OPINION NO. 90-056

Syllabus:

1. The definition of "valid existing rights" codified at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF) is a reasonable rule promulgated pursuant to R.C. 1513.02 and has the full force and effect of law for purposes of determining the existence of "valid existing rights" to conduct coal mining operations on non-federal lands in Ohio pursuant to R.C. 1513.073(D).

2. If a person holds a "valid existing right" to conduct coal mining operations pursuant to R.C. 1513.073(D), as such right is defined at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF), and has not exercised that right by establishing a coal mining operation as a nonconforming use, the valid existing right is not transferable to another person.

To: Joseph J. Sommer, Director, Ohio Department of Natural Resources, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September, 7, 1990

I have before me your request for my opinion regarding the meaning of the term "valid existing rights" ("VER") as used in R.C. 1513.073(D). R.C. 1513.073(D) states that "[a]fter August 3, 1977, and subject to valid existing rights, no coal mining operations except those that existed on August 3, 1977, shall be permitted" on certain lands, which include, *inter alia*, national parks and wildlife refuges, federal lands in national forests, publicly owned parks, national historic sites, 100 foot buffer zones around public roads and cemeteries, and 300 foot buffer zones around dwellings and certain buildings. This provision is part of the major revision of R.C. Chapter 1513 which was enacted in 1978 to conform the regulation of Ohio coal mining with the standards of the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Federal Act"), codified at 30 U.S.C. §§1201 *et seq.* *See* 1977-78 Ohio Laws, Part II, 3771, 3796 (Am. Sub. H.B. 1081, eff. Aug. 2, 1978) section 5 (uncodified). The language and the list of prohibited areas in R.C. 1513.073(D) is substantially the same as that found in §522(e) of the SMCRA, 30 U.S.C. §1272(e).[1]

VER is not statutorily defined in either the Federal Act or in Ohio law. The definition of VER currently promulgated at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF)[2] provides for the establishment of VER by one of two alternative tests, known as the "all permits" test and the "needed for and adjacent to" test. The relevant portion of Rule 1501:13-1-02(FFFFFF) states:

> "Valid existing rights" means:
> (1) Except for haul roads:
> (a) Those property rights of the applicant in existence on August

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[1] When enacted the federal Surface Mining Control and Reclamation Act ("SMCRA" or "the Federal Act") preempted all state regulation of surface coal mining and established August 3, 1977 as the effective date for the prohibitions of §522(e) of the SMCRA, 30 U.S.C. §1272(e). Thus, use of the same date in R.C. 1513.073(D) does not constitute retroactive legislation.

[2] I note that these provisions of the Ohio VER definition we.e first promulgated in 1982 at 2 Ohio Admin. Code 1501:13-3-02. *See* 1982-83 Ohio Monthly Record 101 (emergency rule), 376 (permanent rule). Effective October 1988, a provision dealing with VER in lands which have become prohibited areas after August 3, 1977 (known as continuing VER) was added to the definition and the entire definition was recodified at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF). 1987-88 Ohio Monthly Record 1472; *see also* 1988-89 Ohio Monthly Record 415 (repealing rule 1501:13-3-02 eff. Dec. 1, 1988).

> 3, 1977, that were created by a legally binding conveyance, lease, deed, contract, or other document which authorizes the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant, to produce coal by a mining operation; and
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> (b) The person proposing to conduct coal mining operations on such lands either:
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> (i) Had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or
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> (ii) Can demonstrate to the chief that the coal is both needed for, and immediately adjacent to, an ongoing coal mining operation for which all mine plan approvals and permits were obtained prior to August 3, 1977.

Thus, the Ohio rule requires that an applicant for a permit to mine in the legislatively prohibited areas must have held, as of August 3, 1977, not only the necessary property rights but also all necessary permits for either the land itself or the land immediately adjacent.

Pursuant to discussions between our respective staffs, we have identified your specific questions with respect to the meaning of VER under Ohio law as follows:

1. Is the Ohio definition of "valid existing rights," set out at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF), a valid rule governing the determination of VER under Ohio law?

2. Is a valid existing right transferable from one person to another, under Ohio law?

I begin my analysis of Rule 1501:13-1-02(FFFFFF) with the observation that "reasonable rules promulgated by an administrative body under a valid grant from the Legislature have the force and effect of law." *State ex rel. Kildow v. Industrial Comm'n*, 128 Ohio St. 573, 580, 192 N.E. 873, 876 (1934); *accord Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one). An administrative rule must give effect to the "unambiguously expressed intent" of the statute it interprets, but where the statute is silent or ambiguous, the standard of review is whether the agency's interpretation is based on a "permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *accord Sullivan v. Everhart*, 58 U.S.L.W. 4215, 4216 (U.S. Feb. 21, 1990). Thus, although other interpretations may be permissible, in the absence of clear error, the agency's rule must be given "the force and effect of law." *Kildow*.

