

In those instances when Indian royalty coal is washed, transported, or sold under non-arm's-length conditions, it is necessary for MMS to obtain other data, and in some cases, appropriate sales contracts, to accurately determine if the value of coal and the gross proceeds for royalty calculation purposes have been correctly computed by the lessee. Coal sales contracts for Indian lands are required to be submitted only upon request by MMS. We estimate that four lessees may be requested to submit sales contracts and that each submission will take 3 hours to prepare, a total of 12 burden hours.

Authorization to deduct coal transportation and washing allowances continues for 12 months, or until the contract is changed or terminated. We estimate that recordkeeping for these allowances will require 1 hour per respondent annually (5 respondents  $\times$  1 hour = 5 burden hours). Therefore, the total annual burden hour estimate for this information collection is 18 burden hours (1+12+5=18).

Dated: November 20, 1997.

**Joan Killgore,**

*Acting Associate Director for Royalty Management.*

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### Request for Determination of Valid Existing Rights Within the Wayne National Forest

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

**ACTION:** Notice of decision.

**SUMMARY:** This notice announces the decision of the Office of Surface Mining Reclamation and Enforcement (OSM) on a request by Edward and Madeiline Blaire and Buckingham Coal Company, Inc. (Buckingham) for a determination of valid existing rights (VER) under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSM has determined that the requesters do possess VER to mine coal by surface methods on 25.2 acres of federal lands within the Wayne National Forest in Perry County, Ohio. This decision is based on the "takings standard," which requires OSM to evaluate whether a determination that the requester does not have VER would result in a compensable taking of a property interest under the Fifth Amendment to the U.S. Constitution.

**FOR FURTHER INFORMATION CONTACT:** Peter Michael, Office of Surface Mining Reclamation and Enforcement, Appalachian Regional Coordinating Center, Room 218, Three Parkway Center, Pittsburgh, PA 15220. Telephone: (412) 937-2867. E-mail address: pmichael@osmre.gov.

#### SUPPLEMENTARY INFORMATION:

##### I. Background on VER Requirements for National Forest Lands

Section 522(e) of SMCRA (30 U.S.C. 1272(e)) prohibits surface coal mining operations on certain lands unless a person has VER to conduct such operations or unless the operation was in existence on August 3, 1977, the date of enactment of SMCRA. Section 522(e)(2) in relevant part, applies the prohibition to federal lands within the boundaries of any national forest unless the Secretary of the Interior finds that (1) there are no significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations and (2) the surface operations and impacts are incident to an underground coal mine.

Under section 523 of the Act and 30 CFR 740.11, the state definition of VER applies to all federal lands in states with regulatory programs approved under section 503 of SMCRA. However, under 30 CFR 745.13, the Secretary has exclusive authority to determine VER for surface coal mining and reclamation operations on federal lands within the boundaries of the areas specified in paragraphs (e)(1) and (e)(2) of section 522 of the Act. OSM reaffirmed these basic principles in the preamble to the suspension notice concerning VER published on November 20, 1986 (51 FR 41954). However, to be consistent with a previous federal court decision concerning OSM's March 13, 1979 definition of VER, the preamble included the caveat that, in states with an all-permits standard for VER, OSM would apply the standard as if it contained a good-faith component. In other words, if the state program requires that a person obtain all necessary permits prior to August 3, 1977, to qualify for VER, OSM will apply the standard as if it recognizes that a person also has VER in situations where that person has made a good faith effort to obtain all necessary permits by that date.

The approved Ohio program relies primarily upon the all-permits standard. Ohio Revised Code 1501:13-3-02(A)(1)(a). However, the United States District Court for the Southern District of Ohio has prohibited OSM from using the state program definition or the

policy set forth in the November 20, 1986 suspension notice. *Belville Mining Co. v. Lujan*, No. C-1-89-790 (S.D. Ohio July 22, 1991), *modified*, Sept. 21, 1992. In separate litigation, the same court applied a takings standard to a VER determination. *Sunday Creek Coal Co. v. Hodel*, No. C12-88-0416 (S.D. Ohio 1988).

