United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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DEC 5 1996

Memorandum

To: Secretary

From: Solicitor

Subject: "Control" of Surface Coal Mining Operations under the Surface Mining Control and Reclamation Act

Recently, the Office of Hearings and Appeals (OHA) issued an opinion affirming a decision by the Interior Board of Land Appeals (IBLA) that dissolved the ownership and control link between James Spur, Inc., and B&J Excavating Co., Inc. James Sour, Inc. v. Office of Surface Mining Reclamation and Enforcement, 12 OHA 133 (1996). Although I believe the outcome of that dispute should not be disturbed, some of the reasoning contained in the opinion is flawed and could have significant impact on the heretofore successful operation of the Applicant Violator System (AVS). Therefore, I believe its reasoning should not be followed in future applications except to the extent consistent with the analysis provided below.

I. INTRODUCTION AND SUMMARY

Section 506 of the Surface Mining Control and Reclamation Act (SMCRA) requires every active coal mine to have a permit issued in conformity with the Act by either the federal Office of Surface Mining Reclamation and Enforcement (OSM), or a state regulatory authority under a program approved by OSM. 30 U.S.C. § 1256. An applicant for a permit bears the burden of establishing that his or her application conforms to the requirements of the Act. Id. § 1260(a) and (b). One of those requirements is section 510(c), which provides, in pertinent part:

> Where . . . information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this Act or such other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority, department, or agency which has jurisdiction over such violation . . . .

Id. § 1260(c) (emphasis added).

In the wake of the OHA opinion, OSM has asked what the proper standard should be for determining whether an applicant "controls" another coal mining operation for purposes of carrying out this section and its implementing regulations. See 30 C.F.R. § 773.5(b). Most important, it has asked whether the permit applicant may defend against an allegation that it "controls" another operation by showing a legitimate purpose for that control.

After careful evaluation of SMCRA, its legislative history, OSM regulations and their history, and the relevant case authority, I have concluded that a legitimate reason to exercise control is not an affirmative defense available to the permit applicant. The only necessary inquiry is whether the permit applicant had, in the language of the regulations implementing the statute, "authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." Id. § 773.5(b) (6). Even if the authority exists for legitimate reasons, it is nonetheless sufficient to establish control.

A. "Control" of Another Entity in the Overall Context of SMCRA

SMCRA reflects a congressional determination of an "urgent" need to establish "appropriate standards to minimize damage to the environment and to the productivity of the soil and to protect the, health and safety of the public." 30 U.S.C. § 1201(d). See In re Permanent Surface Mining-Regulation Litig., 653 F.2d 514, 516 (D.C. Cir.) (en banc), cert. denied, 454 U.S. 822 (1981). The "appropriate standards" SMCRA contains include performance standards for surface coal mining and reclamation operations, e.g. 30 U.S.C. § 1265, and standards for obtaining permits to mine, e.g., id. § 1260. Those standards must be applied in light of the purposes of SMCRA, which Congress expressed as, among other-things, to:

> (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;
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> * * *
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> (d) assure that surface coal mining operations are so conducted as to protect the environment;
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> (e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;
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> * * * ; and
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> (m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of

> the public interest through effective control of surface coal mining operations.

Id. § 1202(a), (d), (e), (m).

In crafting the comprehensive scheme to regulate coal surface mining throughout the United States in order to achieve these ambitious purposes, Congress decided to include what has become known as a "permit block" mechanism to spur the industry to bring itself into compliance with the new standards. Section 510(c) represents Congress' judgment that a mining enterprise should not be permitted to undertake a new coal mining operation if that enterprise, or an operator owned or controlled by that enterprise, is currently in violation of the Act at another site. Specifically, section 510(c) prevents issuance of new permits to those who have evaded direct enforcement, or otherwise have allowed operations under their control to leave unabated violations. This "permit block" provision is just one of a number of SMCRA procedures designed to lead to prompt abatement of violations by operators or permittees. Others are found at 30 U.S.C. §§ 1232(e) (unpaid AML fees recoverable, with interest, in any court of competent jurisdiction), 1268 (civil penalties for violations), 1271 (notices of violation, cessation orders, injunctive relief); see also id. § 1211(c) (1) (among the duties of OSM are to "order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto").

The permit block has been described by leading commentators on the Act as

> a particularly powerful enforcement and compliance tool. It is stronger than an NOV [notice of violation] or civil penalty because it uses the regulatory authority's ability to deny permission to mine. If an applicant wants to mine, it must be in compliance with the Act at all of its operations. The permit block provision places the burden of demonstrating current compliance on the applicant. The permit block is particularly useful to states wishing to secure correction of a violation by a large operator that may have applications pending in other states. The applicant has strong economic incentives to avoid delays in the approval of a permit application. Thus, the permit block provides an impetus for early abatement of violations when a permit application is pending. Finally, the permit block is the single strongest disincentive to abandonment of any unreclaimed site, since it can bar an operator from ever operating again.