As I have noted, VER is not statutorily defined. In order to effectively administer the statute, however, it is necessary to have a standard for determining whether an asserted right to mine is a valid existing right. *See generally Doyle*, 51 Ohio St. 3d at 554 N.E.2d at 99 ("[t]he purpose of administrative rulemaking is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly" (quoting *Carroll v. Department of Admin. Services*, 10 Ohio App. 3d 108, 110, 460 N.E.2d 704, 706 (Franklin County 1983))). Accordingly, the chief of the division of reclamation promulgated an administrative definition, pursuant to the rulemaking authority granted in R.C. 1513.02. A brief review of Ohio law with respect to the effect of governmental regulation of land use on the surface rights of the owner of a mineral estate shows that this definition is a reasonable interpretation of R.C. 1513.073(D).

It is an established principle of law that although governments may regulate land use, such regulations must protect preexisting vested rights in order to prevent an unconstitutional deprivation of property without due process of law. *See generally Curtiss v. City of Cleveland*, 170 Ohio St. 127, 163 N.E.2d 682 (1959); *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953). The meaning of preexisting vested rights has been developed in the Ohio case law dealing with the protection of such rights from the effects of local zoning and building code restrictions. *See generally* 1984 Op. Att'y Gen. No. 84-037 (discussing the vested rights doctrine in detail).

In the case of *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954) (syllabus, paragraph three), the court held that a township zoning ordinance can prohibit the use of a particular land area for coal mining operations when preexisting vested rights are recognized and protected. The same constitutional restraints apply when the state seeks to regulate the use of property rights. The provisions of R.C. 1513.073(D) restrict mining operations in certain areas of the state in the same manner as the zoning ordinance in *Juillerat* restricted such operations in certain areas of the township. Accordingly, it is reasonable for the chief of the division of reclamation to turn to the doctrine of preexisting vested rights in order to define the term "valid existing rights" in R.C. 1513.073(D).

Under Ohio law, "an owner of property has no *vested* right to use that property in any particular manner *unless that property has been devoted to that use prior to the regulation thereof.*" *Gibson v. City of Oberlin*, 171 Ohio St. 1, 5, 167 N.E.2d 651, 653 (1960) (emphasis added). In order to have actually used a property for mining before the prohibitions of R.C. 1513.073(D) came into effect, an individual would have needed both a property right to use the surface and a state permit. *See Skivolocki v. East Ohio Gas Co.*, 38 Ohio St. 2d 244, 251, 313 N.E.2d 374, 378-79 (1974) (extent of right to use the surface must be interpreted from the words and intent of the deed, because "the right to strip mine is not incident to the ownership of a mineral estate"); 1947 Ohio Laws 730 (H.B. 314, approved June 28, 1947) (imposing a permit requirement on strip mining operations by enactment of G.C. 898-206).[3] It follows that the definition of VER at Rule 1501:13-1-02 (FFFFFF) provides protection to preexisting vested rights by granting VER to all who held both property rights and the required permits as of the effective date of the prohibitions.

I note that, by basing the definition of VER on the holding of property rights and permits, the rule actually expands the class of protected rights beyond those vested by actual use of the property. Under Ohio law, an owner has a right to have a permit issued pursuant to regulations in effect at the time of the permit application, regardless of subsequently enacted restrictions. *Gibson* (syllabus, paragraph two); *accord Union Oil Co. v. City of Worthington*, 62 Ohio St. 2d 263, 264, 405 N.E.2d 277, 279 (1980). The permit does not in and of itself, however, establish the prior use which is protected by the vested rights doctrine. Rather, it creates only a right to establish that use, which then must be exercised by actual use in order to create the protected vested right, also known as a nonconforming use. *Torok v. Jones*, 5 Ohio St. 3d 31, 448 N.E.2d 819 (1983) (syllabus, paragraph two) ("property owner fails to acquire a vested right to complete construction and fails to establish a nonconforming use under a township zoning resolution where there has been no substantial change of position, or expenditures, or no significant incurrence of obligations in reliance on the zoning permit"); *Juillerat* (syllabus, paragraph four) ("[w]here no substantial nonconforming use is made of property, even though such use is contemplated and money is expended in preliminary work to that end [and owner holds a state license], a property owner acquires no vested right to such use and is deprived of none by the operation of a valid zoning ordinance [prohibiting strip-mining]"). Thus, an individual who holds both a property right and a permit may be prohibited from establishing an actual use as a result of land use regulations enacted after acquisition of the permit.