In the *Belville* litigation, OSM made a commitment to the court to apply a takings standard in determining whether a person possesses VER to conduct surface coal mining operations on federal lands within the court's jurisdiction, including the Wayne National Forest, until a new federal rule defining VER is in place. Therefore, in the Southern District of Ohio, under the takings standard, a person has VER if, as of the date of the lands come under the protection of section 522(e) of SMCRA, application of the prohibitions of section 522(e) would result in a compensable taking of property under the Fifth Amendment to the U.S. Constitution.

##### II. Request for VER Determination

On August 14, 1995, James F. Graham of Buckingham requested that OSM determine whether the company has VER to remove the No. 6 coal seam, using block cut, contour, and area mining methods, from 25.2 acres of federal lands within the authorized boundaries of the Wayne National Forest in Perry County, Ohio. Buckingham previously submitted an application for a permit to conduct surface mining and reclamation operations on this parcel and an adjoining 10.7 acres of land in private ownership to the Ohio Department of Natural Resources (ODNR), Division of Reclamation on March 8, 1995. Of the 35.9 acres in the permit application, Buckingham proposes to mine a total of 12.6 acres of coal. The federal government owns the surface overlying 9.8 of these acres.

The lands included in the request lie along the eastern edge of a 134-acre parcel for which the United States of America purchased the surface rights from Daniel C. Jenkins, Jr. and other interested parties on April 24, 1967, and the Blaires on May 1, 1967. The U.S. Department of Agriculture, Forest Service (USFS) currently manages the land as part of the Wayne National Forest. The Blaires own the mineral estate and Mr. Graham is the lessee of all coal within that estate.

The property extends from north to south along an ephemeral tributary of Pine Run and is about 1.8 miles northeast of the city of Shawnee, Ohio. Its southern limit is adjacent to County

Route 43. The center of the property lies on the boundary between Sections 11 and 14 on the New Straightsville, Ohio USGS Quadrangle.

The proposed permit area, including the federal lands, has been affected by past surface and underground mining of the No. 6 coal seam. Two unreclaimed highwalls and an impoundment remain on 5.1 acres at the southern end of the property. The coal which the requester proposes to surface mine comprises a line of barrier pillars in an abandoned underground mine beneath the Pine Run tributary. The requester estimates that the extractable coal reserves total 88,200 tons.

On August 28, 1995, OSM notified the USFS that it had received a request for a VER determination from Buckingham and requested that the USFS provide a title opinion and any related information concerning Buckingham's property right to mine coal by the methods proposed. By letter dated April 24, 1996, the USFS submitted a report from the U.S. Department of Agriculture's General Counsel that concluded that the Blaires do have the property right to remove the coal by surface mining methods. (A person must possess the right to conduct the proposed activity under state property law before OSM can issue a positive VER determination under SMCRA.)

In a notice published in the March 1, 1996 **Federal Register** (61 FR 8074), OSM provided opportunity for public comment on the Buckingham request. In response to a request for a public hearing from the Buckeye Forest Council, OSM reopened the public comment period by notice published in the July 16, 1996 **Federal Register** (61 FR 37078). The public hearing took place at the Ohio University Inn in Athens, Ohio on August 8, 1996. The comment period closed on August 16, 1996.

On September 16, 1996, OSM requested additional information from Buckingham. Buckingham forwarded supplemental information on September 17 and October 3, 1996. The October 3 submittal also added the Blaires as persons requesting the VER determination.

On May 27, 1997, OSM again requested that Buckingham and the Blaires provide additional information relating to the economic viability of the proposed surface mining operation and other potential uses for the property. On August 7, 1997, Buckingham and the Blaires supplied information responsive to the request after OSM agreed to treat the information as presumptively confidential and protected commercial or financial information within the

limitations of the Freedom of Information Act.

