone, compels a blanket determination of VER to mine the coal within the national forest.

fn. 6 (continued)

that the proposed rulemaking does not alter the legal basis for the decision of the Director under appeal.

Finally, it must be noted that the view of the law set forth in the concurring opinion herein has substantial merit. However, I find no need to reach that issue in the context of this case where it makes no difference to the result of the decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

[*352] ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

The lead opinion affirms a decision of the Director, Office of Surface Mining Reclamation and Enforcement (OSMRE), holding that appellant has failed to establish the existence of valid existing rights (VER) to engage in surface coal mining operations on certain lands within the Daniel Boone National Forest in Kentucky. It reaches this conclusion by applying the definition of "VER" contained in the approved Commonwealth of Kentucky permanent regulatory program. As support for the application of the Kentucky definition, the opinion relies upon this Board's decision in Blackmore Co., 108 IBLA 1 (1989), in which we affirmed the application of the VER definition contained in the approved Commonwealth of Virginia permanent regulatory program in order to determine whether appellants therein had VER to conduct surface coal mining operations on lands within the Jefferson National Forest. While I agree that appellant has failed to establish the existence of VER in the instant case, I do not believe that the Board may apply the definition of VER contained in the various approved state regulatory programs in determining the existence of VER on those Federal lands for which the Secretary has retained jurisdiction to adjudicate the existence of VER. Rather, for reasons which I will set forth, it is my view that, in such cases, the Board must apply the presently existing Federal regulatory definition (30 CFR 761.5), as amended by the Department on August 4, 1980. See 45 FR 51548.

At the outset, however, I think it of primary importance that the specific issue presented by this appeal be clearly delineated. This case does not involve the question of which VER definition should be used in the exercise of OSMRE's oversight responsibilities under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1982). Nor does it even involve the question of what definition a state should use in making determinations of VER on Federal land in those cases in which the state has been vested with authority to so act. Rather, the sole question is what definition of VER applies when the Federal Government is determining, as an original matter, whether or not a VER has been shown to exist.

Thus, under 30 U.S.C. § 1272(e) (1982), surface coal mining is prohibited, subject to valid existing rights and under specified conditions, in a number of areas. Among the prohibitions are a prohibition against mining on all lands within the boundaries of National Parks, National Trails, Wildlife Refuges, Wilderness Areas, and Wild and Scenic Rivers (30 U.S.C. § 1272(e)(1) (1982)), all Federal lands 1/ within National Forests (30 U.S.C. § 1272(e)(2) (1982)), as well as all lands, inter alia, within 100 feet of public roads, subject to certain exceptions (30 U.S.C. § 1272(e)(4) (1982)), and lands within 300 feet of any occupied dwelling (30 U.S.C. § 1272(e)(5) (1982)).

1/ Under 30 U.S.C. § 1291(6) (1982), "Federal lands" is defined as "any land, including mineral interests, owned by the United States without regard to how the United States acquired ownership of the land and without regard to the agency having responsibility for management thereof."

While the regulations expressly prohibited states from making VER determinations for Federal lands within the boundaries of any areas specified in 30 U.S.C. § 1272(e)(1) or (2) (1982), (see 30 CFR 740.4(a)(4) and 745.13(o)), this prohibition does not apply to non-Federal lands in areas specified in section 1272(e)(1), or Federal lands in areas specified in section 1272(e)(3), (4), or (5). Thus, the critical issue presented by the instant appeal relates to the definition to be used in determining the existence of a VER on Federal lands within the areas specified in section 1272(e)(1) or (2).