It is permissible, however, for a land use regulation to provide an exception for permit holders who have not yet established an actual use of their property. As stated by the court in *State ex rel. Bolce v. Hauser*, 111 Ohio St. 402, 408, 145 N.E. 851, 853 (1924):

> The city council might well recognize the fact that there were [permit] applicants who had secured plans and specifications, had filed the same

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3 The permit requirement has remained in the succeeding legislative schemes regulating surface mining. *See, e.g.*, 1949-50 Ohio Laws 634, 637 (Am. Sub. H.B. 150, approved July 23, 1949) (G.C. 898-228); 1953-54 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953) (recodification of G.C. 898-228 at R.C. 1513.07).

> with the building commissioner, and had expended money upon the faith of the building code as it theretofore existed. We see no reason why the city council could not recognize the fact that such a class existed, and therefore relieve those within the class from the operation and effect of a zoning ordinance adopted by it.

Given the time and investment required to bring a mining operation into actual existence, it is reasonable, absent legislative intent to the contrary, to interpret VER as including permit holders who had not established an actual mining use prior to August 3, 1977. Accordingly, I find that Rule 1501:13-1-02(FFFFFF), which recognizes VER in those persons who held both the property right and the necessary permits to conduct coal mining operations as of August 3, 1977, to be a permissible interpretation of R.C. 1513.073(D) under Ohio law.

It is possible, however, even though a regulation protects vested rights, for that regulation to restrict the use of particular property so severely that it results in a governmental taking of that property. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation can effect a taking if it "denies an owner economically viable use of his land"); *Negin v. Board of Building and Zoning Appeals*, 69 Ohio St. 2d 492, 497, 433 N.E.2d 165, 169 (1982) (zoning which renders property "useless for any practical purpose goes beyond mere limitation of use and becomes a confiscation"). Such a taking is constitutionally impermissible unless compensation is made. *Preseault v. Interstate Commerce Comm'n*, 58 U.S.L.W. 4193, 4196 (U.S. Feb. 21, 1990) (Fifth Amendment is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking" (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 305 (1987)). *See generally State ex rel. Killeen Realty Co. v. City of East Cleveland*, 169 Ohio St. 375, 380, 160 N.E.2d 1, 5 (1959) ("[a]t some undefinable point, regulation of property shades into taking of property which must be compensated"). If the taking cannot be compensated, the regulation cannot be constitutionally applied to particular property owners. *See, e.g., East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379, 143 N.E.2d 309 (1957) (township zoning ordinance prohibiting strip mining resulted in total confiscation of plaintiff's mineral rights and was unconstitutional but only as applied to plaintiff). *See generally First English Evangelical Lutheran Church*, 482 U.S. at 321 ("[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain").

There is no "set formula" for determining when a taking has occurred. Rather, the U.S. Supreme Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 295 (1981) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). If a court finds a taking has occurred, the court must further find that compensation is unavailable in order to declare the taking unconstitutional. *Preseault*. Thus, the determination of whether Rule 1501:13-1-02(FFFFFF) effects an impermissible taking of property, either on its face or as applied, involves a constitutional determination based on specific facts. The power to determine constitutionality of state law is exclusively judicial and not within the power of the Attorney General as a member of the executive branch of government. *See generally Maloney v. Rhodes*, 45 Ohio St. 2d 319, 324, 345 N.E.2d 407, 411 (1976); 1986 Op. Att'y Gen. No. 86-010 at 2-45; 1976 Op. Att'y Gen. No. 76-021 at 2-66. It is also inappropriate to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals. *See generally* 1988 Op. Att'y Gen. No. 88-008 at 2-27; 1986 Op. Att'y Gen. No. 86-039. These issues were considered, however, by an Ohio federal district court in the case of *Sunday Creek Coal Co. v. Hodel*, No. C-2-88-0416, slip op. (S.D. Ohio June 2, 1988). I am able, therefore, to address your concerns about the effect of the ruling in that case on the validity of Rule 1501:13-1-02(FFFFFF).