### III. The Applicable Standard

Pursuant to OSM's commitment to the court in the Southern District of Ohio, as set forth in the portion of this notice entitled "Background on VER Requirements for National Forest Lands," OSM evaluated Buckingham's request in accordance with judicial case law involving takings and the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, issued June 30, 1988. See 56 FR 33165 (July 18, 1991). Specifically, OSM relied upon a three-part regulatory takings analysis commonly used by the courts in deciding whether governmental action has effected a compensable taking of private property. This analysis includes a determination of: (1) The economic impact of the proposed government policy or action on the property interest involved, (2) the extent to which the action or regulation interferes with any reasonable, investment-backed expectations of the owner of the property interest, and (3) the character of the government action. Under the standard for compensable takings, OSM will not find that the Blaires have VER unless OSM makes either of two sets of findings. First, OSM could find that the Blaires have demonstrated that, as of August 3, 1977, application of the prohibition would preclude all economic use of the property. In the alternative, OSM could find that prohibition would not substantially advance a legitimate public purpose of SMCRA. Under the latter option, OSM would also have to find that the Blaires have demonstrated either that prohibition of surface coal mining would significantly diminish the property's value, or that prohibition would substantially interfere with the Blaires' investment-backed expectations. If the Blaires have VER to surface mine the 25.2 acres, then the lease to Buckingham would also convey VER to Buckingham.

### IV. Application of the Standard

This matter involves a situation where governmental regulation has the potential to result in a taking of private property. The rights of property owners are not absolute and government may, within limits, regulate the use of property. But, the United States Supreme Court has long held that regulation that affects the value, use, or transfer of property may constitute a taking if it goes too far. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In making the VER determination, OSM must decide whether prohibiting surface

coal mining on the property would cause economic impacts on the property or interfere with reasonable, investment-backed expectations of the persons with an interest in the property to the extent that justice and fairness would require that the public, rather than the private property owners, pay for the public use of the property. *Armstrong v. United States*, 364 U.S. 40, 49 (1959).

When regulation goes too far in infringing on private property rights is not precisely definable. The Supreme Court has consistently "eschewed any 'set formula' for determining how far is too far, preferring to 'engage in \* \* \* essentially ad hoc, factual inquiries.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). To aid in this determination, however, the Court has identified the three factors referenced in Part III above as having "particular significance." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986).

#### A. Protected Property Interest

In *Lucas*, the Supreme Court recognized what it characterized as a "logically antecedent inquiry" into a takings claimant's title prior to the inquiry into whether the government has interfered with rights inherent in that title in a manner that rises to the level of a Fifth Amendment taking. *Id.* at 1027. Thus, OSM starts with this inquiry.

The Court notes in *Lucas* that its takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over the 'bundle of rights' that they acquire when they obtain title to property." *Id.* at 1027. Thus, the Court continues, some regulation of rights should be expected. "In the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings," the possibility of significant impacts should be anticipated. *Id.* at 1027-28. But, the Court indicated that interests in land have greater expectations of protection. *Id.* at 1028. Further, the Court suggested that an "owner's reasonable expectations" may be critical to a takings determination. *Id.* at 1016 n. 7. These expectations are those that "have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution (or elimination of) value." *Id.* at 1016 n. 7.

In this case, the critical property interest is the mineral estate held by the Blaires. This is an interest in land historically accorded recognition and protection by the courts of Ohio, as well as all other states. This is not the type of interest that might normally be expected to be subject to deprivation without compensation. Thus, the Blaires possess title to an interest subject to Fifth Amendment protection.

#### *B. Economic Impact of the Prohibition*

Evaluation of the economic impact of a government action on a property interest involves determination of the economic and property interest or interests affected, the degree of the economic impact on the property interests, the character and present use of the property, the duration of the proposed governmental action, and whether the proposed government action carries benefits to the private property owner that offset or mitigate any adverse economic impact.

With respect to the property interest affected, OSM considers the relevant unit of property for analysis to be the land for which VER is requested and all other contiguous units of property under the same ownership and/or same use. See 56 FR 33161 (July 18, 1991). In this case, the relevant unit of property is the 134-acre tract of property for which the Blaires own the mineral estate.

The VER determination requested by the Blaires and Buckingham includes only 25.2 acres of this unit. The economic interest in this coal has been split, since the Blaires have leased the right to mine the coal at issue to Buckingham in return for a one dollar royalty per ton of the coal mined. Hence, the Blaires' place the value of their interest in the coal at \$88,200, based on an estimated 88,200 tons of recoverable coal. OSM's analysis confirms the requesters' estimate of the recoverable coal reserves. Administrative Record No. 206 (hereinafter, "A.R. \_\_\_\_"). Furthermore, OSM's evaluation of information provided by Buckingham concerning coal quality and overburden ratios confirms the proposed operation is economically viable, which means that the Blaires' royalty interest has economic value. (A.R. 219.)

