

Continuous Rod Casting Lubricant—

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rod cast	
Oil and grease (alternate monitoring parameter).....	0.10	0.052

22. Sections 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Continuous Rod Casting Contact Cooling Water" to read as follows:

Continuous Rod Casting Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rod cast	
Oil and grease (alternate monitoring parameter).....	10	5.1

\$ 467.65 [Amended]

23. Section 467.65 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the table titled "Core" to read as follows:

SUBPART F

Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum drawn with emulsions or soaps	
Oil and grease (alternate monitoring parameter).....	25	12

[FR Doc. 88-29495 Filed 12-23-88; 8:45 am]
BILLING CODE 6560-50-M

Forest Restoration

Tuesday
December 27, 1988

Part IV

Department of the Interior

30 CFR Part 761

Surface Mining Control and Reclamation
Act of 1977; Proposed Rule and Notice
of Statement of Policy

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 761

Areas Unsuitable for Mining; Areas Designated by Act of Congress; Applicability of the Prohibitions of the Surface Mining Act to the Surface Impacts of Underground Coal Mining

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rules.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is proposing to amend those portions of its permanent program regulations at 30 CFR Part 761 which address the circumstances which constitute valid existing rights (VER) to mine in areas where Congress has otherwise prohibited mining under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSMRE is undertaking this action in response to a District Court's decision in Round III of the litigation on OSMRE's permanent program regulations. Specifically, OSMRE is proposing for review and comment two different options for the standard for VER: (1) VER exists when an applicant for a permit to conduct surface coal mining operations has, or had made a good faith effort to obtain, all necessary permits; or (2) VER exists when an applicant has a legal right to the coal resource and has authority to mine by the method intended, as determined by State law. The proposed rule also reorganizes the existing rule for clarity.

OSMRE is also proposing for review and comment a rulemaking proposal on the applicability of the prohibitions in section 522(e) of SMCRA to subsidence resulting from underground mining. Section 522(e) prohibits surface coal mining operations on certain lands and within specified distances of certain structures and facilities.

DATES: *Written comments:* OSMRE will accept written comments on the proposed rules until 5:00 p.m. eastern time on March 7, 1989.

Public hearings: Upon request, OSMRE will hold public hearings on the proposed rules within the comment period. OSMRE will accept requests for hearings until 5:00 p.m. eastern time on January 17, 1989.

Individuals wishing to attend but not testify at any hearing should contact the person identified under "FOR FURTHER INFORMATION CONTACT" beforehand to verify that the hearing will be held.

ADDRESSES: *Written comments:* Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record Room 5131L, 1100 L Street, NW., Washington, DC, or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131L, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

Public Hearings: The addresses and times for any hearings which may be scheduled will be announced prior to the hearings.

Requests for public hearings: Submit orally or in writing to the person and address specified under "FOR FURTHER INFORMATION CONTACT" by the time specified under "DATES."

FOR FURTHER INFORMATION CONTACT: Dr. Annetta Cheek or Mr. Dermot Winters, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; telephone Dr. Cheek at (202) 343-4006 and Mr. Winters at (202) 343-1928 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

II. Discussion of Proposed Rules

A. Areas Designated by Act of Congress—Valid Existing Rights

1. Background

2. Discussion of Proposed Rule

B. Applicability of the Prohibitions of SMCRA to the Surface Impacts of Underground Coal Mining

1. Background

2. Discussion of Proposed Rules Options

C. Environmental Impact Statement and Regulatory Impact Analysis

D. Effect in Federal Program States and on Indian Lands

III. Procedural Matters

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rules should be specific, should be confined to issues pertinent to the proposed rules, and should explain the reason for any recommended change. Where practicable, commenters should submit five copies of their comments (see "ADDRESSES"). Comments received after the close of the comment period (see "DATES") may not be considered or included in the Administrative Record for the final rules.

Public Hearings

OSMRE will hold public hearings on the proposed rules upon request only. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written copy of their testimony. To assist OSMRE in preparing appropriate responses, OSMRE also requests that persons who plan to testify submit to OSMRE, at the address previously specified for the submission of written comments (see "ADDRESSES"), an advance copy of their testimony.

II. Discussion of Proposed Rules

A. Areas Designated by Act of Congress—Valid Existing Rights

1. Background

Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*) (SMCRA, or the Act) prohibits surface coal mining operations in certain areas, subject to valid existing rights and except for those operations which existed on August 3, 1977. Lands designated by section 522(e)(1) include 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 designated under § 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress. Lands designated by sections 522(e) (2), (3), (4), and (5) include National Forests, publicly owned parks, properties listed on the National Register of Historic Places, 100-foot buffer zones around public roads and cemeteries, and 300-foot buffer zones around occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks.

The term "valid existing rights" is not defined in SMCRA. The legislative history "does not suggest that Congress did not intend to infringe on valid property rights or affect takings through section 522(e)." *NWF v. Hodel*, No. 84-5743, Slip. Op. at pp. 115-116 (D.C. Cir. 1988).

The following discussion relates the history of the major provisions in the current rule for which OSMRE is proposing substantive revisions. Other provisions are discussed only in section 2, *Discussion of Proposed Rule*. That section also discusses the reorganization of the rule which OSMRE is proposing.

Section 761.5(a)—Definition of "valid existing rights": OSMRE's first attempt to define VER in 1979 was an unsuccessful effort to limit the

exemption to those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary mining permits on or before August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for, and immediately adjacent to, a mining operation in existence prior to August 3, 1977 (30 CFR 761.5(a), 44 FR 15342 (March 13, 1979)).

On judicial review, the court remanded to the Secretary that portion of the definition requiring the property owner to have obtained all permits necessary to mine. Specifically, the court indicated that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test" (*In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144, Mem. Op. at 20 (D.D.C. February 26, 1980)). To comply with this opinion, OSMRE suspended the definition insofar as it required that all permits must have been obtained prior to August 3, 1977 (45 FR 51547, 51548 (August 4, 1980)). The suspension of suspension 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.

On June 10, 1982 (47 FR 25278), OSMRE proposed three major options for revising the definition of VER, including a "good faith/all permits" test, and three alternatives which were variations of the principal options. All of the proposed options were attempts to identify in a straightforward manner the class or classes of circumstances which would operate to establish VER under section 522(e). These tests are referred to as "mechanical" tests. Commenters on the proposed rule criticized each option as either too broad or too narrow, and many raised the issue of taking without compensation on one or more of the proposed options. These comments led OSMRE to examine the case law applying the "just compensation" clause of the Fifth Amendment. As a result of that examination, OSMRE stated that "because the courts refuse to prescribe set formulas for takings, OSMRE 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" (48 FR 41314 (September 14, 1983)). Therefore, on September 14, 1983, OSMRE promulgated a broad definition of VER which relied on a general "takings" standard (48 FR 41312).