J. McElfish & A. Beier, Environmental Regulation of Coal Mining;

SMCRA's Second Decade, 63-64 (1990).[1] These commentators also identified the challenge in designing an effective system:

> An effective permit block system must be capable of identifying all federal and state violations tied to a surface mining permit applicant. This requirement has two components:
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> (1) identifying all violators and violations of SMCRA and other environmental laws, and
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> (2) establishing direct and indirect ownership and control links to the permit applicant.
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> A permit block system must be able to find any links between a permit applicant and owners or operators with violations. These links may cross state lines, because many coal companies operate in several states. Consequently, an effective nationwide system must have ready access to information on violators and violations of all state and federal surface mining regulations and other environmental laws.
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> An effective permit block system must also contain information enabling it to trace direct and indirect ownership and control links among owners and operators. The tracing of ownership and control is important because the business relationships among mining entities can be complex. The applicant is not always the operator; many mining operations are run by contractors that are not applicants. Moreover, some or all of the owning or controlling entities maybe corporations or partnerships. Many different people may have roles in corporate decisionmaking; information on stock ownership or debt structure may identify those people. Additionally, family-run mining operations may use various names on permit applications. Ownership and control information must also be updated frequently. Many mine sites have numerous operators, owners, or controllers over the course of mining and reclamation.

Id. at 64-65. These observers note that "'shell' corporations and family enterprises using different names" have had a long history in the coal fields, and "with the advent of the permit block system, techniques for insulating applicants have become more sophisticated." Id. at 70.

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[1] Although the commentators described the permit block as an enforcement tool, it is actually a permit eligibility criterion that encourages compliance with the Act's requirements by applicants and others. See infra pp. 14-15.

The Tennessee Valley Authority (TVA) put the problem this way:

> A typical example of a relationship in which the former owner may exert continued control is the case in which ownership is transferred to the spouse or to a different family member. While the spouse or member transferring the function remains in the background, because of experience, knowledge, and proximity to principals, he or she continues to guide or exert control over continuing operations. To the extent that the law allows, we believe some recognition of this occurrence may help expose some of the fictions that are created to circumvent the law.

Comments of TVA on OSM's proposed regulation on ownership and control (June 28, 1985), Admin. Record at 405.

Other commenters focused on recurring problems at contract mining[2] sites:

> Historically, contract mining has caused untold environmental damage through irresponsible conduct on the part of both the contractor and the entity arranging to have the coal extracted. While "contract mining" is a perfectly legitimate method of mining, and in certain cases is plainly desirable, there is no question but that "contracting" has been and is being used on a widespread basis to evade compliance with SMCRA.

Comments of the National Wildlife Federation (NWF) and Save Our Cumberland Mountains, Inc. (SOCM), on OSM's proposed ownership and control regulation (undated), Admin. Record at 892.

> Contract mining is extremely common in many mining areas, and much abuse has been associated with the practice. Holding the large company responsible not only reflects the reality of control that the large companies in fact exercise, but will ensure that the mines are reclaimed.

Comments of NWF, et al., on the proposed ownership and control rules (Aug. 11, 1986), Admin. Record at 946.

In the first few years after SMCRA's enactment in 1977, the promise of the "permit block" inducement to compliance was not fulfilled.

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[2] A "contract miner" is a common term, used in the preamble but not in the regulations, to refer to an entity which (1) obtains a surface coal mining permit in its own name, (2) mines coal belonging to another person, and (3) must deliver the mined coal to that person or pursuant to that person's directions. See generally 53 Fed. Reg. 38876 (1988).

SMCRA does not define "owned or controlled." The Act does require a permit applicant which is a partnership, corporation, association or other business entity to include in its application

> the name and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and addresses of any person owning of record 10 percenturn or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation . . . within the five-year period preceding the date of submission of the application.

30 U.S.C. § 1257(b) (4). The relevant committee reports reflect congressional recognition of the link between information about the applicant and the "permit block" provision of section 510(c):

> The information required [by 30 U.S.C. § 1257(b)(4)] is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met as stipulated in Section 510 and . . . to allow identification of parties ultimately responsible for . . . the operation as well as to cross-check the mining application with other applications in the same State or other States.

H.R. Rep. No. 896, 94th Cong. 2d Sess. 111 (1976); see also S. Rep. No. 28, 94th Cong., 1st Sess. 206 (1975).

OSM's first permanent regulatory program, adopted in 1979, did not define "owned or controlled." See 44 Fed. Reg. 15379 (1979); 48 Fed. Reg. 44394 (1983). In the early days of SMCRA's administration, OSM and state regulatory authorities had few sources of information about industry practices and enterprises except for what might be disclosed in permit applications. They also lacked a regulatory structure or centralized data processing system to track persons or entities which owned or controlled operations with unabated violations as they reincorporated or renamed themselves, used a series of contract miners, or moved from state to state. The relatively crude and haphazard ways for regulatory authorities to determine whether an applicant "controlled" another operation with an unabated violation was a significant problem given the relative frequency of contract mining and shifting ownerships.[3]

[3] See 53 Fed. Reg. 38868 (1988); McElfish & Beier, supra, at 71. In the mid-1980's, OSM began manual review of applications for federal permits under section 510(c) of. SMCRA, and began developing computer databases and software to improve the process. OSM's manual review showed that substantial numbers of applicants

The problem was particularly difficult to address when an applicant for a permit in one state owned or controlled an operation with an unabated violation in another state. The difficulty increased as OSM approved state programs, which gave states "regulatory primacy," allowing them to issue permits and nearly all notices of violation of the Act. See 30 U.S.C. § 1253; 53 Fed. Reg. 38886 (1988).