With respect to Buckingham's interest, the company contends that the coal is a necessary and integral part of a larger operation. Specifically, the company states that it needs the low-sulfur coal from this property to blend with higher-sulfur coal from its other mines to meet contractual supply obligations with a local utility.

Buckingham further contends that it will suffer losses amounting to approximately 3.5 million dollars if it cannot mine the coal in question. This contention is based upon the assumption Buckingham will be unable to market the coal from its other reserves if it cannot blend this coal with the coal from the national forest tract.

OSM's analysis, however, finds that Buckingham may have other options with far less dramatic financial implications. (A.R. 220.) For example, obtaining low-sulfur coal from another source could reduce the projected financial impact by 90% or more. Alternatively, Buckingham might be able to renegotiate its supply contract and acquire sulfur dioxide emission allowances to package with its higher sulfur coal, which would reduce the potential losses by 67-90 percent. Under either option, OSM agrees that the company likely would sustain some lost profit potential if it cannot develop the proposed mine. However, it is not clear from the record what the loss in market value of the leased coal would be, as distinguished from lost profits in Buckingham's business dealings.<sup>1</sup>

Analysis of the economic impact of a prohibition on surface mining involves a number of factors. First, there cannot be a compensable taking unless there is a diminution in the value of the requesters' property rights. Thus, if the coal could be extracted by some other method, there may be no taking issue. If this is not possible, any value allegedly taken must be compared to other value in the property that has accrued or will accrue to the owners. If a prohibition would affect merely one strand of a bundle of property rights and would not be significant, there may be no taking. Thus, it must be determined whether the property proposed surface coal mining.

With respect to alternative methods of mining, the requesters claim that the absence of competent rock above the coal seam precludes underground mining. The requesters also dismiss auger mining as a viable alternative, because they contend that method is not suitable for the removal of pillars from abandoned underground mine workings.

After a technical review, OSM finds that underground mining is not feasible for this site because of stress relief fracturing, roof stability and water inflow problems. (A.R. 206.) In addition, because of the need to establish a face-

up to perform auger mining and due to the irregular shape of the remaining block of coal and the fact that entries have been cut through it in the past so that it is not solid, OSM agrees that auger mining is an unviable option for mining the coal.

Since alternative methods of mining are not possible here, other benefits derived from the property or other potential uses for the property are relevant. The 134-acre tract for which the Blaires own the mineral interest has previously been underground and/or surface mined. Maps in OSM's mine map repository indicate this mining was completed prior to 1940, which predates the current owners' acquisition of the property. Thus, the bulk of the use of the coal interest in this property has already been derived from the property by the Blaires' predecessors in interest. Prohibition of mining the remainder of the coal, then, would only deprive the Blaires of the use of the unmined pillars of coal.

OSM's investigation indicate there may be other recoverable coal from the No. 6 seam within the 134-acre tract. (A.R. 222.) The maps in OSM's mine map repository show barrier pillars along Pine Run which, if still existing, may be surface mineable. The record provides no further information on the value of that coal. In addition, the 1961 New Straightsville USGS topographic quadrangle indicates that surface mining has already occurred along both sides of the run. In any event, any remaining coal could not be surface mined absent a VER determination. Underground extraction of the remainder of the workings appears infeasible because of mine-stability and safety considerations, as well as the low percentage of coal remaining. (A.R. 222.)

Published geologic maps and cross sections for Ohio indicate the potential existence of other seams below the No. 6 coal seam. However, there has been little interest in mining these seams to date and ODNR has no records of marketable coal beneath the No. 6 seam in Perry County. (A.R. 222.) An ODNR geologist advised that the occurrence of these coal beds is spotty and, where present, the quality of the coal can change significantly between locations. (A.R. 222.) Thus, there is no data to indicate any value in lower coal seams in which the Blaires may have an interest.