On judicial review, the court held that the broad takings standard represented such a significant departure from the mechanical tests of the proposed rule that a new notice and comment period was necessary. *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. 1985) (hereinafter *In Re: Permanent (II)*). Accordingly, the court held that the promulgation of the VER definition in 30 CFR 761.5(a) violated the Administrative Procedure Act (APA), 5 U.S.C. 553, and remanded the definition to the Secretary for proper notice and comment (*In Re: Permanent (II)*, Mem. Op. at 11 (March 22, 1985)). In response to this order, OSMRE suspended the definition of VER in 30 CFR 761.5(a) (51 FR 41961 (November 20, 1986)).

The suspension generally had the effect of putting 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 suggestion that a good faith effort to obtain all permits would establish a VER. Accordingly, OSMRE has been making VER determinations in Federal program States and on Indian lands using the 1980 test. 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 in section 522(e)(1) or (e)(2) of the Act. Since 30 CFR 740.11(a) makes State programs applicable to Federal lands in that State, OSMRE has been using State program definitions of VER on Federal lands in States with approved programs.

Section 761.5(c)—"Needed for and adjacent" test. In its permanent program rules promulgated at 30 CFR 761.5(a)(2)(ii) on March 13, 1979, OSMRE introduced a provision known as the "needed for and adjacent" test for determining VER. Plaintiffs in *In Re: Permanent* (D.D.C. 1980), objected to the provision as unduly expanding the concept of valid existing rights. The court found that the "need and adjacent" component of the rules was consistent with Supreme Court decisions regarding taking of property, and determined that it was a rational method of allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations. (*In Re: Permanent*, Mem. Op. at 21 (February 26, 1980)).

The September 14, 1983 revised regulation included a similar provision (30 CFR 761.5(c), 48 FR 41315-41316).

The 1983 rules amplified the "needed for" portion of the 1979 rule by providing a definition of "needed for." Specifically, the 1983 rule removed the requirement that the operator had to have a right to the coal for which the exemption was sought prior to August 3, 1977. Additionally, the 1983 rule provided that "needed for" meant that the extension of mining was essential to make the surface coal mining operation as a whole economically viable (30 CFR 761.5(c) (1984)).

The court concluded that the rule as promulgated in 1983 did not have adequate notice and comment under the APA, because it was related to the overall VER definition remanded by the court and because nothing in the proposed rule suggested such an extension of the "needed for and adjacent" test. The court therefore remanded the test to the Secretary for notice and comment in accordance with the APA. In order to comply with the court's opinion, OSMRE suspended paragraph (c) of the definition of VER in 30 CFR 761.5 (51 FR 41961 (November 20, 1986)). This had the effect of returning to the "needed for and adjacent" test as promulgated in 1979.

Section 761.5(d)—Valid existing rights where prohibitions come into effect after August 3, 1977. Paragraph 761.5(d) was first promulgated on September 14, 1983. It provides for situations where areas come under the protection of section 522(e) after August 3, 1977. This provision has been called "continually created VER," and was intended to protect existing property interests where land came under the protection of section 522(e) sometime after the date SMCRA was passed. For example, if Congress were to designate a new National Forest or National Park, this provision would protect property interests that existed on the date the Park or Forest were created. Similarly, if after August 3, 1977, someone were to construct a home, highway, or any other feature or facility protected by section 522(e), the provision would protect all property interests that existed on the date the new section 522(e) protections came into existence. Section 761.5(d)(1) provides that VER shall be found if on the date the protection comes into existence a validly authorized surface coal mining operation exists on that area. Section 761.5(d)(2), now suspended, provided that VER shall be found if the prohibition as applied to the property interest would effect a taking which would require compensation under the Fifth or Fourteenth Amendments to the Constitution. In effect, then, § 761.5(d)(2) depended upon

the "takings" definition of VER promulgated in § 761.5(a) in 1983, discussed above.

In its 1985 decision cited above, the court upheld the basic concept of "continually created VER," but remanded for further notice and comment that portion of the regulation (§ 761.5(d)(2)) which incorporated the takings test of § 761.5(a). In order to comply with the court's decision, OSMRE suspended paragraph (d)(2) of the definition of VER in 30 CFR 761.5. (51 FR 41961 (November 20, 1986)). However, since paragraph (d)(1) was not suspended, there is still a provision that VER exists where an area comes under the protection of section 522(e) of the Act after August 3, 1977, if a validly authorized surface coal mining operation exists on that area on the date the prohibition against mining comes into existence. As expressed in § 761.5(d)(2), the concept of "continually created VER" was upheld in *NWF v. Hodel*, No. 84-5743, Slip. Op. at 116 (D.C. Cir. 1988).

Section 761.11—Areas where mining is prohibited or limited. Section 761.11(h) was promulgated on September 14, 1983 (48 FR 41349) in response to numerous comments from persons concerned that mining or drilling would occur in National Parks or other areas protected under section 522(e)(1) of the Act. Section 761.11(h) provides:

There will be no surface coal mining, permitting, licensing, or exploration of Federal lands in the National Park System, National Wildlife Refuge System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas, unless called for by Acts of Congress [Emphasis added.]

The District Court held that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in this context since section 522(e)(1) prohibits, subject to VER and except for operations existing on August 3, 1977, surface coal mining operations on any lands within the statutorily protected areas (*In Re: Permanent (II)*, Mem. Op. at 15 (March 22, 1985)). The court remanded the rule for lack of proper notice and comment under the APA. In response to the court's order, OSMRE suspended § 761.11(h) (51 FR 41961 (November 20, 1986)). As a result of the suspension, neither Federal nor private lands are subject to the prohibitions found in § 761.11(h).

2. Discussion of Proposed Rule

The rule proposed here provides two options for the definition of valid

existing rights in OSMRE's permanent program regulations at 30 CFR 761.5.

As discussed in the preceding section of this preamble, OSMRE has promulgated definitions of VER on two prior occasions: March 13, 1979 (44 FR 15342) and September 14, 1983 (48 FR 41312). Both of these regulations were remanded to the Secretary by the court. OSMRE has reconsidered the administrative record of these promulgations, as well as the legislative history of SMCRA and the various judicial opinions, in developing this proposed rule.

This proposed rule would affect all portions of the definition of "valid existing rights" found in the existing regulations. The proposed rule has been extensively reorganized for clarity and brevity. Substantive revisions are proposed for four concepts in the existing rule, those currently contained in §§ 761.5(a), 761.5(b), 761.5(c) and 761.5(d)(2). The remaining provisions have been reorganized and edited for consistency with other proposed revisions. A description of all rule changes OSMRE is proposing to its permanent program rules follows.

Introductory Statement—Definition of "valid existing rights". OSMRE is proposing a new introductory statement in the section on VER. This statement constitutes the basic definition of VER. Unlike earlier "definitions", it does not constitute a "test" which must be met for VER to be found. Rather, it simply defines VER as a right to conduct surface coal mining operations on lands on which, without such a right, mining operations would be prohibited. Subsequent paragraphs contain a set of standards against which individual cases would be measured, to determine whether this right exists.