In 1981 environmental groups brought a lawsuit against the Secretary alleging systemic nationwide failure to enforce SMCRA. The parties eventually negotiated a consent order which required OSM to implement section 510(c) of SMCRA by establishing the computer system now known as the AVS[4], and by encouraging state regulatory authorities to use the information on the AVS to withhold or to revoke permits. Save Our Cumberland Mountains, Inc. v. Clark, 22 Env't Rep. Cas. (BNA) 1217 (D.D.C. 1985)[5]. Proposed

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had ownership or control relationships with operations responsible for unabated violations. As summarized in the preamble:

> For instance, from March 1985 to April 1986 it was found during the permit review process that approximately fifty-six percent of all Federal permit applicants had problems such as unpaid AML fees, unabated violations, or unpaid penalties, or were the subject of a pending appeal.

53 Fed. Reg. 38886.

[4] A good description of the development and details of the AVS through 1989 is found in McElfish & Beier, supra, at 66-71.

[5] This litigation had a tangled subsequent history. The consent order was to have been effective for five years, but in April 1989, plaintiffs moved for an order finding OSM in substantial non-compliance. The parties reached an settlement agreement requiring further steps by OSM, and sought approval by the court in January 1990. Mining industry associations intervened to oppose approval, but the district court approved the amended settlement in September 1990. Ruling on the industry's appeal, the Court of Appeals reversed, holding that the district court lacked jurisdiction under SMCRA's citizen suit provision. Save Our Cumberland Mountains, Inc. v. Lujan, 963 F.2d 1541 (D.C. Cir. 1992), cert. denied, 507 U.S. 911 (1993). This ruling did not affect the 1988 "ownership and control" regulation being addressed here. The preamble to the 1985 proposed rules and the 1988 final rules both noted that, while the regulation would "assist OSM" in implementing the 1985 consent order, see 50 Fed.

rules that, among other things, for the first time defined "ownership and control" for purposes of section 510(c) were published a little more than two months after the consent order was entered and were made final in 1988. 30 C.F.R. Part 773.[6]

The preamble to the rules proposed in 1985 explained their purpose this way:

> A significant number of operators who have unabated violations of [SMCRA] at one mine, or who have‘ not paid civil penalties or AML fees, are applying for permits for other sites. In some instances, individuals involved in operations which have unabated violations or outstanding fees or penalties have formed new corporations, partnerships, or other business entities and have applied for permits for new operations without correcting the violations or paying the fees and penalties resulting from the first operation. Frequently, the person or entity named as the applicant for a permit has no previous. record of violations. However, because of the relationships involving the applicant, it appears that the applicant is, in fact, owned or controlled by persons who do have outstanding violations. Such practices have enabled operators to avoid the requirements of the Act first by operating a mine in violation of the Act until the regulatory authority issues a cessation order, and then by abandoning the site of the violation and starting a new operation under a new name or a new business organization and continuing the same practices. Similar practices occur with respect to civil penalties and AML fees which have not been paid when due. If allowed to persist, these practices could seriously weaken enforcement of the Act.

50 Fed. Reg. 13724 (1985).

> Broadly defining "ownership" and "control" will limit the circumvention of the requirements of 510(c) through manipulation of business organizations by which the "applicant" would always be the lowest rung on the

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Reg. 136 (1985), 53 Fed. Reg. 38868 (1988), the regulatory authority being exercised came from the statute, not the consent decree vacated by the Court of Appeals. See 30 U.S.C. §§ 1211(c) (2), 1251(b), 1260(c).

[6] Besides the initial publication of proposed rules in 1985, OSM also published further proposals and refinements of the original proposal in 1986 (51 Fed. Reg. 12879), and 1987 (52 Fed. Reg. 16275, 52 Fed. Reg. 37164).

"ownership" or "control" ladder. Under such manipulations, the "applicant" would be found to be without violation and could receive a permit even though those persons who owned or controlled the applicant may have current violations.

* * *

Th[e] mandate [of section 201(c) (1)] may be implemented by denying permits where applicants are owned or controlled by persons who own or control surface coal mining and reclamation operations which are in violation of environmental laws in addition to denying permits where the applicant itself owns or controls operations which are in violation of such laws. In order to accomplish this OSM is proposing to amend 30 CFR 773.15(b) (1), wh[i]ch implements the finding requirement of section 510(c).

* * *

The proposed definition also would provide that there may be instances where a person with no financial interest in an entity may, through his or her relationship to such entity, have the express or implied authority to determine the manner in which such entity carries out its day-to-day business affairs. Specifically, the proposed definition would describe control as ownership or any other relationship which gives one person express or implied authority to determine the manner in which that person or another person mines, handles, sells or disposes of coal.

* * *

In addition, the proposed definition would create a rebuttable presumption of "control" where a person owning or controlling coal arranges to have another entity mine such coal but retains the right to receive such coal after it is mined. This situation commonly occurs in what has become known as "contract mining." A person could rebut this presumption of "control" by showing that he or she did not exercise express or implied control over the operation that actually extracted the coal. This would have to be determined on a case-specific basis. Contractual arrangements between the owner of the coal and the operation mining such coal, wherein the owner disclaims responsibility for the actions of the operation mining the coal, would not necessarily be conclusive evidence of the absence of "control."

Id. at 13725-26.[7]

OSM's 1985 proposed rules included the following:

> Owning or controlling coal to be mined by another under a lease, sublease or other contract and having a right to receive such coal after mining shall establish a rebuttable presumption of control of such other person.

Id. at 13727 (proposed 30 C.F.R. § 773.5).