Other potential uses of the mineral estate include oil and gas production. The Blaires receive royalties from two wells operating since 1987 on the 134-acre tract of land. Another well drilled on the property proved economically unproductive. The wells tap the Clinton

<sup>1</sup> In any case, as noted below, OSM did not base its decision on the economic impacts of prohibition of mining on Buckingham's current property interests, but rather on the property interests that existed on August 3, 1977.

sandstone, which is the most productive oil and gas deposit in the region. Income from the two economically productive wells has been modest. Based on the state's regulatory restrictions on spacing of oil and gas wells and information provided by the Blaires concerning performance of the existing wells, OSM determined that the Blaires could potentially develop two or three additional wells on the property, the value of which, with the existing wells, would likely be approximately the same as the value of the coal royalties the Blaires expect to receive from their coal interest. (A.R. 221.) Other deposits may exist, but their presence and recoverability are entirely speculative.

Clay also exists on the property, with the shallowest deposit located immediately underneath the No. 6 coal seam. However, the market for clay is limited (Perry County produced less than 18,000 tons in the last two years combined) and its value is low, generally about one-fifth that of coal. (A.R. 222.) Most clay mining occurs in conjunction with coal mining and is secondary to the coal mining. In addition, the requesters state that the type of clay on the property is not in demand, so no market exists. Therefore, OSM finds that the record (including available market and geologic information) indicates that the clay on the property is not economically recoverable and that clay mining does not constitute a reasonable alternative use of the property.

Based on the record before it and on the analysis in this decision, OSM finds that application of the 552(e)(2) prohibition to the Blaires property (the mineral estate of the 134-acre parcel) would not deny the Blaires all economic use of the property in question. In particular, OSM finds that predecessors in interest to the Blaires have already made reasonable economic use of the coal rights on the 134 acres, because the record shows that the coal on this property has already been underground and surface mined. Further, OSM finds that the Blaires are making economic use of the oil and gas rights they hold in the 134 acres by means of two operating oil and gas wells and available information indicates the Blaires could potentially operate as many as three more wells on their property.

However, because the remaining coal on the Blaires property can only be mined by surface methods, OSM also concludes that a negative VER determination would preclude recovery of the remaining coal, and therefore would cause diminution in the value of the Blaires' property.

### *C. Interference With Reasonable, Investment-Backed Expectations*

This element of the standard taking analysis requires an evaluation of (1) the owner's demonstrated expectations for use of the property, (2) whether the expectations are reasonable and investment-backed, and (3) the degree to which the government action interferes with these expectations.

The Blaires cite the acquisition of the property with an expectation of mining, contending that the coal was the principal value of the mineral estate. Buckingham points to its investment of resources in preparation of a permit application, as well as significant additional investments in an integrated mining operation that it claims relies upon access to the high sulfur coal under the national forest tract. Buckingham invested significant resources (several million dollars) in both acquiring the contract to be served by the integrated operation, and in establishing the mining operation.<sup>2</sup>

While the Blaires may have had expectations of exploiting the mineral interest when they acquired the property, it appears their acquisition was by inheritance and, consequently involved no investment. Presumably, the purchase they cite was the original purchase by the predecessor in interest. OSM does not consider this an investment by the Blaires, and therefore concludes that the record does not demonstrate that the Blaires have investment-backed expectations.

### *D. Character of the Government Action*

This element of the takings analysis requires an evaluation of (1) the intended purpose of the enabling statute, (2) whether the action will substantially advance a legitimate public purpose, and (3) the degree to which the regulated activity contributes to a harm that the governmental action is designed to address.

The public purpose in this matter is Congress' intent to protest federal lands in national forests from the harmful affects of surface coal mining operations. The prohibition, specified in section 522(e)(2) of SMCRA, is based on Congress' determination that federal lands in the national forests are places that are generally incompatible with surface coal mining operations. *See* S. Rep. No. 95-128, at 55 (1977). Congress was concerned that mining might destroy the land's potential for other equally or more desirable land uses. *Id.*

<sup>2</sup> OSM did not base its decision on evaluation of the investment-backed expectations of Buckingham, because Buckingham did not hold the coal rights on August 3, 1977.