Section 761.5(a)—Property rights. This proposed paragraph provides that a person shall demonstrate that there was a legal right to the coal resource for which VER is sought as of the date of the Act, or as of the date the prohibition against mining came into effect. This provision constitutes the property rights concept which has been an integral part of the VER definition since OSMRE first defined it in 1979. In order to demonstrate VER, a person must show possession of a conveyance, lease, deed, contract, or other document establishing a legal right to the mineral resource. The language "as of the date of the prohibition against mining came into effect" incorporates the "continually created" VER provision currently found in § 761.5(d).

Although this provision is rewritten and reorganized in this proposal, the basic intent and application are not

changed. Essentially, this provision protects property rights where a section 522(e) prohibition or limitation on mining did not exist on the date of enactment, but comes into existence at some later date. It means that in such cases the standards for determining whether VER exists, proposed in following sections, will be applied using the date the prohibition came into existence, rather than the date of the Act. The history of this provision is discussed in more detail above, in the "Background" section of this preamble.

Additionally, paragraph (a) specifies that interpretation of the terms of the documents relied upon to establish the rights to which this paragraph applies shall be based upon applicable State statutory or case law concerning interpretation of documents conveying such rights. The original promulgation of the definition of VER in 1979 included a paragraph discussing the interpretation of the terms of the document relied upon to establish VER. This paragraph was revised in 1983 at 30 CFR 761.5(e) and is discussed in detail in the preamble to that rule (48 FR 41315 (September 14, 1983)). By moving this provision to paragraph (a), OSMRE is not proposing any substantive changes to this paragraph.

Finally, this section specifies that in addition to the property rights test of paragraph (a), at least one of the standards listed in the succeeding subparagraphs, (a) (1) and (2), must be met by a person wishing to conduct surface coal mining operations on lands protected by section 522(e) of SMCRA in order to receive a determination that VER exists. This means that, except as to haulroads covered by paragraph (b), the property rights standard contained in paragraph (a) must be met by all applicants for VER, but that applicants are required to meet only one of the other two standards.

Section 761.5(a)(1)—"Needed for and immediately adjacent to" test. OSMRE is proposing to revise the "needed for and adjacent" test by making it substantially the same as the 1979 test. This proposal reinstates the requirement that the property rights in question must have been in existence on August 3, 1977 (or as of the date the section 522(e) prohibitions came into effect, as specified in proposed § 761.5(a), above). Additionally, OSMRE is proposing to remove the definition of "needed for" because we have determined that the definition does not help clarify the intent or application of these provisions. Finally, because of the reorganization of the proposed rule, the "needed for and

immediately adjacent to" provision would become § 761.5(a)(1).

Section 761.5(a)(2). OSMRE is proposing two options for the standards for VER in § 761.5(a)(2). Both of these options would apply to all lands designated in § 522(e) of SMCRA.

VER Option 1: Ownership and Authority Option

Section 761.5(a)(2)(i). Under this option OSMRE is proposing at § 761.5(a)(2)(i) that VER exists if the person can demonstrate the right, as determined by the laws of the State in which the mining would occur, to extract the coal by the method that person intends to use. The term "right to mine by the method intended" refers to whether the applicant has the necessary property rights to allow mining by the proposed method. For example, if the applicant proposed to mine by surface methods, the question would be whether the relevant conveyances have given the applicant all of the necessary rights to surface mine the coal, or whether the applicant lacks certain essential property rights or has obtained only the right to undertake underground mining. The right to mine by a certain method is an issue of property rights, and would be evaluated through consideration of the provisions of State property law as they applied to the particular situation.

Under this option, the existence of VER to extract coal would be a function of state property rights. It would not depend upon the holder of such rights having attempted to exercise them by the date of enactment of the Act, or by any other date. Thus an applicant for VER to extract coal would not be required to demonstrate that applications had been made for necessary permits by any particular date.

The standard proposed under this option would also accommodate Congress' concern that the Act not effect takings of property without compensation. As the D.C. Circuit Court of Appeals recently observed in *NWF v. Hodel*, *supra*, at pp. 115-116, the VER exception was included to protect valid property interests, as well as to avoid takings.

This option finds extensive support in the legislative history of the Surface Mining Act. In its discussions of VER in the legislative history, Congress affirmed on numerous occasions that valid existing property rights were to be preserved, and that the provisions of the bill were not intended to change such rights in any way.

Congress emphasized that the "language 'subject to valid existing rights' in section 522(e) is intended * * *

to make clear that the prohibition on strip mining * * * is subject to previous court interpretations of valid existing rights" (H.R. Rep. No. 218, 95th Cong., 1st sess., at 95 (1977)). In that context the House Report referred to the *Polino* decision (*United States v. Polino*, 131 F. Supp. 772 (N.D. W. Va. 1955)) as one example of a previous court interpretation which should be accepted. In that decision, the Federal district court held that the right to conduct surface mining in a National Forest was to be determined by State property law and that surface mining was not authorized under West Virginia law unless such rights were specifically established.

The language in the Senate report is slightly different. Without citing the *Polino* case, it states that the use of the phrase ["subject to valid existing rights"] "is intended to make clear that the prohibition of strip mining * * * is subject to previous state court interpretation of valid existing rights" (S. Rep. 95-128, 95th Cong., 1st sess., at 94 (1977)). Both reports demonstrate that Congress intended that there must be some deference to State law in determining what constituted VER. Thus, OSMRE is proposing an option for VER within lands affected by the prohibitions of section 522(e) based on and consistent with existing State law concerning property rights. OSMRE believes that it is consistent with Congressional intent for the VER exception to the prohibitions in section 522(e) to be interpreted in this manner.

Congress' deference to State property law is further evidenced by the removal of a provision from H.R. 2 in 1977. The provision removed was an amendment to H.R. 2 that was adopted by the Committee on Interior and Insular Affairs during the first session of the 95th Congress. The provision would have required the permit applicant to submit the written consent of a private surface owner or some other conveyance expressly granting the right to extract coal by surface mining methods. This amendment was intended to supersede the effect of prior State judicial interpretations of the broad form deed and would have imposed "a new concept of Federal property law in an area traditionally reserved to the States." (H.R. Rep. 95-218, 95th Cong., 1st sess., at 184, (1977)). However, this provision was not enacted.

OSMRE has reviewed the law of States where coal mining is conducted to determine whether adoption of the proposed rule would allow surface mining to occur where such a method was not contemplated at the time the mineral estate was severed from the

surface estate. Although generalization from this complex body of State law is difficult, it appears that in most States surface mining where the surface is not owned by the mineral owner is not authorized absent other evidence that such a mining method is consistent with the parties' intentions.

A decision by the Kentucky Supreme Court (*Akers v. Baldwin*, No. 85-SC-392-CL and 85-SC-422-TG, 736 S.W. 2d 294 (Ky., July 2, 1987)), overturned the Kentucky statute limiting mineral rights under certain "broad-form" deeds which do not specify the method of mining to be used. However, an amendment to the Kentucky State Constitution restricting broad form deeds has been adopted. OSMRE intends to evaluate the effect of the Kentucky constitutional amendment on OSMRE's proposed VER definitions.