Upon OSM's publication of the draft rules in 1985, Congress reentered the picture. First, it began conditioning states' receipt of "Abandoned Mine Land" (AML) funds[8] on their agreement

> to participate in a nationwide data system established by [OSM] through which all permit applications are reviewed and approvals withheld if the applicants (or those who control the applicants) applying for or receiving such permits have outstanding State or Federal air or water quality violations in accordance with section 510(c) of [SMCRA], including failure to abate cessation orders, outstanding civil penalties associated with such failure to abate cessation orders or uncontested past due [AML] fees . . . .

Pub. L. No. 99-190, 99 Stat. 1233-34 (1985).[9]

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[7] As explained further below, the preamble to the final regulations substitutes "actual" control for "express or implied" control as used in the last quoted paragraph in the text, and explains that the final rule focuses on ability to control, not the actual exercise of control. 53 Fed. Reg. 38877, 38878 (1988). See infra pp. 21-23.

[8] AML funds are derived from AML fees, which are essentially excise taxes due on coal production. United States v. River Coal Co., 748 F.2d 1103, 1106 (6th Cir. 1984); In re C. M. & C. Coal Co., 33 B.R. 358 (Bankr. N.D. Ala. 1983). See generally 30 U.S.C. § 1232(a).

[9] Such a condition was also placed on some succeeding appropriations acts, including Pub. L. No. 99-591, 100 Stat. 3341-254 (1986); Pub. L. No. 101-121, 103 Stat. 712-13 (1989); Pub. L. No. 101-512, 104 Stat. 1928 (1990); see also 30 U.S.C. § 1235(h) (annual grants of AML funds to States with approved reclamation plans). Almost all states promptly entered into memoranda of understanding with OSM concerning use of the AVS. In 1994, OSM promulgated regulations that mandated state participation in OSM's AVS program. 30 C.F.R. § 773.22(a) (2). That step reduced if not eliminated the need for legislative incentives for cooperation.

Congress also conducted oversight hearings that addressed the issue. At these hearings SMCRA's chief congressional sponsor lamented how, nine years after SMCRA's enactment, "many people grossly abuse the land by using corporate shells through which a company rapes one site, changes its name, and then rapes a second site. Under its new name, the process continues seemingly without end." Oversight Hearing on the Office of Surface Mining Budget for Fiscal Year 1987, Subcommittee on Energy & the Env't H.R. Comm. on Interior & Insular Affairs, 99th Cong., 2d Sess. 3 (1986) (opening statement of Rep. Morris Udall).

That same year, the House Committee on Interior and Insular Affairs drew attention to the fact that' although more than one thousand 'reclamation bonds had been forfeited, many of the forfeiting operators "subsequently have been given new mining permits." H.R. Comm. on Interior & Insular Affairs, 99th Cong., 2d. Sess., Report on Proposed F.Y. 1987 Budget at 41 (Comm. Print No. 5, 1986); accord 50 Fed. Reg. 13724 (1985); see generally 30 C.F.R. § 800.50 (bond forfeitures).

In 1987, the House Committee on Government Operations issued a report on SMCRA, Surface Mining Law: A Promise Yet to be Fulfilled, H.R. Rep. No. 183, 100th Cong. 1st Sess. (1987), that noted the delay in promulgating definitions of ownership and control had created significant uncertainty about application of the permit block system. Id. at 31.

In a continuing executive-legislative branch dialogue, Congress has generally been supportive of the cooperative efforts of OSM and the states to combat the problem of owners or controllers of mines with unabated violations receiving new permits under other names or through other business entities. For example, Congress appropriated millions of dollars for OSM and the States to implement the SOCM settlement agreement. See, e.g., SOCM v. Lujan, 963 F.2d 1541, 1546, n.5 (D.C. Cir. 1992).

In 1990, Congress amended Section 402(c) of SMCRA to require disclosure of additional information, including the owner of the coal and the purchaser of the coal, as part of the quarterly report all operators must file with their payment of AML fees to OSM. Abandoned Mine Reclamation Act of 1990, § 6003(b), 104 Stat. 1388-290 (1990) (codified at 30 U.S.C. § 1232(c)). This amendment also directed that the new information "be maintained by the Secretary in a computerized database," so that it would become part of the AVS.

The Senate Appropriations Committee in its 1993 Report on OSM's budget characterized its support for the AVS this way:

See infra n. 10.

> Regarding the AVS, the Committee joins the House in commending OSM for improvements made to the system. The Committee has consistently supported development and implementation of the AVS because the AVS is essential to effective enforcement of the Surface Mining Control and Reclamation Act of 1977 . . . .

S. Rep. No. 114, 103d Cong., 1st Sess. 47 (1993).

B. The OSM Regulatory Provisions

The current regulations were promulgated on October 3, 1988. 30 C.F.R. §§ 773.5, 773.15(b) (1) (ii), (2), (3).[10] Section 773.5 defines "owns or controls" and "owned or controlled" in terms of three irrebuttable presumptions, id. § 773.5(a) (l)-(3), and six rebuttable presumptions, id. § 773.5(b) (l)-(6).[11] For purposes of this Opinion, the most important rebuttable presumption is contained in section 773.5(b) (6), which provides as follows:

> (b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

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[10] The 1988 ownership and control rules were amended in respects not relevant to the present issue in 1994. See 59 Fed. Reg. 54306, 54352-53 (1994) (among other things, amending 30 C.F.R. §§ 773.5, 773.15(b)). Parts of the amendments were recently upheld against industry challenge, see National Mining Ass'n v. Babbitt, No. 94-2740 (AER) (D.D.C. July 10, 1996), appeal pending No. 96-5274 (D.C. Cir. filed Sept. 5, 1996). Challenges by environmental groups are still pending in a separate case. National Wildlife Fed'n v. Babbitt, No. 94-2761 (AER) (D.D.C. filed Dec. 27, 1994).