The *Sunday Creek* case involved the federal use of Ohio's VER definition to determine whether an applicant held valid existing rights to conduct a coal mining

operation on national forest land located in Ohio. In reversing the negative determination by the federal Office of Surface Mining and Reclamation Enforcement ("OSMRE"), the court found, as a matter of law that "OSMRE's adoption of a state standard which results in the denial of virtually all applications for a determination of valid existing rights is inconsistent with the congressional policy under the SMCRA. The agency's action was not a reasonable means of implementing the SMCRA and was arbitrary and capricious." *Sunday Creek*, slip op. at 8. The court further concluded that "OSMRE's adoption of the State of Ohio's standards for the determination of valid existing rights deprived the plaintiff of its property without just compensation in violation of the Fifth Amendment to the United States Constitution." *Id.*, slip op. at 8.

As the language of the *Sunday Creek* opinion indicates, its findings pertain to the federal adoption of Ohio's VER definition rather than directly to the definition itself. The facts applicable to an analysis of federal use of Ohio's VER definition, however, differ from the facts applicable to an analysis of Ohio's VER definition used in the context of Ohio law. In order to understand this distinction, it is helpful to review the relationship between state and federal regulation of coal mining operations and some of the historical background thereto.

The federal SMCRA establishes minimum nationwide standards "to protect society and the environment from the adverse effects of surface coal mining operations...." §102(a) SMCRA, 30 U.S.C. §1202(a). Rather than completely preempt state regulation in this field, however, the SMCRA provides that states with federally approved "state programs" shall exercise permanent regulatory authority over surface coal mining operations on non-federal lands within their borders. §503 SMCRA, 30 U.S.C. §1253. States with approved programs may also enter into cooperative agreements with the federal government, pursuant to §523(c), SMCRA, 30 U.S.C. §1273(c), whereby the state acquires some regulatory authority over federal lands within the state.

R.C. 1513.073(D) and Rule 1501:13-1-02(FFFFFF) are part of the federally approved "state program" under which Ohio has acquired permanent regulatory authority over the surface coal mining operations on non-federal lands within its borders. *See* 30 C.F.R. Part 935 (federal approval of Ohio program and amendments thereto); 1977-78 Ohio Laws, Part II, 3771 (Am. Sub. H.B. 1081, eff. Aug. 2, 1978) title and section 5 (uncodified) (enacting amendments to preexisting R.C. Chapter 1513 for the stated purpose of retaining Ohio's jurisdiction over strip mining and surface impacts incident to underground mining in compliance with the requirements of the SMCRA).[4] With respect to federal lands in Ohio, the state has entered into a cooperative agreement with the federal government. *See* 30 C.F.R. §935.30 (text of cooperative agreement). Pursuant to §523 of the SMCRA, 30 U.S.C. §1273, and Article VI(B) of the agreement itself, 30 C.F.R. §935.30, however, the Secretary of the Department of Interior, acting through OSMRE, retains the responsibility of determining whether mining on such federal lands is prohibited by the requirements of §522(e) of the SMCRA, 30 U.S.C. §1272(e). Thus, since approval of Ohio's regulatory program in 1982, the Ohio division of reclamation has been using the "all permits" and "needed for and adjacent to" tests, now codified at Rule 1501:13-1-02(FFFFFF), to make VER determinations with respect to non-federal lands in Ohio.[5] With respect to federal lands in Ohio, however, OSMRE has made VER determinations[6] pursuant to the applicable federal regulatory definition of VER.

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4 *See also* 47 Fed. Reg. 34688 (1982) (promulgation of approval of Ohio plan); 53 Fed. Reg. 51544 (1988) (federal approval of recodification and amendment of Ohio VER definition [*see* n.1, *supra*]); 1979-80 Ohio Laws, Part II, 4459 (Am. Sub. H.B. 1051, eff. April 9, 1981) title (enacting amendments to R.C. Chapter 1513 to achieve compliance with the SMCRA).

5 2 Ohio Admin. Code 1501:13-3-04 (procedure for the division of reclamation to make VER determinations).

6 30 C.F.R. §740.4(a)(4) (Secretary to make VER determinations for federal lands).