For purposes of this takings analysis, OSM will assess the degree to which the mining of this specific property would contribute to the harm Congress proposed to address by prohibiting mining. This determination, then, must address the intended uses, purposes and values of this particular national forest land.

The United States acquired the surface rights to this parcel pursuant to the Weeks Forestry Act of 1911, 16 U.S.C. § 515. The Weeks Act authorized the Secretary of Agriculture to "purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber." *Id.* Thus, the principal purposes for acquiring land for the national forests under this Act were to provide watershed control and to ensure a national timber supply. But, over time, the uses, purposes and values of the national forests have expanded. In the Multiple-Use Sustained-Yield Act of 1960, Congress expressed its policy "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528. The Secretary of Agriculture was further "directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. Accordingly, the current purpose of national forest lands is to provide a diversified, multiple use of the forest resources. Pursuant to the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act, national forest administrators are required to prepare forest management plans. 16 U.S.C. § 1604. The Wayne National Forest has such a plan. This plan provides guidance on the uses, purposes and values of lands within the forest. The tract at issue here is included in Management Area 3.3, which has a designated management goal of providing (1) high-quality hardwoods on a sustained-yield basis; (2) wildlife habitat diversity, favoring species that require mature and overmature hardwoods; and (3) dispersed recreational activities, such as hiking, horseback riding and hunting. Forest areas managed for these purposes are intended to be in blocks of 1,000 acres or larger. Provision is made for mineral exploration and extraction.

More general statements in the forest plan recognize the existence of considerable private mineral ownership

on federal lands within the national forest. The plan does not specifically address surface coal mining, but it does refer to the possibility of surface mining and recognizes that mineral extraction will occur throughout the forest. With respect to minerals, the forest management goal provides that the USFS administer private mineral rights so that all activities and operations are prudently consistent with the best private management practices.

The persons requesting the VER determination claim that the proposed surface coal mining operation would not adversely impact these uses, purposes and values. They state that the land in its current condition has no significant recreational, timber, or economic values incompatible with the proposed surface mining. They point out that the USFS has not developed the land for recreation. There are no camp sites, picnic sites or hiking trails. Further, it is noted that the tract is not contiguous with any other USFS property and only approximately twenty acres of relatively undisturbed timber is at issue. They also assert that development of the property as a resource is limited by the topography, soil conditions, shape of the area and timber quality. Finally, the requesters contend that the proposed mining and reclamation would improve the land in some respects by eliminating highwalls and subsidence depressions resulting from previous surface and underground mining operations.

OSM's examination of the property confirms that the requesters have accurately portrayed the condition of the property. In particular, the size of the subject property and its isolated location render it of limited current use and value for the purposes specified by the USFS. As indicated, the size of the property is small for the intended uses and the USFS has not developed the property. Also, it is approximately three-fourths of a mile from any other national forest tract, with properties owned by a number of other persons separating the forest tracts, making consolidation in the near future unlikely. In addition, the quality of the timber does not appear to be consistent with the purposes delineated for the property. It has been characterized as low to medium quality by the USFS. (A.R. 223.) Further, the property exhibits scars of previous mining that would benefit from reclamation, as claimed.

Finally, the USFS has not asserted that any governmental interest in the national forest would be significantly impacted by the proposed mining. (A.R. 223.) Rather, the USFS has confirmed that the proposed operation likely

would have no significant impact on the current uses, purposes and values of this land. In addition, the USFS has provided input to the state regulatory authority concerning the proposed reclamation plan for the site and has stated that the agency will work closely with the state to ensure that reclamation fully returns the land to its planned use under the USFS management plan for this area. (A.R. 112.) Thus, OSM finds that mining the subject tract would have no significant impact on the current uses, purposes and values of the national forest.

#### **V. Summary and Disposition of Comments**

As discussed in Part II of this notice, OSM solicited public comments and held a public hearing on the request for a VER determination. Approximately 175 people attended the public hearing and OSM received approximately 150 comments. With two exceptions, all commenters opposed a positive VER determination. Most of the comments are addressed in the foregoing analysis of this matter. The following, however, are more specific responses to the comments made.