[11] Mere entry on the AVS carries no negative connotations. Rather, the AVS is simply a source of information about ownership or control relationships. Whether or not a person is a "controller" of another for purposes of this provision does not depend in any way on whether the controlled entity has any violations. All ownership or control relationships with each surface coal mining operation since the enactment of SMCRA belong on the AVS, along with beginning and end dates of control. For example, as of October 1, 1996, the AVS lists 946 persons or entities who are presumed to be in a control relationship with existing permits associated with contract mining of coal under the "contract miner" presumption. Few of these persons or entities have any outstanding violations, according to OSM.

* * *

> (6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

Id. § 773.5(b) (6).[12] For convenience in discussing these regulations, this Opinion will refer to presumptive controllers as "applicants" and presumptively controlled entities as "contract miners."[13]

30 C.F.R. § 773.15(b) requires all regulatory authorities to withhold new permits where any surface coal mining operation owned or controlled by the applicant or by a person who owns or controls the applicant is currently in violation[14] of SMCRA, a state program, or other air or water environmental law. Id. § 773.15(b) (1). An applicant may receive a conditional permit, however, if either (a) the violation notice is the subject of a timely, good-faith appeal, or (b) the violation is in the process of being corrected to the satisfaction of the regulatory authority issuing the violation. Id. § 773.15(b) (1) (i), (ii), (2). The former exception has been in the regulation from the beginning to carry out the intent expressed in SMCRA's legislative history. See s. Rep. No. 28, 95th Cong. 1st Sess. 79 (1977); 48 Fed. Reg. 44344 (1983). The second exception is in section 510(c) itself. 30 U.S.C. § 1260(c).

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[12] An ownership and control relationship is irrebuttably presumed where the applicant is a permittee; owns more than 50% of the entity; or has "any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations." In addition to the provision discussed in the text, the regulations establish rebuttable presumptions of ownership and control where the applicant is an officer, director, operator or general partner; owns 10-50% of the entity; or is able to commit the financial or real property assets or working resources of an entity.

[13] See supra n.2, for a definition of "contract miners."

[14] "Violation" includes unabated cessation orders, delinquent civil penalties, bond forfeitures, delinquent abandoned mine land (AML) fees, and similar failures of environmental compliance at any surface coal mining operation. See 30 C.F.R. § 773.15(b) (1); 53 Fed. Reg. 38881, 38883 (1988); see also 30 C.F.R. § 773.5 (definition of "violation notice" added in 1994).

It should be noted that a finding of "control" does not require the applicant to abate any violation that may exist at the other operation. It does result in denial of the permit to conduct the surface coal mining operation for which the application was submitted. The preamble to the final rule put it this way: "The rule does not transfer liability for civil penalties and reclamation work to the permit applicant. Those responsibilities remain with the persons who originally incurred the obligation." 53 Fed. Reg. 38875 (1988). Cf. 30 U.S.C. §§ 1268(f) (individual civil penalties for directors, officers, and agents of offending corporations); 1271(c) (injunctions to compel agents of permittees to abate violations). Put another way, the permit block is not an enforcement mechanism brought to bear against violators, for the rules cannot lead to an injunction or judgment against a violator. See National Wildlife Fed'n v. Babbitt, 41 Env't Rep. Cas. (BNA) 1515, 1521 (D.D.C. 1995), appeal filed sub nom National Mining Ass'n v. Babbitt, No. 95-5434 (D.C. Cir. filed Oct. 24, 1995). Rather, they are part of an applicant's eligibility requirements to receive new permits to mine. Id. Their intentional effect, as described below, is to see to it that applicants do not receive permits if contract miners they control have outstanding violations.

C. Effectiveness of the Ownership or Control Regulations as Implemented by OSM

The presumption of control in the "contract mining" provision of OSM's rules, 30 C.F.R. § 773.5(b) (6), has been effective in promoting abatement of violations at many previously abandoned mining sites. Applying this provision, OSM and State regulatory authorities have reached comprehensive settlement agreements with several major coal companies that have controlled contract-miners within the meaning of the regulations as applied by OSM. These agreements have allowed the companies to obtain new permits only upon their agreement to reclaim thousands of acres of abandoned mined land through the expenditure of several million dollars.[15] In addition to agreements with large companies, small operators have performed reclamation and paid overdue AML fees and federal and state civil penalties in order to bring themselves into compliance and receive new permits. From January 1, 1991, through June 30, 1996, the monthly reports of the OSM's AVS Office show that recommendations from OSM that state regulatory authorities withhold permits for unabated violations have resulted in collection of nearly $5 million in payment of federal civil

[15] Federal and state comprehensive settlement agreements with major coal producers included the reclamation of more than 2,500 acres of abandoned mine land at an estimated cost of $7 million.

penalties and AML fees.[16]

OSM's ownership or control regulations have also been effective in promoting compliance with the Act through administration of the program to clean up and restore abandoned mined lands by ensuring that federally funded AML contracts are not awarded to those in violation of the Act. AML fees are appropriated for use primarily in reclaiming lands mined before the enactment of SMCRA. 30 C.F.R. § 872.11(b). Private contractors bidding for work using AML funds must be reviewed for ownership and control links to operations with unabated violations. Id. § 874.16. Since July 1994, OSM's AVS Office has, after reviewing requests by state regulatory authorities for recommendations concerning bidders for AML contracts, issued 31 "deny" recommendations and two "conditional issue" recommendations. The two "conditional issue" recommendations resulted from payment plans negotiated by a coal company specifically to bring itself into compliance to allow it to bid on AML contracts.