The lead opinion herein ably recounts the factual milieu in which the present controversy has arisen. Thus, as initially promulgated, the VER determination involved what was known as the "all permits" test. In other words, in order to establish the existence of a VER, it was necessary to establish the existence of a legally binding instrument which authorizes production of coal by surface mining operations and that all necessary state and Federal permits for such operations had issued as of August 3, 1977. See 30 CFR 761.5, 44 FR 15342 (Mar. 13, 1979). Subsequently, as a result of the determination by the United States District Court for the District of Columbia that the regulation failed to make adequate provision for those situations in which an operator had made a good faith attempt to obtain all necessary permits prior to August 3, 1977, this regulation was suspended "insofar as it requires that all permits must have been obtained prior to August 3, 1977." See 45 FR 51548 (Aug. 4, 1980). Rather, this notice provided, the regulation would be interpreted as requiring a good faith effort to obtain all permits. Id.

Approximately 2 years later, the Department proposed several alternative definitions of VER and solicited comments thereon. See 47 FR 25278, 25279-81 (June 10, 1982). Thereafter, on September 14, 1983, an entirely new definition of VER was adopted, providing that VER would be deemed to exist if the application of any of the prohibitions contained in section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1982), would constitute a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. This became known as the "taking" test. This definition was subsequently struck down in In re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (D.D.C. 1985), on the ground that the final regulation adopted was so different from the definitions proposed that the Department was required to repropose the "taking" test and permit further public comment.

It was at this point in time that the adjudicatory situation began to become increasingly confused. On November 20, 1986, a full year after the District Court decision, the Department formally suspended the "taking" test. See 51 FR 41952, 41954-55 (Nov. 20, 1986). At the same time, however, the Department expressed its concern over

the possible effect the suspension could have on property rights. Creation of a regulatory vacuum would be unworkable in this instance because OSMRE does not wish to unduly delay the permitting process or be required to shut down ongoing operations merely because the agency lacks a regulatory definition of VER. * * *

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Suspending the rule has the effect of undoing the improper promulgation and leaving in place the VER test in use before the 1983 definition was promulgated. That test was the 1979 test, including the "needed for and adjacent" test, as modified by the August 4, 1980 suspension notice which implemented the District Court's February 1980 opinion in In re Permanent (I) (the 1980 test). The suspension notice stated that pending further rule-making OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.

Id. Based on the foregoing, the Department determined that the "good faith/all permits" test would be applied in Federal program states and on Indian lands.

With respect to lands situated in states with an approved state program, the suspension notice made different provision. Thus, the notice declared:

During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands, and on non-Federal lands within the boundaries of [30 U.S.C. § 1272](e)(1) areas where operations would affect the Federal interest, using the VER definition contained in the appropriate State or Federal regulatory program.

Id. While the suspension notice declared that it was OSMRE's intention to promulgate a new regulatory definition of VER in the future, no such change has ever been effectuated. See 54 FR 30557 (July 21, 1989), withdrawing proposed definitions, published on December 27, 1988 (53 FR 52374), for further study.

In the present case, OSMRE advances two separate theories in support of its argument that the state definition of VER controls. First, it argues that, under 30 CFR 740.11, upon approval of the state permanent regulatory program, Federal lands became subject to the state program and, therefore, the state definition of VER properly applied to determinations of the existence of VER on all Federal lands within that state. Secondly, OSMRE argues that, even if this were not the case, the November 30, 1986, suspension notice effectively directed the same result. In its decision in Blackmore, supra, this Board accepted OSMRE's first argument. Id. at 7-8. The lead opinion herein follows the same analysis. In my view, however, the rationale employed in Blackmore on this point does not withstand critical analysis. Moreover, for reasons which I will expand upon below, it is also my view that the November 20, 1986, suspension notice cannot bear the interpretation now being placed on it by OSMRE. Moreover, if OSMRE is correct in its analysis of that notice, I think it clear that this suspension notice, itself, violated the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), and could not, therefore, be properly applied by this Board. See Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981).