A number of commenters argued that OSM should rely upon the good-faith all-permits standard rather than the takings standard in making the VER determination. As discussed in Part I of this notice, as a result of litigation, OSM must use the takings standard when making VER determinations in the Southern District of Ohio.

One commenter proposed delaying a decision on the request until OSM adopts a final federal rule defining VER. OSM finds no support in law or regulation for this course of action. The agency has an obligation to execute its responsibilities with due diligence.

Several commenters questioned the propriety of Buckingham requesting the VER determination, since it did not own the coal in question. As noted in Part II of this notice, the owners of the mineral estate (the Blaires) subsequently joined Buckingham in requesting the VER determination. OSM notes, however, that Buckingham, as the lessee of the coal, also possesses an interest in the coal and is appropriately a part of the determination.

Some commenters emphasized SMCRA's expressed intent to protect public lands and urged OSM to accord preference to the public interest over the private interests when conducting the takings analysis. As discussed in Parts III and IV of this notice, OSM has conducted its takings analysis in accordance with its understanding of applicable takings jurisprudence.

Many commenters expressed concern about Buckingham's ability to reclaim the site and avoid adverse impacts to soil, water, wildlife habitats and ecosystems. While these concerns are not pertinent to the VER determination process, the regulatory authority must address them as part of its review of the permit application. Under both SMCRA and the Ohio program, the regulatory authority may not approve a permit application unless it finds that reclamation in accordance with the requirements of the approved program is feasible and that the operation has been designed to ensure compliance with these requirements. In addition, the USFS has provided input to the state concerning the proposed reclamation plan for the operation, and has stated that it does not anticipate that the proposed surface coal mining operation would significantly affect the current use of value of the affected lands for national forest purposes.

A few commenters also expressed concern that a positive VER determination in this case could establish an adverse precedent for allowing surface coal mining in the national forests. Since all takings analyses are fact-specific and limited to the unique circumstances of each case, OSM does not consider this case to have precedential value of the nature feared by the commenters.

#### **VI. Conclusion**

OSM deems the Blaires' interest to be key to this VER determination. If the Blaires had VER on August 3, 1977, they could transfer it under the lease to Buckingham. Conversely, if the Blaires did not possess VER as of that date, then VER could not be created by transferring one small portion of the coal rights to Buckingham.

As of August 3, 1977, if OSM applied the section 522(e)(2) prohibition to the Blaires' property, the Blaires would be deprived of the right to conduct surface coal mining on federal lands portion of the proposed permit area, which would mean that they could not recover approximately 88,200 tons of coal. This deprivation is slight, because the majority of the coal on the entire 134-acre parcel has already been exploited by predecessors of the Blaires. In addition, the Blaires also have a remaining use of their mineral estate in the form of oil and gas production. The value of the remaining oil and gas interest is probably about equivalent to the value of the coal interest. Thus, OSM finds that (1) most of the economic use of the Blaires' coal interest has already been made by previous exploitation; (2) the Blaires retain

substantial remaining use of their mineral property interests in the form of oil and gas production; (3) prohibition of the proposed surface coal mining would cause a diminution in value of the Blaires' property; and (4) the Blaires have no reasonable, investment-backed expectations of surface mining this land.

Finally, the agency finds that mining of this national forest tract would not contribute significantly to the harm Congress addressed through the prohibition of mining on federal lands within national forests. Because of its small size, isolated location relative to other national forest lands, and previously mined condition, the tract is of limited current use for the designated national forest purposes. The proposed surface coal mining operation would have only minimal short-term impacts on the current use and value of the land. There are no anticipated adverse long-term impacts. Thus, mining the tract would have no significant impact on the forest and reclamation will restore the land to the planned uses under the management plan. Therefore, OSM concludes that the record does not demonstrate that prohibition of surface coal mining of the property in question would substantially advance the section 522(e) prohibition.

OSM also finds that, because most of the coal on this property has already been mined, the use of that part of the Blaires' property interest has already occurred. Therefore, a prohibition on surface mining the remaining coal would not totally abrogate a property interest historically viewed as an essential stick in the bundle of property rights. However, because prohibition would diminish the value of the Blaires' property and would not substantially advance a legitimate public purpose of SMCRA, OSM finds that application of the statutory prohibition on surface mining the Blaires' property would constitute a compensable taking of the Blaires' property interests under the Fifth Amendment to the U.S. Constitution. Therefore, OSM finds that the Blaires have VER for the lands in question and that Buckingham acquired VER for the same lands by virtue of its lease of the Blaires' coal rights.