The plaintiff's claim in *Sunday Creek* arose because of changes in the federal definition of VER. Although the "all permits" and "needed for and adjacent to" tests have always been a part of Ohio's definition, the federal definition has been less constant, due both to the pressures of litigation and to executive policy shifts reflective of the changes in administration after passage of the SMCRA.[7] At the time the Ohio definition of VER was promulgated, *see* 1982 Ohio Monthly Record 101 (emergency rule), 376 (permanent rule), and approved by the Secretary of the Interior, it mirrored the language of the federal regulation then in effect. 44 Fed. Reg. 15342 (1979) (promulgating definition of VER with permit tests); *see also* 47 Fed. Reg. 34714 (1982) (approval of Ohio rule, noting that the Ohio definition of VER included both the "all permits" and "needed for and adjacent to" tests which appeared in the 1979 promulgation of 30 C.F.R. 761.5). In response to the decision of the District Court of the District of Columbia in *In Re: Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) 1083 (D.D.C. Feb. 26, 1980) (mem. op.), the Secretary suspended the 1979 definition of VER to the extent that it required all permits to have been obtained prior to August 3, 1977 and gave notice that pending further rulemaking, he would interpret the regulation "as requiring a good faith effort to obtain all permits" by that date. 45 Fed. Reg. 51548 (1980).[8] The Ohio division of reclamation interprets Rule 1501:13-1-02(FFFFFF) in the same fashion. *See generally Hauser v. State ex rel. Endman*, 113 Ohio St. 662, 150 N.E. 42 (1925) (if a permit would have been issued but for government inaction on an application filed under a prior regulatory scheme, subsequent restrictions cannot defeat right to the permit).

Rather than incorporating the modification suggested by the district court in the 1980 *Permanent Surface Mining* decision, however, the new federal regulation promulgated in 1983 abandoned the "all permits" and "needed for and adjacent to" tests and provided instead for the establishment of VER in any instance where prohibiting mining would result in a compensable taking of property under the Fifth and Fourteenth Amendments of the U.S. Constitution. 48 Fed. Reg. 41312, 41349 (1983) (promulgating 30 C.F.R. 761.5). The District Court of the District of Columbia held that the promulgation of this new "takings" test violated the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. §553. *In re: Permanent Surface Mining Regulation Litigation*, 22 Env't Rep. Cas. (BNA) 1557 (D.D.C. March 22, 1985) (mem. op.). Pending proper repromulgation of the "takings" test, the Secretary gave notice that, with respect to federal lands in states with approved regulatory programs, VER determinations would be made using the definition in the state program. 51 Fed. Reg. 41954 (1986).[9] It is pursuant to this

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[7] A review of the litigation and administrative policy with respect to VER can be found at 53 Fed. Reg. 52374 (1988). Several cases have also noted the litigation and administrative policy changes with respect to both VER and the SMCRA in general. *See, e.g., Illinois South Project, Inc. v. Hodel*, 844 F.2d 1286, 1287-89 (7th Cir. 1988); *National Wildlife Federation v. Hodel*, 839 F.2d 694, 701-02 and n.4 (D.C. Cir. 1988).

[8] The court held, in *In Re: Permanent Surface Mining Regulation Litigation*, 14 Env't Rep. Cas. (BNA) 1083, 1091 (D.D.C. Feb. 26, 1980) (mem. op.), that "[t]he court believes that a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test. The court therefore remands 30 C.F.R. §761.5(a)(2)(i) to the Secretary for revision." The court further ordered the Secretary to disapprove state plans containing remanded rules. On August 15, 1980, the court issued a stay of the order to disapprove such state plans if, *inter alia*, the rules therein were adopted by valid state rulemaking after the court's February 26 remand. *See* 45 Fed. Reg. 64963-64 (1980). Thus Ohio's rule incorporating the all permits test, promulgated in 1982, n.1, *supra*, could be approved by the Secretary, even though the federal rule on which it was based had been remanded.

[9] Although the invalidation of the "takings" test effectively reinstated the earlier "all permits" and "needed for and adjacent to" tests, the Secretary declined to operate under the earlier rule. *See Illinois South*

1986 notice, as elaborated in Temporary Directive 88-1 (OSMRE Jan. 2, 1988), that the plaintiff in *Sunday Creek* became subject to the Ohio definition of VER. *Sunday Creek*, slip. op. at 3.