Initially, it is helpful to review the basis for the original conclusion in Blackmore that the state regulatory definition of VER was applicable in those VER determinations reserved in the regulations to the Department with respect to Federal lands within 30 U.S.C. § 1272(e)(1) and (2) (1982) areas. Thus, after restating the pertinent language of 30 CFR 740.11, the Board declared:

As noted supra, Virginia's permanent regulatory program has been approved since December 15, 1981. Under 30 CFR 740.11(a)(3) and as a result of the June 6, 1983, Federal Register notice removing the restrictions against application of Virginia's program on Federal lands, Virginia's permanent regulatory program applies to Federal lands located within the Commonwealth. Although Virginia lacked authority to administer its approved program on Federal lands until May 7, 1987, and still does not have authority to make a determination of VER on Federal lands, its permanent regulatory program definition of VER should be applied on Federal lands within the Commonwealth. Accordingly, we find that under the facts of this case, OSMRE properly applied the definition of VER set forth in Virginia's permanent regulatory program. [Emphasis supplied; footnote omitted.]

Id. at 8. In all candor and with due deference to my colleagues, the conclusion espoused is based on no more than a simple ipse dixit.

It is one thing to maintain that, in those instances in which the state is enforcing its program on Federal lands, the state regulatory provisions will apply. Indeed, as was subsequently noted, the major purpose of the changes in 30 CFR Part 740 which were adopted on February 16, 1983 (see 48 FR 6921), and which added the language presently appearing at 30 CFR 740.11, was "to allow States to assume greater responsibility for administering the requirements of SMCRA on Federal lands." 54 FR 23388 (May 31, 1989). Thus, an interpretation of the regulation that would permit the state to use its own regulatory definition in making its determinations as to the existence of VER would fully accord with this purpose. 2/ But it is a far different thing to assert that the state provisions were intended to apply in those cases where OSMRE was discharging its reserved authority under the Act.

Moreover, in promulgating the 1983 revisions to the Federal Lands Program, 30 CFR Part 740, the Department expressly noted that "[v]alid existing rights determinations on [30 U.S.C. § 1272(e)(1) and (2)] areas are of such paramount national importance that this responsibility appropriately should not be delegated." 48 FR 6917 (Feb. 16, 1983). It is scarcely credible that so critical a matter as defining the term "valid existing rights" would have been delegated to the states, at the exact same time that the Department was expressly recognizing the "paramount national importance" of the ultimate decision.

2/ Whether such a regulation would comport with the overall purposes of SMCRA need not be decided within the confines of the present appeal.

Finally, perhaps the most convincing argument against OSMRE's present assertion that it was the intent of the 1983 revision of 30 CFR 740.11 to make the state definition of VER applicable to the determination of the existence of VER on Federal lands situated in section 1272(e)(1) and (2) areas can be made from the language of the November 20, 1986, suspension notice. Thus, the notice declared: "During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands * * * using the VER definition contained in the appropriate State or Federal regulatory program." 51 FR 41955 (emphasis supplied). If, in point of fact, the state definition was always applicable, there would have been nothing to decide. The invalidation of the taking test embodied in 30 CFR 761.5 (1986) would simply have had no effect within any state with an approved permanent regulatory program. I examine below the deficiencies inherent in such an attempt to effectively amend 30 CFR 740.11(a) via this suspension notice. But I think it clear beyond peradventure that, prior to 1986, there was never any intimation that the state regulatory definition of VER was relevant in determining the existence of a VER on Federal lands within section 1272(e)(1) and (2) areas.

Thus, the basis of the holding in Blackmore, as well as in the instant case, can simply not be sustained. Under the regulatory scheme existing prior to 1986, the mere fact that a permanent state regulatory program had been approved and was functioning had no effect on determining the definition used in ascertaining the existence of VER on Federal lands within section 1272(e)(1) or (2) areas. I recognize, of course, that OSMRE argues, in the alternative, that even if this was the law prior to the November 20, 1986, suspension notice, the effect of the notice was to make the state regulatory definition applicable. I think this argument is flawed on a number of bases.