Such a result was contemplated by Congress. A March 1975 colloquy between Congressman Udall of Arizona and Congressman Hechler of West Virginia concerning an earlier bill which was a predecessor to SMCRA directly addresses the issue of State law and broad form deeds. Mr. Hechler reported on a situation in West Virginia where coal companies which bought land many years ago were coming in and evicting home owners in order to mine the coal, without compensating the home owners. Mr. Hechler went on to request an amendment to the bill that would take care of the rights of homeowners on land where coal was subsequently discovered and the coal company wants to go in and mine. Mr. Udall replied that there had been prior testimony and controversy about the problem of the "so-called broad form deed, but a decision was made by the conferees that this is largely a matter of State property law and State constitutions, and that there is a serious question about the ability of the Federal government to move into such a situation" (121 Cong. Rec. H. 6679 (1975)).

Following this exchange, Congressman Latta of Ohio asked Mr. Udall if he understood correctly that "this bill does not deal with the situation * * * where a private citizen has sold the surface to the Federal Government and has retained the mineral rights." Mr. Latta asked whether "this bill would not in any way affect the mineral rights of that private citizen?" In response, Mr. Udall noted that "This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected."

id. Thus, in 1975, Congress clearly contemplated the preservation of mineral rights under State law, even where such rights were created by a broad form deed.

Section 761.5(a)(2)(ii). This option would also include, at § 761.5(a)(2)(ii), a standard for VER for preparation plants and other surface coal mining operations not involving the extraction of coal. The standard provides that VER exists for such facilities if the operator had authority to conduct such operations as of the date the section 522 prohibition became effective, as determined by the laws of the State.

This provision uses the phrase "authority to conduct the operations" rather than "right to mine." Determining whether an operator is entitled to conduct certain operations or operate particular offsite facilities may not involve determining whether and to what extent essential mineral rights have been obtained, since the operator may require only a surface property interest. It is likely that State law may have required the existence of some permit, such as a building permit or zoning permit or other specific authority to conduct that particular operation in that particular place. Whether all such applicable prerequisites to operation have been met appears to be the most relevant standard for determining whether the operator has VER for such facilities.

A separate provision for preparation plants and other surface coal mining operations not involving the extraction of coal is needed because a standard based on right to mine by the method intended cannot be applied to operations that do not actually involve the mining of coal. Therefore, this separate provision for such operations would be included if OSMRE promulgated Option 1. The rationale for basing VER in such situations on State law is the same as that discussed above for § 761.5(a)(2)(i). OSMRE specifically invites comments on the need to provide any test for VER for such facilities, and suggestions for modifications to the proposed test for such facilities such as a need to consider zoning restrictions which may have limited the potential uses of that surface estate.

VER Option 2: Good Faith-All Permits Option

Under this option, OSMRE is proposing at § 761.5(a)(2) that VER exists if the person desiring to conduct surface coal mining operations has, or has made a good faith effort to obtain, all necessary permits as of the date the prohibition against mining came into effect.

This definition of VER is similar to the one initially promulgated by OSMRE in its first rulemaking on this issue in 1979. That 1979 rule provided that VER consisted of having obtained all necessary permits. Judicial review of this rule (*In Re: Permanent*, Mem. Op. at 20 (February 26, 1980)) resulted in OSMRE issuing a notice suspending the requirement to have obtained all necessary permits, and substituting a requirement that a good faith effort had to have been made to obtain all necessary permits prior to the date the prohibitions went into effect (45 FR 51547, 51548 (August 4, 1980)). This decision is discussed above in the *Background* section. A good faith effort would be considered made if all necessary permits had been applied for prior to the date the prohibitions came into effect.

Transferability of VER. OSMRE has, from time to time, received inquiries about whether VER can be transferred from one owner to another. OSMRE has consistently responded to such inquiries in the affirmative. The property rights requirement in this proposed section remains consistent with that position and does not mean that the individual seeking VER must have had the legal right to the coal since the date of the Act, or since the date the prohibition against mining came into effect. To have VER someone must have had a specific right to the coal resource on the date of the Act, or the date the prohibition came into effect, whichever is applicable, and must also meet one of the standards of subparagraphs (a)(1) or (a)(2). However, if a person with a property interest in the coal on August 3, 1977, or as of the date the prohibitions against mining came into effect, had VER, that person may transfer the right to a successor after the date of the Act. The transferred right may suffice as the basis for a finding of VER for the successor in interest.

Section 761.5(b)—Haul roads. OSMRE's initial analysis of haul roads revealed that there were two situations in which VER might be established for haul roads. This analysis was discussed in the preamble to the first definition of VER, promulgated in 1979 at 30 CFR 761.5(b) (44 FR 14933 (March 13, 1979)). Except for renumbering, this provision has been unchanged since that promulgation. The only change proposed here is the addition of language clarifying that the "continually created VER" provision applies to haul roads. OSMRE believes that VER would exist if any of the prohibitions of section 522(e) of SMCRA were applied to existing haul roads in cases where the prohibitions

came into effect at some time subsequent to the date SMCRA was passed. Therefore, OSMRE is proposing to amend the haul road portion of the VER definition to provide that VER means (1) a recorded right of way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977, or as of the date the protection under § 522(e) came into effect, or (2) any other road in existence on August 3, 1977, or as of the date the protection under section 522(e) came into effect.

Section 761.5(d)(2)—Taking test. The proposed rule will, when promulgated as a final rule, have the effect of removing § 761.5(d)(2), which set forth a takings test for VER, and which was suspended by OSMRE (52 FR 41961 (November 20, 1986)).

Section 761.11(h)—Areas where mining is prohibited or limited. Section 761.11(h), which prohibits mining and other activities on Federal lands within section 522(e)(1) areas, was suspended on November 20, 1986 (51 FR 41961). OSMRE is proposing to remove this language as it is not needed to implement section 522(e)(1). Section 761.11(a) already prohibits surface coal mining operations within section 522(e)(1) areas unless an operator has VER and except for those operations existing on August 3, 1977.

In addition, the Department has made a commitment to prevent surface coal mining operations in the areas covered by section 522(e)(1) of SMCRA. The Department has a variety of tools to protect such lands, including purchase authority, authority to exchange private mineral rights for Federal lands within the same state, and condemnation. Furthermore, as a means of facilitating this policy the Department has proposed legislation which would give the Secretary the authority to exchange certain private coal rights in one State for Federal coal or other mineral rights in another State.

To emphasize the Department's commitment to prevent surface coal mining operations in section 522(e)(1) areas the Department is issuing a policy statement providing that if a person takes action to exercise valid existing rights under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 to conduct surface coal mining operations on 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 designated under section 5(a) of the Wild and Scenic Rivers Act, and

National Recreation Areas designated by Act of Congress, subject to appropriation the Secretary of the Interior will use available authorities to seek to acquire such rights through exchange, negotiated purchase, or condemnation.

As explained below, a totally new provision is being proposed at (h) which would specify the extent to which subsidence is prohibited by section 522(e) of the Act.