Completion of mine site reclamation by owners or controllers is a direct and immediate benefit to the environment and the welfare of coal field residents. The deterrent effect of the permit block provision -- encouraging prevention and prompt abatement of violations during mining -- is impossible to quantify, but plainly OSM's implementation of § 510(c) significantly contributes to the successful implementation of SMCRA overall.

II. LEGAL ANALYSIS

In James Sour, Inc. v. OSM, 12 OHA 133 (1996), the Director of the Department's Office of Hearings and Appeals (OHA), upheld a decision of the Interior Board of Land Appeals (IBLA), reported at 133 IBLA 123, 102 I.D. 32 (1995), that an applicant for a surface coal mining permit did not control contract mining operations of its lessee, B&J Excavating Company, Inc., that conducted operations resulting in unabated violations of SMCRA. The OHA Director's decision shall remain as the Department's final resolution of the disagreement between the applicants and OSM regarding the surface coal mining operations and violations at issue in that case.

For the reasons that follow, however, I believe that the IBLA's and the Director's decisions in Spur do not sufficiently acknowledge the presumption of control that the regulatory authorities may apply upon the showing of certain facts. For that reason, this Opinion is intended to modify the reasoning of that decision and to govern all pertinent decisions by OSM, IBLA, and other Departmental

[16] OSM believes that these figures represent approximately one-half of the violation abatement attributable to the ownership and control regulations. Variations among state practices in tracking such agreements prevent a more accurate accounting.

decisionmakers in the future. To the extent of a conflict between the IBLA and OHA Director's decisions and this M-Opinion, this Opinion controls.

The fundamental issue at issue in Spur was whether, under OSM's regulations, an applicant may rebut a presumption of control by showing that it did not intend to control a contract miner, or had "legitimate purposes" for the elements of its relationship with another that establish a presumption of control.

A. The Spur Decision

In Spur, the IBLA pursued the following inquiry as it sought to determine whether "control" existed:

> [I]n view of the potentially serious consequences accompanying creation of an AVS link, it is critical that inferences not be replaced by innuendo. We therefore look to whether applicants have offered credible explanations demonstrating legitimate purposes (apart from an interest or intention to influence the conduct of operations) for elements of their relationship with the operator.

133 IBLA at 187, quoted in 12 OHA 182, 184 (1996).

On appeal, the Director of OHA agreed with the IBLA that the legitimate purposes rebuttal was necessary to prevent the presumption at 30 C.F.R. § 773.5(b) (6) from becoming effectively irrebuttable. 12 OHA at 183. The Director reasoned that instead of creating a new rebuttal standard, the legitimate purposes inquiry was a proper application of the existing standard because it looked "at all of the factors affecting the relationship between Spur and B&J. OSM has required no less in the preamble to the regulations where it lists a number of factors as examples which may be relevant." Id., citing 53 Fed. Reg. 38877.

B. The Applicant's Intent Is Not At Issue In Determining Ownership or Control Under the OSM Regulations

The IBLA's "legitimate purposes" inquiry has no support in section 510(c), any other section of SMCRA, or OSM's regulations. Neither the statutory text nor the legislative history of section 510(c) contains evidence that Congress meant for an applicant's motivation to be a necessary element in, or a defense to, a finding of ownership or control. See, e.g., H.R. Rep. No. 896, 94th Cong., 2d Sess. 133 (1976). Similarly, the preamble to the ownership and control rules does not indicate that a person's intent would be relevant to whether that person owned or controlled a surface coal mining operation. See, e.g., 53 Fed. Reg. at 38877 (lst-2d col.). Finally, it is contrary to 30 C.F.R. § 773.5(b) to allow a rebuttal of a presumptive ownership or control relationship based on the

parties' intentions.

The lack of an intent element as either part of OSM's burden or an applicant's rebuttal is not surprising. Ownership or control of a surface coal mining operation is not a crime, for which an intent element would be customary. See generally 30 U.S.C. §§ 1201(b), 1202(f). Cf. Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law, ch. 3, § 27 at 193 (1972).

Lack of ability to control is different from a lack of desire to do so. Professions of lack of intention are easy to make and difficult to disprove. It was for just that reason OSM sought to concentrate on more objective facts about relationships, rather than factors as subjective as intention.

The preamble recites that OSM "will look to the actual relationship between the parties" and lists two factors and three types of information that could be included in a rebuttal. 53 Fed. Reg. 38877. An applicant's reasons for retaining ability to control the contractor are not listed as a relevant consideration.

C. OSM's Implementation of the Regulations Has Not Created a De Facto Irrebuttable Presumption

In creating the presumption in 30 C.F.R. § 773.5(b) (6), OSM considered but rejected including a comprehensive list of valid rebuttals. See 53 Fed. Reg. 38879-80. It explained that it did not want to foreclose persons in the mining industry from presenting evidence supporting theories of rebuttal which OSM could not have anticipated in a rulemaking proceeding. Id. at 38880. OSM did indicate, however, that rebuttal evidence must be directed toward the applicant's lack of ability to control, directly or indirectly, the surface coal mining operation. See, e.g., id. at 38871, 38877.