The court's holding in *Sunday Creek* must be understood in the context of the above facts. As an initial matter, I observe that *Sunday Creek* involved a challenge to federal use of Ohio's VER definition as applied rather than a facial challenge to the definition. Since the application of the Ohio definition will clearly result in the granting of VER in some instances, the plaintiff could not claim that mere adoption of the regulation constituted a violation of the Fifth Amendment takings clause.[10] The facial validity of the provisions of Ohio's VER definition can be inferred from the February 1980 decision in *In re: Permanent Surface Mining* which indicated that the "needed for and adjacent to" test and a good faith effort interpretation of the "all permits" test would be acceptable as a federal rule. *See* n.8, *supra*. I note additionally, that the District of Columbia Court of Appeals has rejected a facial challenge to an analogous federal "all permits" test for the granting of continuing VER with respect to lands which come under the protection of §522(e) of the SMCRA, 30 U.S.C. §1272(e), after the date of the Federal Act (e.g., a site included in the National Historic Register after 1977). *National Wildlife Federation v. Hodel*, 839 F.2d 694, 748-51 (D.C. Cir. 1988). Further, several state courts have upheld the validity of the "all permits" test in their state regulatory schemes in spite of the fluctuations in the federal rule and found that the "all permits" test as applied did not result in an unconstitutional taking. *See, e.g., Cogar v. Faerber*, 371 S.E.2d 321 (W.Va. 1988); *Willowbrook Mining Co. v. Commonwealth, Dep't of Envtl. Resources*, 92 Pa. Commw. 163, 499 A.2d 2 (1985). Therefore, as the *Sunday Creek* opinion interpreted the Ohio VER definition only as applied under federal law, its holdings must be interpreted in light of that application.

As a general rule, "as applied" analysis under Ohio law does not invalidate a land use regulation but merely precludes its application to the particular property involved. *See, e.g., East Fairfield Coal Co. v. Booth*, 166 Ohio St. 379, 143 N.E.2d 309 (1957). The legislature has linked the validity of state regulations under R.C. Chapter 1513, however, to the validity of the corresponding federal regulations as determined by the federal courts in Ohio. In 1981-82 Ohio Laws, Part I, 732, 781 (Am. Sub. S.B. 323, eff. March 18, 1983) section 4 (uncodified), the legislature has provided that:

> Provisions of Chapter 1513. of the Revised Code, or rules adopted thereunder, shall not apply to surface coal mining operations if comparable provisions of the "Surface Mining Control and Reclamation Act of 1977," 91 Stat. 446, 20 U.S.C. 1201, or regulations adopted

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Project Inc., 844 F.2d at 1289 ("[t]he 1979 regulation regained currency when the 1983 regulation died, but its prospective significance is cloudy. The Secretary's statement in 1985 did not suggest that he would apply that rule to any pending matter, because although procedurally valid the 1979 rule no longer expressed the Secretary's substantive views"); *see also Willowbrook Mining Co. v. Commonwealth, Dep't of Envtl. Resources*, 92 Pa. Commw. 163, 168-69, 499 A.2d 2, 5 (1985) (1979 Federal regulation was reinstated by nullification of 1983 regulation). I note that at the time the Secretary anticipated a repromulgation of the "takings" test. Due to yet another change in administration and issues raised during the notice and comment period, however, this proposed rule was withdrawn and no new rule has yet been promulgated. *See* 54 Fed. Reg. 30557 (1989).

[10] *See generally Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 295-97 (1981) (only issue in a facial takings challenge is whether "mere enactment" of the statute constitutes a taking (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980))); *accord Pennel v. City of San Jose*, 485 U.S. 1, 17-19 (1988) (Scalia, J., concurring in part and dissenting in part); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 494-495 (1987).

> thereunder, have been held, in a final judgment of a federal court sitting in Ohio, which judgment is not subject to appellate review due to expiration of the time for appeal or otherwise, and which judgment is not inconsistent with the judgment of a superior federal court, to exceed the powers granted to the congress of the United States by the constitution of the United States or to be otherwise unconstitutional.

I note first that the federal use of Ohio's definition does not make it a federal regulation adopted under the SMCRA. Thus, the *Sunday Creek* decision cannot be said to involve a federal regulation comparable to the Ohio rule and does not fall within a literal interpretation of section 4 of Am. Sub. S.B. 323. Even assuming *arguendo* that section 4 is applicable, however, I am of the opinion that the *Sunday Creek* court's analysis of Ohio's VER definition as applied did not have the effect of invalidating Rule 1501:13-1-02(FFFFFF) within the meaning of that section.

It is clear from the language of the findings in *Sunday Creek* that it was OSMRE's *adoption* of Ohio's VER definition which the court invalidated, rather than the definition itself. The 1983 federal regulation based on the "takings" test would have accorded VER status to some interests which would not have qualified under the 1979 "all permits" and "needed for and adjacent to" tests. *See generally Illinois South Project, Inc. v. Hodel*, 844 F.2d 1286 at 1289. Thus, the plaintiff in *Sunday Creek* would have been granted VER under the invalidated federal rule and presumably would again have VER once that rule was properly reinstated. Due to the economic factors involved in plaintiff's particular situation, however, the plaintifff could not delay the start of his mining operation on the federal lands in question. Thus, the plaintiff was denied the right to mine by OSMRE's interim adoption of the more restrictive Ohio definition, a result the court found arbitrary and capricious. *Sunday Creek*, slip op. at 8.