Standard for Federal VER

Determinations. In the November 20, 1986 Federal Register suspension notice, at 51 FR 41955, OSMRE stated that this rulemaking would address which VER definition would apply when OSMRE makes a VER determination concerning surface coal mining operations on Federal lands. The issue is whether the VER definitions contained in the approved State programs should apply to such Federally-made VER determinations, as is presently the case, or whether one standard should be used nationwide.

In part, the resolution of this issue depends upon what VER standard is ultimately adopted by OSMRE and whether State regulatory authorities will be required to amend their definitions to be consistent with OSMRE's definition. If all State regulatory authorities adopted OSMRE's VER definition, then the same VER definition would be used by OSMRE nationwide, regardless of whether OSMRE used each State program definition.

Comments are solicited on this issue, and also, to the extent determinable, on whether State regulatory authorities should be required to revise their definitions to conform with whatever definition OSMRE adopts.

B. Applicability of the Prohibitions of SMCRA to the Surface Impacts of Underground Coal Mining

1. Background

OSMRE is undertaking this rulemaking in part because of Citizen and Environmental Plaintiffs' assertion in the *In Re: Permanent (II)* challenge (which is discussed herein) that the existing rules implementing section 522(e) (4) and (5) of the Act, at 30 CFR 761.11 (d) through (g), are unclear as to the surface impacts of underground mining. Beyond clarifying existing rules, OSMRE is interested in examining policy, economic, environmental and legal considerations concerning application of the mining prohibitions in section 522(e) to subsidence resulting from underground mining. This rulemaking proposal, therefore, addresses the broader issue of whether

and to what degree subsidence is covered by the mining prohibitions set forth in section 522(e) of the Act. The issue is one of great interest and concern for the coal industry and various environmental and citizen groups because the final rule may have substantial economic or significant environmental consequences. Whether the rule would have such consequences depends on which standard for VER proposed for § 761.5(a) is chosen. If the standard for VER proposed in option 1 for § 761.5(a)(2) is adopted, most coal owners would have VER to remove coal by certain underground mining methods, and the prohibitions of section 522(e) of the Act would not apply to coal extraction using such methods. However, if the standard for VER proposed in option 2 for § 761.5(a)(2) is chosen most persons owning coal who did not apply by the applicable date for all necessary permits to conduct underground coal mining would not have VER and the prohibitions would apply.

OSMRE intends to develop rules that are compatible with SMCRA, unambiguous, reasonable to administer and, in striking a reasonable balance between legitimate competing interests, reflective of good public policy and Congressional intent. Two alternative section 522(e) rule options are proposed.

The issue of whether and to what extent subsidence is subject to the prohibitions of section 522(e) of SMCRA depends upon the interrelationship among sections 522(e), 701(28), and 516 of SMCRA and upon the scope of Secretarial discretion to define and interpret statutory provisions when applying the prohibitions to subsidence. Before undertaking the analysis, the next two sections of this preamble establish the context to this rulemaking by briefly describing the *In Re: Permanent (II)* litigation, and the interests potentially affected by this rulemaking.

In Re: Permanent (II). As mentioned earlier, this rulemaking derives in part from litigation concerning OSMRE's current rules. Environmental and citizen plaintiffs raised the issue of the applicability of the section 522(e) (4) and (5) prohibitions to underground mining when they contended in *In Re: Permanent (II)*, *supra*, that the regulations at 30 CFR 761.11 (d) through (g) do not "clearly and explicitly prohibit surface impacts of underground mining within the specified protected areas set forth in Section 522." (Citizen Plaintiffs' Mem. in Round III of *In Re: Permanent (II)*, at 56) Disagreement exists over whether and to what extent subsidence and underground coal

extraction operations which cause or are expected to cause subsidence are prohibited, if at all. Environmental and citizen groups have indicated they believe that all subsidence (and, by implication, all underground coal extraction operations expected to cause subsidence) is prohibited. On the other hand, industry groups have indicated that they believe that all subsidence and all underground coal extraction operations causing or expected to cause subsidence are not covered by the prohibitions. In its decision on the issue, the court affirmed the current regulations in §§ 761.11 (d) through (g), stating that they track the statutory language, while noting that the Secretary had committed to a new rulemaking (50 FR 13250 (April 3, 1985)) with respect to the impact of section 522(e) (4) and (5) on underground mining. *In Re: Permanent (II)*, Mem. Op. at 70 (July 15, 1985)).

Interests Affected. The coal industry is greatly concerned because of its perceptions about the potential impairment that applying the prohibitions to subsidence could pose to availability of minable reserves, and productivity, and particularly about the effect of such prohibitions on the longwall method of underground mining. The underground coal mining industry regards the increased use of longwall mining as essential to its future economic viability, inherently safer for underground workers, more productive, and much higher recovery ratio of the resource than the standard room and pillar method of mining. The longwall method results in planned, controlled, and almost immediate surface subsidence in contrast to the less predictable subsidence resulting from the room and pillar method of mining. However, longwall mining does not allow the operator to leave coal pillars for support beneath surface features, facilities, and structures. Thus, the coal industry is especially concerned about whether or not they would be able to mine beneath those structures and features enumerated in section 522(e) (4) and (5) since such are widely distributed in the eastern and midwestern coal fields.

Environmental and citizen groups have expressed opposition to the use by industry of longwall mining because they are concerned with the disruption and damage to buildings, surface uses and surface lands and other surface features and facilities. Consequently, they believe that all subsidence, in addition to the other surface impacts of underground mining, should be prohibited in the areas specified in

section 522(e) of the Act. Quite clearly these interests are at variance with those of the coal industry.

Further complicating the issue of conflicting interests are property rights conflicts which exist between surface estate and mineral estate owners under the varying laws of the different coal mining states. Especially troubling are those issues regarding the right to subside the surface and how and when that right may have been acquired by the mineral owner from a surface owner.

Because this rulemaking covers sections 522(e) (1), (2) and (3) areas, as well as (e) (4) and (5) areas, constituent groups interested in the protection afforded by all of section 522(e) could be affected by this rulemaking.

Statutory Analysis. The prohibitions of section 522(e) of SMCRA are established by general introductory language and the five subparagraphs (e)(1) through (e)(5). Subject to VER and except for operations existing on August 3, 1977, the general introductory language extends the prohibitions in each of the five subparagraphs to "surface coal mining operations." Thus an understanding of the definition of the term "surface coal mining operations" in section 701(28) is required to determine the scope of the prohibitions.

The term "surface coal mining operations" is defined in section 701(28) and includes certain aspects of underground coal mining. Section 701(28) states in relevant part:

"surface coal mining operations" means—
(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, * * * ;
and

(B) the areas upon which such activities disturb the natural land surface * * *

The terms "surface impacts incident to an underground coal mine" and "areas upon which such activities disturb the natural land surface" as they appear in section 701(28) (A) and (B), respectively, are not defined in SMCRA. In this proposal, OSMRE is suggesting two alternative options, each of which is based upon a slightly different statutory construction as to the degree of subsidence which is considered a surface coal mining operation. The first option treats subsidence as a surface coal mining operation only when it results in, or could reasonably be expected to result in, a functional impairment of the surface or surface features, facilities or structures. The second option treats as a surface coal mining operation any subsidence which affects, or could reasonably be expected

to affect, the surface, or surface features, facilities, or structures.