The key language in the suspension notice on which OSMRE relies is the statement that "[d]uring the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations * * * using the VER definition contained in the appropriate State or Federal regulatory program." 51 FR 41955 (Nov. 20, 1986). OSMRE argues that the effect of this language was to independently make the state definition applicable to Federal VER determinations. There are, however, substantial interpretive problems with this assertion.

First of all, by referencing the definition of VER contained in the "appropriate State or Federal regulatory program," the Notice implicitly recognized that the Federal definition would be operative in some instances. However, OSMRE had already dealt with the standards to be used in both Federal program states and on Indian lands. Thus, this language necessarily implies that the "Federal" definition of VER could be utilized in states with approved permanent regulatory programs. The fact that no guidance was provided as to those circumstances in which a state rather than the Federal definition would be used merely underlines the lack of utility in the suspension notice. It does not require that the state definition be used in all circumstances.

Moreover, use of varying state definitions of VER would seem to run afoul of other provisions of the regulations. Thus, under 30 CFR 732.15, approval of a state permanent program is dependent upon a finding that "the State's laws and regulations are in accordance with the provisions of the Act and consistent with the requirements of the Chapter." The regulations further provide that:

As used in this subchapter unless otherwise indicated Consistent with and in accordance with mean:

(a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act.

(b) With regard to the Secretary's regulations, the State laws and regulations are no less effective than the Secretary's regulations in meeting the requirements of the Act.

30 CFR 730.5. Thus, any definition of VER in the Federal regulations would, of necessity, be applicable to the states. ^{3/} Indeed, Judge Flannery expressly noted this facet in his determination that 30 CFR 761.5 was a "legislative rule."

In rejecting an argument that the VER definition in 30 CFR 761.5 was an interpretive rule, the Court observed:

[G]iven the Secretary's authority to approve or disapprove state programs as set forth in § 503(a) of the Act, 30 U.S.C. § 1253(a), and his ability to provide for Federal enforcement where a state program is not properly enforcing the program, under § 504(b), 30 U.S.C. § 1254(b), and § 521(b), 30 U.S.C. § 1271(b), of the Act, the regulations are not advisory.

In re Surface Mining Litigation, supra at 1559. Clearly, the Court was recognizing that, by adopting the "taking test" in its VER definition at 30 CFR 761.5, OSMRE was effectively requiring the states to adopt a similar definition. ^{4/}

Of course, as a practical matter, it would not normally matter whether one applied the Federal definition or the approved state program definition since they would be the same. And, in point of fact, virtually every state permanent program was approved prior to the change to the 1983 "taking"

^{3/} Thus, after the District Court had earlier required inclusion of consideration of "good faith" efforts in application of the "all permits" test, approval of pending state programs was, in a number of cases, made expressly subject to the "good faith/all permits" test. See, e.g., 30 CFR 918.10(b)(1); 30 CFR 924.10(b)(3).

^{4/} Indeed, that is why the Pennsylvania Department of Environmental Resources participated as a party plaintiff and the Commonwealth of Kentucky participated as an amicus in In re Surface Mining Litigation, supra, both arguing that the new VER definition should be invalidated.

test, so that all programs which had defined VER 5/ had necessarily, because of the consistency requirement, embraced the "all permits" test. See fn. 3, supra. The problem, however, is that as amendments to approved permanent state programs were processed throughout the period from 1983 to 1986, a number of individual state programs adopted the new "taking" test, which amendments were duly approved as "consistent with" the new OSMRE definition of VER. See, e.g., Illinois Adm. Code, Title 62, Part 1701, Appendix A; Virginia Rules, Part 480-03-19.700.5; West Virginia Code of State Reg., Title 38, 38-2-2.119. Thus, under OSMRE's present position, in these states the determination of the existence of VER on Federal lands in section 1272(e)(1) and (2) areas would be governed by the "taking" test.