Clearly, these facts are not applicable to use of the Ohio definition by the division of reclamation with respect to non-federal lands in Ohio. Ohio's definition of VER has remained constant since its adoption and federal approval in 1982. I am aware of no state or federal cases challenging either the "all permits" or the "needed for and adjacent to" test in the context of its use as part of Ohio's regulatory scheme. It is apparent, however, that the degree of interference with "reasonable investment backed expectations," *Hodel v. Virginia Surface Mining*, 452 U.S. at 295, caused by use of Ohio's VER definition will vary, depending upon whether it is applied within the federal or the Ohio regulatory framework. Accordingly, the finding in *Sunday Creek* that federal use of Ohio's definition constituted a "taking" cannot be extended to the use of the same definition by the Ohio division of reclamation in the context of Ohio law. *See, e.g., Cogar*, 371 S.E.2d 321; *Willowbrook*, 92 Pa. Commw. 163, 499 A.2d 2 (state "all permits" test regulations found not to result in a "taking").

A close reading of *Sunday Creek* further indicates that the court's finding that an impermissible taking had occurred rests upon the court's construction of the SMCRA itself, rather than on constitutional limitations. As stated previously, the Fifth Amendment is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Preseault*, 58 U.S.L.W. at 4196 (quoting *First English Evangelical Lutheran Church*, 482 U.S. at 315). Thus, in order to find a violation of the Fifth Amendment takings clause, it must be shown not only that a taking has occurred, but also that no compensation will be available. *Preseault; Hodel v. Virginia Surface Mining*, 452 U.S. at 297 n.40. As a general rule, compensation for takings which occur pursuant to federal statutes, is available under the Tucker Act, 28 U.S.C. §1491(a),[11] unless the statutes exhibit an "unambiguous intention to withdraw the Tucker Act remedy." *Preseault*, 58 U.S.L.W. at 4196 (quoting *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1019

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[11] The Tucker Act, 28 USC §1491(a), gives the U.S. Claims Court jurisdiction over claims to recover damages from the federal government for constitutional claims, including takings.

(1984)). The SMCRA contains no language withdrawing claims thereunder from the Tucker Act grant of jurisdiction. *See, e.g., Whitney Benefits, Inc. v. U.S.*, 752 F.2d 1554, 1556 (Fed. Cir. 1985), *on remand*, 18 Cl. Ct. 394 (1989) (finding that applicable SMCRA provisions, which did not include either VER or the all permits tests, resulted in a compensable taking and granting money award under the Tucker Act), *nonsubstantive correction*, 20 Cl. Ct. 324 (1990). Thus, the *Sunday Creek* court's finding that use of Ohio's VER definition resulted in an uncompensable taking is inextricably bound to its finding that OSMRE's adoption of Ohio's definition "is inconsistent with the congressional policy under the SMCRA." *Sunday Creek*, slip op. at 8. This finding is a matter of statutory rather than constitutional construction. It is, therefore, not equivalent to declaring the use of the "all permits" and "needed for and adjacent to" tests to be unconstitutional. For all of the above reasons, I conclude that the Ohio definition of "valid existing rights" at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF) has not been invalidated by the federal court decision in *Sunday Creek* and therefore is the controlling law governing determinations of VER made by the Ohio division of reclamation with respect to non-federal lands in Ohio where mining is prohibited under R.C. 1513.073(D).[12]

I turn now to your second question in which you ask whether VER is transferable. You have informed me that the Ohio division of reclamation has consistently interpreted VER, as defined by Rule 1501:13-1-02(FFFFFF), as non-transferable. From the information provided with your request and by members of your staff, I understand that this interpretation is based upon the analogy of VER to preexisting vested rights. In the materials provided with your request, the division's position on the transferability of VER is explained as follows. An applicant who has VER, by virtue of having had both the property rights and necessary permits as of August 3, 1977, has had a right to establish a nonconforming use by actually beginning to mine after that date. An applicant who has failed to exercise that right, however, is viewed as having abandoned the nonconforming use and cannot, therefore, transfer the VER to a successor in interest who did not have the required property rights and permits as of August 3, 1977.