The Secretary has the authority to adopt either interpretation of the undefined terms if his interpretation is consistent with Congressional intent as evinced by the terms of the legislation, the overall statutory scheme, and the legislative history. Such Secretarial discretion recently has been strongly reaffirmed by the United States Court of Appeals for the District of Columbia Circuit at numerous places in its January 29, 1988 decision in *NWF v. Hodel*, No. 84-5743 (D.C. Cir. 1988). For example, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. at 842-43 (1984), the Court reaffirmed the principle that great deference should be given to the Secretary, in matters which Congress has left to the interpretation of the agency. *NWF v. Hodel*, No. 84-5743, at 95 and at 111.

OSMRE believes that the first option is legally supportable. No evidence exists that Congress was concerned about subsidence except where a functional impairment of surface use, facility, or value would occur. Section 516, the section of the Act expressly dealing with subsidence, treats subsidence as a surface impact to be regulated only to the extent that it (1) causes material damage (section 516(b) (1)), or (2) diminishes the value or the reasonably foreseeable uses of the surface (section 516(b) (1)), or (3) creates imminent danger (section 516(c)). The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. See, H.R. Rep. No. 218, 95th Cong., 1st sess. 126 (1977).

Further, inclusion of subsidence which does not cause material damage in the definition of "surface coal mining operations" at section 701(28) could be regarded as failing to accommodate congressional intent regarding underground mining and longwall mining in particular. The application of the prohibitions in section 522(e) to subsidence not causing material damage could substantially impede longwall and other full-extraction mining methods. The language of SMCRA demonstrates that Congress intended to encourage underground mining, and especially full-extraction methods such as longwall mining. In section 101(b) of SMCRA, 30 U.S.C. 1201(b), Congress found that "the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and

economically healthy underground mining industry; * * * ." With regard to this finding, in section 102(k), 30 U.S.C. 1202(k), Congress declared one purpose of SMCRA is to "encourage the full utilization of coal resources through the development and application of underground extraction technologies; * * * ." The legislative history also demonstrates congressional contemplation that SMCRA would allow full extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra*. Such techniques involve planned subsidence. Therefore, it is possible to conclude that Congress intended only subsidence which causes functional impairment to be regulated under SMCRA.

It is also possible to develop reasoning that the section 701(28) definition means that all measurable subsidence is included in the term "surface coal mining operations," is subject to regulation under section 516, as applicable.

Relevant Regulatory Provisions. The treatment of subsidence also should be examined in the context of existing rules and past agency interpretations. Sections 522(e) (4) and (5) are implemented by 30 CFR 761.11 (d) through (g) which provide that, subject to valid existing rights and an exemption for mines existing on August 3, 1977, no surface coal mining operations shall be conducted within the specified distances, "measured horizontally," of the listed features and facilities. The rules which became final on March 13, 1979 (44 FR 15343) prohibited (subject to certain exceptions) surface coal mining operations—

(d) Within 100 feet measured horizontally of the outside right-of-way line of any public road, * * *

(e) Within 300 feet measured horizontally from any occupied dwelling, * * *

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

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

With the exception of the placement of commas before and after the phrase "measured horizontally" in paragraphs (d) and (e), the above portions of the prohibitions were unchanged by OSMRE's 1983 regulatory revisions. It is clear because of the use of the phrase "measured horizontally" that in 1979 OSMRE did not intend to preclude

underground coal extraction activities beneath the areas protected by 30 CFR 761.11 (d) through (g). The language "measured horizontally," was added in response to a comment to clarify that underground mining beneath a public road would not be prohibited. In accepting the suggestion, OSMRE stated it believed mining under a road should not be prohibited where it would be "safe to do so" (44 FR 14994 (March 13, 1979)). Based upon the parallel construction, it seems that the "safe to do so" standard applied to all the §761.11 (d) through (g) areas. However, there was no further clarification as to what is meant by "safe to do so."

The Section 701(28) definition is implemented at 30 CFR 700.5. Section 700.5 defines "surface coal mining operations" as "Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine. * * *;" and "[T]he areas upon which the activities described in Paragraph (a) of this definition occur or where such activities disturb the natural land surface * * *."

The phrase "surface operations and * * * impacts incident to an underground mine," which is found in section 522(e)(2)(A) of SMCRA, is defined in 30 CFR 761.5 as " * * * all activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in 30 CFR 700.5 * * *." This definition was promulgated specifically to apply to 30 CFR 761.11(b), the rule which implements the section 522(e)(2) prohibition against mining on Federal lands in National forests. OSMRE indicated in its 1978-79 rulemaking that, at a minimum, subsidence causing material damage was prohibited in section 522(e)(2) areas (43 FR 41826 (September 18, 1978), and 44 FR 14990, (March 13, 1979) See also the comment response at 44 FR 14990 (March 13, 1979)). No regulatory definition for "surface operations and surface impacts incident to an underground mine," the phrase in § 701(28)(A) of SMCRA, has been established for any of the other section 511(e) areas.

2. Discussion of Proposed Rule Options

A discussion follows of the two section 522(e) options being considered in this proposed rule. These options

would have practical applicability to underground coal mines which do not have VER and did not exist on August 3, 1977. Irrespective of the option ultimately selected, subsidence will continue to be regulated by the permitting requirements at 30 CFR 784.20 and the performance standards at 30 CFR 817.121 and 817.122.

OSMRE also considered an option which would include a complete ban on underground extraction beneath protected areas and an option that would not apply the prohibitions of section 522(e) to subsidence at all (See scoping notice of June 19, 1985 (50 FR 25473)).

Section 522(e) Option 1: Subsidence causing material damage within the protected areas covered by the section 522(e) prohibitions.

Under this option only those underground coal extraction operations which produce, or are expected to produce, subsidence causing material damage in the section 522(e) areas would be prohibited. Material damage would be defined to mean a functional impairment of the surface, features, facilities, or structures. Thus, impairment of function would include, for example, diminution of values or of reasonably foreseeable use. It would also include any situation in which an imminent danger to person would be created. Subsidence which does not, or is not expected to, produce material damage in the section 522(e) areas would not be prohibited. Thus, if a permit applicant could satisfactorily demonstrate that an underground coal extraction operation would not reasonably be expected to produce subsidence causing material damage, the underground coal mining operation would not be prohibited. The degree of surface disturbances constituting material damage for certain section 522(e) areas may be very different from that for other section 522(e) areas. The material damage threshold would be implemented by creating a new 30 CFR 761.11(h) which would read:

(h) *Provided*, with regard to subsidence, this section applies to the extent such subsidence results in, or could reasonably be expected to result in, material damage to the land surface, or the protected features, facilities, or structures. Material damage means a functional impairment of the surface, features, facilities or structures.