Under the regulations, rebuttal of a presumptive control link is evaluated case by case. Id. at 38880. The types of rebuttals to a section 773.5(b) (6) link that might succeed if supported by sufficient evidence include, though are not necessarily limited to: (1) proof that the applicant in fact attempted to exercise control using every means available to prevent or to abate violations and was unsuccessful, see, e.g., id. at 38871, 38874;[17] (2) proof that the applicant lacked ability to terminate the mining either without cause,[18] with a cause within the control or discretion of the

[17] It might be necessary for an applicant to have severed the relationships which give rise to a section 773.5(b) presumption in order to have used every available means to achieve compliance.

[18] See generally S & M Coal Co. and Jewel1 Smokeless Coal Co. v. OSM, 79 IBLA 350, 358 (1984).

applicant,[19] or for violations of environmental regulations or permit conditions; and (3) proof that the applicant did not provide any financial, engineering, or representational[20] services to the operator and did not have the ability to approve or disapprove mining or reclamation plans, see, e.g., id. at 38877.

OSM has not interpreted the rebuttable presumption of control in an overly restrictive manner. Applicants successfully rebutted a presumption in eleven, or approximately thirteen percent, of the 88 final agency decisions (FAD's) concerning disputed ownership and control links OSM had issued as of July 31, 1995.[21]

Most coal lessors who retain the right to receive the mined coal fail to rebut the presumption of section 773.5(b) (6) because they have chosen to structure their relationship with an operator so that they could control the operation. Such lessors are properly subject to a regulatory presumption of control. The OSM regulations reflect the reasonable judgment that persons who structure relationships to enable them to exercise control over a coal mining operation should be accountable for that operation. Id. at 38871, 38878.

In short, there is no indication that either Congress or OSM adopted a standard that is less protective of the environment for reviewing permit applications where owners or controllers have benevolent or legitimate motives for their actions or arrangements. See, e.g., 30 C.F.R. § 773.15(b). Where Congress or the Secretary have determined that good intentions of persons in the mining industry are relevant, they have made it clear. See, e.g., 30

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[19] See generally McWane Coal Co.. Inc., 95 IBLA 1, 6, 9-11 (1986).

[20] See generally United States v. Dix Fork Coal Co., 692 F.2d 436 (6th Cir. 1982) (permittee's representative deemed an "agent" with individual liability).

[21] The number of FAD's resulting from disputed ownership or control links does not include instances in which applicants successfully rebutted presumptions at OSM’s staff level, or conceded that they were owners or controllers. The 88 FAD's reviewed for this Opinion arose from instances where OSM's staff and the applicants disagreed over alleged ownership or control links. In three of the FAD's (less than 3%), the applicant showed that the facts did not give rise to a presumption. In 70, or about 80%, of the FAD's, the applicant failed to rebut any presumption. Seven of the FAD's, or less than 8%, are not pertinent to this Opinion. Several FAD's contained more than one issue, such as challenges to multiple links in a chain of ownership or control, or a request that OSM acknowledge the date an entity claimed to have severed its ownership or control relationship with a violator.

U.S.C. § 1268(a); 30 C.F.R. § 845.13(b)(4) (reduction of civil penalties for good faith in attempting to achieve compliance). The lack of any "good faith exception" in section 510(c) of SMCRA or in the ownership and control rules for an applicant with "legitimate purposes" argues strongly against such an exception.

D. Federal Court Precedent Does Not Support OHA's Decision in Spur

There is little federal court precedent. on the proper interpretation of the ownership and control regulations. In NWF v. Babbitt, the district court upheld the ownership and control regulations against a host of challenges brought by the mining industry and environmental groups. The industry argued, among other things,[22] that the Secretary lacked authority to define the statutory term "owned or controlled by" as broadly as he did in the 1988 regulations. 41 Env't Rep. Cas. at 1518. The court rejected the argument, finding that "[a]n analysis of the structure and language of SMCRA, as well as the statute's legislative history, establishes that the Secretary's interpretation of 'owned or controlled' is permissible under SMCRA." Id. at 1518. In upholding the rules against other arguments by the industry, the court repeatedly relied on the preamble to the regulations as the authoritative explanation and interpretation of the rules. Id. at 1521.

Although a defense of legitimate purposes was not directly raised in NWF v. Babbitt, the district judge's opinion does not suggest any sympathy with that argument. The court analyzed the industry's arguments, in pertinent part, as follows:

> The industry Plaintiffs next argue that the ownership and control regulations violate § 510(c) by requiring a permit applicant to prove the absence of links to SMCRA violators. This claim also fails. Section 510(b) of SMCRA places the burden of proving that all requirements of the statute and of the state or federal programs have been complied with on the permit applicant. 30 U.S.C. § 1260(c) [sic]. Section 510(c) prohibits issuance of a permit where there are outstanding violations at any surface coal mining operation owned or controlled by the applicant until that applicant submits proof that the violations have been or are in the process of being corrected. 30 U.S.C. § 1260(c).
>
> * * *

[22] The failed arguments from industry included challenges based on State "primacy," the statute of limitations at 28 U.S.C. § 2462, and due process.

> The industry Plaintiffs further contend that the ownership and control regulations should be struck down because they dictate permit blocks if an applicant is linked to a mine, violation due to relationships either constituting or giving rise to a presumption of ownership or control. Relying on 30 U.S.C. § 1260(c), Plaintiffs contend that permit blocks are permissible only if a mine owned or controlled by an applicant is currently in violation. The Court's approval of the Secretary's interpretation of the ownership and control regulations and of the burdens of proof set forth in the regulations dictates that the industry Plaintiffs' contention be rejected.