## VII. Appeals

Any person who is or may be adversely affected by this decision may appeal to the Interior Board of Land Appeals under 43 CFR 4.1390 *et seq.* (1988). Notice of intent to appeal must be filed within 30 days from the date of publication of this notice of decision in a local newspaper with circulation in Perry County, Ohio.

Dated: November 19, 1997.

**John A. Holbrook, II,**

*Acting Regional Director, Appalachian Regional Coordinating Center.*

[FR Doc. 97-31041 Filed 11-25-97; 8:45 am]

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## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-372 (Enforcement Proceeding)]

### In the Matter of Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same; Notice of Commission Determination to Deny Motion of YBM Magnex, Inc. to be Substituted for Complainant Crucible Materials Corporation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission ("the Commission") determined to deny as moot the September 25, 1997, motion of YBM Magnex, Inc. ("YBM") to substitute YBM for complainant Crucible Materials Corporation ("Crucible") in the above-referenced enforcement proceeding.

**FOR FURTHER INFORMATION CONTACT:** Jay H. Reiziss, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202-205-3116.

**SUPPLEMENTARY INFORMATION:** On May 16, 1996, the Commission instituted a formal enforcement proceeding based on an enforcement complaint filed by Crucible Materials Corporation ("Crucible") alleging that respondents San Huan New Materials High Tech, Inc. ("San Huan"), Ningbo Konit Industries, Inc. ("Ningbo"), and Tridus International, Inc. ("Tridus") (collectively "respondents") had violated the Commission's October 11, 1995, consent order wherein those respondents agreed not to sell for importation, import, or sell after importation magnets which infringe any of claims 1-3 of Crucible's U.S. Letters Patent 4,588,439 ("the '439 patent") by importing or selling magnets that infringed the claims in issue of the '439 patent. On December 24, 1996, following an evidentiary hearing, the presiding administrative law judge ("ALJ") issued a recommended determination ("RD") finding that respondents had violated the consent order on 33 different days and recommending that the Commission impose a civil penalty of \$1,625,000 on

respondents. The Commission adopted the bulk of the RD's findings on violation on April 8, 1997, and issued an opinion explaining that determination on April 15, 1997, finding that respondents violated the consent order on 31 days between October 11, 1995, and October 10, 1996. On September 26, 1997, the Commission issued its final determination in the enforcement proceeding, imposing a \$1.55 million civil penalty on respondents, revoking the consent order and issuing an exclusion order directed to foreign respondents San Huan and Ningbo and a cease and desist order directed to domestic respondent Tridus, denying Crucible's request for attorneys' fees and its petition for reconsideration of the Commission's prior determination regarding the application of the Federal Circuit decision in *Maxwell v. J. Baker, Inc.* 86 F.3d 1098, 29 U.S.P.Q.2d 1001 (Fed. Cir.), *reh'g denied, suggestion of reh'g in banc declined (1996), cert. denied*, 117 S. Ct. 1244 (1997), and denying respondents' request that the Commission require the domestic industry to submit periodic reports regarding its status as a domestic industry. Thus, there are no outstanding issues in this investigation.

On September 25, 1997, YBM moved to be substituted as the complainant in this investigation in place of Crucible in light of the fact that YBM had acquired the '439 patent from Crucible. On October 6, 1997, respondents and the Commission investigative attorney filed replies to YBM's motion opposing it as moot in light of the fact that the Commission concluded this investigation on September 26, 1997.

Because the Commission concluded this investigation on September 26, 1997, the Commission determined to deny YBM's motion as moot. The Commission noted, however, that it would have granted YBM's motion had this proceeding still been ongoing.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and section 210.75 of the Commission's Rules of Practice and Procedure (19 CFR § 210.75).

By order of the Commission.

Issued: November 20, 1997.

**Donna R. Koehnke,**

*Secretary.*

[FR Doc. 97-31091 Filed 11-25-97; 8:45 am]

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