A material damage threshold is consistent with a number of past agency actions. For instance, the 1979 rules did not prohibit underground mining in section 522(e) (4) and (5) areas because such mining should be allowed where it "would be safe to do so." (44 FR 14994

(March 13, 1979)). The material damage option also accords with the Department's position filed with the D.C. Circuit Court of Appeals in its December 24, 1980 brief in *In Re: Permanent Surface Mining Regulation Litigation* No.'s 80-1810, 80-1811, 80-1812, 80-1813, and 80-1823 (D.C. Cir.), at p. 135. The material damage threshold is also consistent with OSMRE's initial view of a VER request to mine in the Otter Creek Wilderness area, an area covered by the section 522(e)(i) prohibitions. In the May 1980 Affidavit of then-OSMRE Director Walter Heine submitted to the U.S. Court of Claims in *Otter Creek Coal Company v. U.S.*, No. 83-79L, Director Heine stated that "it is possible that a coal company could conduct underground coal mining operations to remove coal deposits underlying a wilderness area without violating the requirements of the Act." Following that statement, in a January 19, 1981 letter, OSMRE set forth the conditions under which mining would be allowed in the wilderness area. OSMRE stated that "[s]ubsidence from mining activities under wilderness areas is acceptable so long as it does not significantly affect surface features."

OSMRE continues to believe, as it has since promulgation of the final permanent program regulations on March 13, 1979, that individual determinations of what would constitute a functional impairment should be "left to the regulatory authority under its regulatory program, so that the term is applied in a manner appropriate for subsidence problems in each jurisdiction." (See 44 FR 15075, (March 13, 1979)). Thus, a determination of what would constitute "material damage" would be made by the regulatory authority on a case by case basis at the appropriate point in the regulatory process.

Under this option only subsidence causing material damage is a "surface impact" within the meaning of section 701(28). Only subsidence causing material damage would be included in the definition of "surface coal mining operations." If this option were adopted, only subsidence causing, or which could reasonably be expected to cause, material damage (i.e. resulting in functional impairment) would be subject to the section 522(e) prohibitions. Such an approach is consistent with the purposes of the Act, and especially section 516 which regulates only subsidence which causes problems on the surface.

Section 522(e) Option 2: Any subsidence which affects, or could reasonably be expected to affect, the

land surface, or protected features, facilities or structures is covered by the section 522(e) prohibitions.

Under this option all subsidence which affects, or could reasonably be expected to affect the section 522(e) areas would be prohibited. This option would have the effect of banning both underground coal extraction operations in the section 522(e) areas which cause or could cause subsidence, and underground coal extraction taking place outside of section 522(e) areas which could be expected to produce subsidence within those areas. (The concept of "angle of draw" as it relates to surface subsidence due to underground coal extraction is discussed in the draft EIS.) Planned subsidence and subsidence not producing material damage would also be prohibited in section 522(e) areas under this option. Consequently, all underground coal extraction operations producing or expected to produce any measurable degree of subsidence in the section 522(e) areas would be prohibited unless they existed on August 3, 1977, or could establish VER. Thus, the practical effect of this rule depends upon the VER definition adopted.

This option would be implemented by creating a new 30 CFR 761.11(h) which would read:

(h) *Provided*, with regard to subsidence, this section applies to any subsidence which affects, or could reasonably be expected to affect the land surface, or the protected features, facilities, or structures.

Under this option, any measurable subsidence would be considered a "surface impact" as used in the Act's section 701(28) definition of surface coal mining operations, which includes "surface impacts incident to an underground coal mine," and areas "where such activities disturb the natural land surface." This proposed option would establish that measurable subsidence is always a "surface coal mining operation." Therefore, under this option, subsidence would be subject to the section 522(e) prohibitions, and, indirectly, all underground coal extraction operations expected to result in subsidence would be subject to the section 522(e) prohibitions.

C. Environmental Impact Statement and Regulatory Impact Analysis

Following the April 3, 1985 Federal Register notice of intent to propose a rule, OSMRE published a "Notice of intent to prepare a draft environmental impact statement (EIS) and a preliminary regulatory impact analysis (RIA) and to hold scoping meetings" (50 FR 25473 (June 19, 1985)). Public scoping

meetings were held on August 1, 1985 in Pittsburgh, Pennsylvania, August 6, 1985 in St. Louis, Missouri, and on August 9, 1985 in Washington, DC. Public comments on the proposal were received through September 10, 1985. Based on comments received OSMRE decided to combine the VER and section 522(e) rules for purposes of analysis under the National Environmental Policy Act (NEPA). Subsequently a new scoping notice was published in the Federal Register (52 FR 2421 (January 22, 1987)). Comments received and both a draft EIS and a preliminary RIA have been prepared for public review and comment.

For an analysis of the economic and environmental consequences of alternative rule options the reader is referred to OSMRE's preliminary Regulatory Impact Analysis (RIA) and draft Environmental Impact Statement (EIS) which have been prepared in conjunction with this proposed rulemaking and may be examined in OSMRE's Administrative Record office. The draft EIS is also available upon request from Catherine Roy, Division of Technical Services (5121-L), 1951 Constitution Avenue NW., Washington, DC. 20240. Likewise, the preliminary RIA is available upon request from Nancy Broderick, Division of Technical Services (5121-L), 1951 Constitution Avenue NW., Washington, DC. 20240.

D. Effect in Federal Program States and on Indian Lands

The rules proposed today, if adopted, would be applicable through cross-referencing in those States with Federal programs and on Indian lands. The States with Federal programs are Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The Indian lands program appears at 30 CFR Part 750.

Comments are specifically solicited as to whether unique conditions exist in any of these States or on Indian lands relating to these proposed rules which should be reflected either as changes to the national rules or as specific amendments to any or all of the Federal programs or Indian lands program.

OSMRE has proposed (52 FR 39594 (October 22, 1987)) to implement a Federal program for the State of California. The proposed rule would apply through cross-referencing to the Federal program for California. Comments also are specifically solicited as to whether conditions exist in

California that should be reflected in the proposed Federal program for that State.

III. Procedural Matters

Federal Paperwork Reduction Act

There are no new information collection requirements in the proposed rules for 30 CFR Part 761 requiring submittal to the Office of Management and Budget under 44 U.S.C. 3507.

Executive Order 12291

The DOI has examined the proposed rules according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that they are major and do require a regulatory impact analysis. The determination was made previously in connection with the preparation of the notice of intent to conduct rulemaking and continues to be valid (50 FR 13250) (April 3, 1985); *see also* "Intent to Prepare a Draft Environmental Impact Statement and a Preliminary Regulatory Impact Analysis on the Proposed Rule Defining the Applicability of the Prohibitions in section 552 to Underground Coal Mining; Notice of Scoping Meeting," 50 FR 25473 (June 19, 1985)).