An agency's interpretation of its own rule is entitled to great deference as long as it is not in clear conflict with the law. *See generally United States v. City of Painesville*, 644 F.2d 1186, 1190 (6th Cir. 1981) ("[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous") *cert. denied*, 454 U.S. 894 (1981); *accord Cuyahoga County Bd. of Comm'rs v. Ford*, 35 Ohio App. 3d 88, 92, 520 N.E.2d 1, 5 (Cuyahoga County 1987). I have already noted that it is reasonable for the division to define VER by analogy to preexisting vested rights. Further review of the vested rights doctrine shows that the division's interpretation of that administrative definition is also reasonable.

Once established, a nonconforming use runs with the land and extends to successors in interest. *See City of Akron v. Klein*, 171 Ohio St. 207, 168 N.E.2d 564 (1960) (syllabus, paragraph six) (right to continue nonconforming business use in a residentially zoned district extends to subsequent business of the same kind, even though not a continuation or part of the particular business at the time of enactment); *Donham v. E.L.B. Inc.*, 8 Ohio Misc. 2d 31, 32, 457 N.E.2d 953, 955 (C.P. Clermont County 1983) ("[c]hange of ownership is not considered a change of use"). It is, however, the actual use of the land which creates a protected right to continue that nonconforming use by the successors in interest. *Gibson v. City of Oberlin*, 171 Ohio St. at 5, 167 N.E.2d at 653; *Smith v. Juillerat*, 161 Ohio St. 424, 119 N.E.2d 611 (1954) (syllabus, paragraph four). Because land use restrictions contemplate the gradual elimination of nonconforming uses, a period of non-use extinguishes the right to resume the nonconforming use. *See Petti v. City of Richmond Heights*, 5 Ohio St. 3d 129, 130, 449 N.E.2d 768, 769 (1983) (zoning contemplates gradual elimination of nonconforming uses); *City of Akron v. Chapman*, 160 Ohio St. 382, 388, 116 N.E.2d 697, 699 (1953) (denial of right to resume a nonconforming use after a period of nonuse has been upheld).

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12 I express no opinion on the effect of the court's decision on VER determinations made by OSMRE. *See generally* 1989 Op. Att'y Gen. No. 89-001, p.2-1, n.1 ("Attorney General is not empowered to provide authoritative interpretations of federal law").

A permit to engage in a land use which was lawful under preexisting law does not establish a nonconforming use, it merely creates a right to establish the nonconforming use. *Gibson*, 171 Ohio St. at 3, 167 N.E.2d at 653. By operation of Rule 1501:13-1-02(FFFFFF), the right of a permit holder to establish such a nonconforming use has been extended beyond August 3, 1977, when the prohibitions of R.C. 1513.073(D) went into effect. The right to establish a nonconforming use created by a preexisting permit, however, is also extinguished by nonuse. *Torok v. Jones*, 5 Ohio St. 3d 3, 448 N.E.2d 819 (1983) (syllabus, paragraph two) ("property owner fails to acquire a vested right to complete construction and *fails to establish a nonconforming use* under a township zoning resolution where there has been no substantial change of position, or expenditures, or no significant incurrence of obligations in reliance upon the zoning permit"). Thus if a holder of VER has failed to establish or maintain a coal mining operation on prohibited lands by exercising that VER, no nonconforming use which runs with the land has been established. *Torok; Klein; Juillerat*. The interpretation of the division of reclamation that such unused VER cannot be transferred to a successor in interest is, therefore, fully consistent with Ohio law in this respect.

I note that once a mining operation has been established as a nonconforming use through the exercise of VER, the right to continue the operation as a nonconforming use extends to subsequent owners. *Klein*. From the materials provided, I understand that your interpretation of VER allows the transfer of such actually established mines as a nonconforming use. Accordingly, I find the division's interpretation of Rule 1501:13-1-02(FFFFFF) as excluding the transfer of unused VER not in conflict with Ohio law.

It is, therefore, my opinion and you are hereby advised that:

1. The definition of "valid existing rights" codified at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF) is a reasonable rule promulgated pursuant to R.C. 1513.02 and has the full force and effect of law for purposes of determining the existence of "valid existing rights" to conduct coal mining operations on non-federal lands in Ohio pursuant to R.C. 1513.073(D).

2. If a person holds a "valid existing right" to conduct coal mining operations pursuant to R.C. 1513.073(D), as such right is defined at 2 Ohio Admin. Code 1501:13-1-02(FFFFFF), and has not exercised that right by establishing a coal mining operation as a nonconforming use, the valid existing right is not transferable to another person.