The important point to remember, however, is that the only reason these states were allowed to adopt a "taking" test definition in the first place was because of the adoption in 1983, by the Department, of the same test. It would seem to me that, to the extent that Judge Flannery remanded the "taking" test definition to the Department because it was improperly promulgated, this action necessarily invalidated all state regulations which had been adopted "consistent" therewith. To the extent, therefore, that the Department seeks to utilize a taking test in such states, it is indirectly applying the same regulation which it could not directly apply at this time. See Harman Mining Corp. v. OSMRE, 659 F. Supp. 806, 810-11 (W.D. Va. 1987). 6/ Moreover, this approach turns "consistency" on its head by effectively requiring that the Federal definition be consistent with the state definition rather than vice-versa.

Appellant herein has argued that the Federal definition is, indeed, applicable to the determination of VER in this appeal. Appellant, however, contends that, because it made its application for a VER determination on March 24, 1986, the Federal "taking" definition should be applied, since it was not suspended until November 20, 1986. Appellant's position is clearly untenable.

First, the "taking" definition of VER was struck down by the District Court on March 22, 1985. See In re Surface Mining Litigation, supra. The November 20, 1986, suspension notice merely formalized what had already taken place. Even if OSMRE had never formally suspended the "taking" test, it would still have been of no force or effect, once the time for filing an appeal from the court's decision had elapsed. Thus, the Federal "taking" definition was clearly not applicable when appellant submitted its request for a VER determination.

5/ A few state programs did not define VER at all, while at least one, Kansas, had expressly cross-referenced the Federal definition. See Kansas Adm. Reg., 47-12-4.

6/ This is not to say that the Department could not ultimately choose to re-adopt the "taking" test. But it clearly has yet to do so. See 54 FR 30557 (July 21, 1989) withdrawing proposed definitions of VER for further study. As this Board has noted in the past, regulations can be applied only when they are in effect, not before they are promulgated or after they have been repealed. See Smelser v. BLM, 75 IBLA 44 (1983).

Moreover, even had appellant applied prior to the District Court's decision, it is abundantly clear that the regulation adopted in 1983 could not be applied on appeal. It is a truism, oft repeated by the Board, that duly promulgated regulations have the force and effect of law. But the key requisite for application of this doctrine is that the regulation must be "duly promulgated." The Court expressly found that the "taking" definition of VER was not duly promulgated. In re Surface Mining Litigation, *supra*. Therefore, it never had the force and effect of law. See United States v. Larionoff, 431 U.S. 864, 873 (1977); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936); United States v. Mississippi, 578 F. Supp. 348, 352 (S.D. Miss. 1984). Accordingly, while I agree with appellant that the Federal definition must apply, the only Federal definition which can be applied is the "good faith/all permits" test.

I recognize full well that the dispute over whether the state or Federal definition is applicable has no impact on the ultimate result of the instant case since the Commonwealth of Kentucky has retained the "good faith/all permits" definition of VER. Nevertheless, by adopting the position that it is the state definition rather than the Federal definition that applies, the Board is setting the stage for the eventual application of the "taking" test definition to Federal lands within section 1272(e)(1) and (2) areas in those states which have adopted that definition. ^{7/} Such an application would, to my mind, be manifestly contrary to applicable laws and properly promulgated regulations. Accordingly, while I concur in the result reached herein, I wish to record my firm disagreement with the rationale used to attain it.

James L. Burski
Administrative Judge

^{7/} There seems little room for doubt that the "good faith/all permits" definition is more restrictive than the "taking" test. Indeed, OSMRE implicitly recognized this point in the Nov. 20, 1986, suspension notice, wherein it stated: "In States where the State program provides for a 'takings' test, OSMRE will not process VER applications within units of the National Park System until a Federal rule is finalized. This decision is based on National Park Service concerns over potential impacts on such units." 51 FR 41955.

Leaving aside any question as to the lack of concern by the Fish and Wildlife Service over impacts in National Wildlife Refuges or the United States Forest Service as to impacts in the National Forests, this statement is a clear recognition that the "taking" test is less restrictive than the "good faith/all permits" test since application of the latter standard within units of the National Parks was not forestalled.