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rules will have significant economic impact on a substantial number of small entities and requires the preparation of an initial Small Entity Flexibility Analysis (SBFA) which is available in the Administrative Record. This too is a continuation of a determination made in April 1985 (50 FR 13250 (April 3, 1985)). The combined preliminary RIA and initial SBFA have been placed in the Administrative Record. The combined preliminary RIA and initial SBFA are available for inspection in the Administrative Record Office, Room 5131L, 1100 L Street, NW., Washington, DC.

National Environmental Policy Act

OSMRE has determined that the proposed rules require the preparation of an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) (50 FR 25473, (June 19, 1985)). The draft EIS is available for inspection in the Administrative Record, Room 5215, 1100 L Street, NW., Washington, DC. Single copies are available upon request from Catherine Roy, Division of Technical Services (5121-L), 1951 Constitution Avenue, NW., Washington, DC (telephone (202) 343-5143).

Executive Order 12630

In accordance with Executive Order 12630 (53 FR 8859, March 18, 1988) and the Attorney General's Guidelines For the Evaluation of Risk and Avoidance of Unanticipated Takings issued June 30, 1988, the Department has prepared a takings implication assessment (TIA). The TIA is available for inspection in the Administrative Record, Room 5215, 1100 L Street, NW., Washington, DC.

Effect on State Programs

Following promulgation of the final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of the Act to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

Agency Approval

Section 516(a) of the Act requires that, with regard to rules directed toward the surface effects of underground mining, OSMRE must obtain written concurrence from the head of the department which administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. OSMRE will obtain the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, on the final rule to be promulgated following analysis of public comments received on this proposal.

Authors

The authors of this regulation are Dr. Annetta Cheek, Division of Technical Services; and Mr. Dermot Winters, Regulatory Development and Issues Management Staff, Office of the Director, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone Dr. Cheek at (202) 343-4006; Telephone Mr. Winters at (202) 343-1928 (Commercial or FTS).

List of Subjects in 30 CFR Part 761

Coal mining, Historic preservation, Monuments and memorials, National forests, National parks, Surface mining, Underground mining, Wildlife refuges.

Accordingly, it is proposed that 30 CFR Part 761 be amended as set forth below.

Date: May 6, 1988.

James E. Cason,
Acting Assistant Secretary for Land and
Minerals Management.

SUBCHAPTER F—AREAS UNSUITABLE FOR MINING**PART 761—AREAS DESIGNATED BY ACT OF CONGRESS**

1. The authority citation for Part 761 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34.

2. The definition of valid existing rights in § 761.5 is revised to read as follows:

§ 761.5 Definitions.

* * * * *

Valid existing rights means that a person has a right, subject to the requirements of the Act, to conduct surface coal mining operations on lands where, in the absence of that right, such operations would be prohibited by section 522(e) of the Act. Valid existing rights shall be established by application of the following standards.

(a) Except as provided in paragraph (b) of this definition, to establish valid existing rights, a person intending to conduct surface coal mining operations which will extract coal on lands protected by section 522(e) of the Act shall demonstrate a legally binding conveyance, lease, deed, contract, or other document which establishes a right to the coal resource as of August 3, 1977, or as of the date of the prohibitions became effective for lands that come under the protection of section 522(e) of the Act at a subsequent date. Interpretation of the terms of the documents relied upon to establish the rights to which this paragraph applies shall ordinarily be based upon applicable State statutory or case law concerning interpretation of documents conveying such rights. In addition, a person intending to conduct surface coal mining operations on lands protected by section 522(e) of the Act shall demonstrate that one of the following standards is met.

(1) The coal is both needed for, and immediately adjacent to, a validly authorized surface coal mining operation existing as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective; or

Option 1: Ownership and Authority Option

(2) The person can demonstrate that, as of the date the section 522(e)

prohibitions became effective, he had, as determined by the laws of the State in which the mining would occur, (i) the right to extract the coal by the method he intends to use; or (ii) for preparation plants and other surface coal mining operations not involving the extraction of coal, the authority to operate the plants or conduct the operations.

Option 2: Good Faith-All Permits Option

(2) The person had, or had made a good faith effort to obtain, all necessary permits prior to the date the section 522(e) prohibitions became effective.

[End of option 2]

(b) For haul roads, valid existing rights means—

(1) A recorded right of way, recorded easement or a permit for a coal haul road recorded as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective, or

(2) Any other road in existence as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective.

3. Section 761.11 is amended by revising paragraph (h) to read as follows:

§ 761.11 Areas where mining is prohibited or limited.

* * * * *

Option 1: Section 522(e) Prohibitions Apply to Operations Which Are Expected to Result in Subsidence Causing Material Damage Within the Protected Areas

(h) *Provided*, with regard to subsidence, this section applies to the extent such subsidence results in, or could reasonably be expected to result in, material damage to the land surface, or the protected features, facilities or structures. Material damage means a functional impairment of the surface, features, facilities, or structures.

* * * * *

Option 2: Section 522(e) Prohibitions Apply To Underground Coal Extraction Operations Which are Expected to Cause Subsidence Within the Protected Areas

(h) *Provided*, with regard to subsidence, this section applies to any subsidence which affects, or could reasonably be expected to affect, the land surface, or the protected features, facilities or structures.

* * * * *

[FR Doc. 88-29547 Filed 12-22-88; 10:18 am]
BILLING CODE 4310-05-M

DEPARTMENT OF THE INTERIOR**Departmental Policy Pertaining to the Exercise of Valid Existing Rights in Areas Covered by Section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977****AGENCY:** Department of the Interior.**ACTION:** Notice of Statement of Policy.

SUMMARY: Section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et. seq.*) prohibits surface coal mining operations in certain areas, subject to valid existing rights and except for operations which existed on August 3, 1977. The policy outlined below specifically addresses situations where valid existing rights exist and are about to be exercised in an area that is protected under section 522(e)(1). This policy is also reflected and discussed in a proposed rulemaking

issued on this date by the Office of Surface Mining Reclamation and Enforcement, Department of the Interior, that addresses areas unsuitable for coal mining and defines valid existing rights. That rulemaking contains detailed background information and discussions of the applicable statutory provisions and issues that relate to this policy. The policy reads as follows.

Policy To Prevent Coal Mining in the Areas Covered by Section 522(e)(1) of the Surface Mining Control and Reclamation Act

If a person initiates action to exercise valid existing rights under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 to conduct surface coal mining operations on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National

Wilderness Preservation System, the National Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, and National Recreation Areas designated by Act of Congress, subject to appropriation the Secretary of the Interior will use available authorities to seek to acquire such rights through exchange, negotiated purchase or condemnation.

FOR FURTHER INFORMATION CONTACT:

Barbara Wyman, Special Assistant to the Assistant Secretary for Fish and Wildlife and Parks, 18th and C Streets NW., Washington, DC 20240; Telephone: 202-343-9211.

Date: September 22, 1988.

Earl E. Gjelde,

Under Secretary of the Interior.

[FR Doc. 88-29546 Filed 12-22-88; 10:18 am]

BILLING CODE 4310-70-M