41 Env't Rep. Cas. at 1521. OHA's decision did not cite NWF v. Babbitt.

Another federal district court has said that "consideration of whether an owner or controller of a violator acted in good faith does not enter into the analysis required by the [ownership and control] regulation." Ballmer v. Babbitt, No. 2:96-0010, slip op. at 6 (S.D. W.Va. May 28, 1996) (emphasis added), appeal pending, No. 96-2060 (4th Cir. filed July 23, 1996) (holding plaintiff's argument that he was without fault in being financially unable to complete reclamation was an improper challenge to the ownership and control regulations themselves). Ballmer had not been decided at the time of the Director's decision in James Spur.

OHA's decision relied on Coteau Properties Co. v. Department of the Interior, 53 F.3d 1466 (8th Cir. 1995) as support for the legitimate purposes inquiry. Coteau was procedurally tangled. An agency of the state of North Dakota, a primacy state, had concluded that Coteau's surface coal mining operations were not controlled by Basin Electric. The OSM Director, overruling his subordinates, concluded that the state was correct, but following a change in presidential administrations the new acting director reversed that decision. Coteau sought injunctive relief in federal district court, which was denied. On appeal, the key issue was whether OSM had accorded proper deference to the state determination, and all three judges agreed that it had not. Rather than remand the matter to OSM, however, two of the judges on the panel went on, over a vigorous dissent, to discuss the evidence of linkage between Coteau and Basin. Finding that Coteau had shown a likelihood of succeeding on the merits on the control question, the majority ordered the district court to enjoin OSM from enforcing its determination pending a trial on the merits.

There are several reasons why I believe the Coteau decision does not control on the question before me. First, the two judge majority, ruling on a request for a preliminary injunction, was not rendering a decision on the merits. Rather, as the dissent pointed out, it was engaging only in "mere predictive forecasting entitled

to no real weight when the merits of the dispute" are ultimately reached. 53 F.3d at 1482, n.2, citing Campbell "66" Exp., Inc. v. Rundel, 597 F.2d 125, 130 (8th Cir. 1979). Indeed, the ultimate issue of control is still pending before OSM, having been remanded the issue by the district court after remand from the Eighth Circuit.

Second, the basic issue before the court was the appropriate standard OSM was to apply in reviewing a state determination. Thus the majority's comments about the evidence on the control issue were, as the dissent pointed out, dicta, offered "on the basis of an inadequately developed record," and debatable in any event -- the dissenter thought OSM's determination of linkage was not arbitrary and capricious. 53 F.3d at 1481 (Heaney, J., dissenting). Finally, the majority did not focus directly on the question before me - whether "legitimate purposes" for an arrangement constitutes a defense to a control link under OSM's regulations. Instead the majority simply recited at substantial length all the reasons the state agency gave for finding that Basin Electric did not control Coteau, and concluded that the state had in fact "addressed the relevant connections between Basin and Coteau." 53 F.3d at 1477. The state agency's reasons included "an impressive list of key operating activities over which Coteau [rather than Basin Electric] maintained control." Id. It also included, among other factors, the state's judgment that the contracts between Basin and Coteau "were at arm's length, and the provisions in them were designed to protect each party's interests, not to establish Basin's control over Coteau's operations." Id. This is as close as the Coteau majority's opinion comes to suggesting that legitimate purposes -- a term it never uses -- are sufficient to rebut a control link.

OHA's decision makes too much of the majority's opinion in Coteau. The case's only holding was that OSM had applied the wrong standard and in any event had not made a sufficient showing that the state agency's detailed decision on control was wrong. The fact that the majority acknowledged that 'the state agency had "addressed the relevant connections" cannot be construed as a judicial endorsement of a "legitimate purposes" defense, nor as disagreeing with the other court decisions, described above, which suggest the contrary.

E. The Spur Decision Rests On a Misinterpretation of the Preamble to the Ownership and Control Regulations

OHA also sought support for its view in the following quotation from the preamble to the ownership and control rule:

> Actual authority. As originally proposed, the rule would have defined "control" as "any relationship which gives one person express or implied authority to determine the manner in which the person or another person mines,

> handles, sells or disposes of coal * * *." Some commentators stated that it was not clear what was meant by "express or implied authority." They suggested that control should turn on "actual" authority, as opposed to "express or implied" authority. OSMRE agrees, and has not included the phrase "express or implied" in the final definition. [30 C.F.R. 773.5(a) (3) (1994)] and [30 C.F.R. 773.5(b) (1994)] simply use the term "authority" which is intended to mean actual authority. [Emphasis added].

53 Fed. Reg. 38870 (quoted at 12 OHA at 181, adding emphasis).

As OHA characterized it, "OSM made clear in the preamble to its control regulations that 'implied' authority to control would not be considered, but only 'actual' authority to control." 12 OHA at 189-90.[23]

This interpretation misreads the preamble. OSM did not exclude "implied" authority from the operation of the ownership and control rules any more than it does "express" authority. See id. at 38870. Instead, it subsumed both concepts under the term "actual authority."

As the preamble explains in the context of a closely related topic:

> One commenter argued that the phrase "authority directly or indirectly to determine" used in paragraph (a) (3) should be changed for clarity to the phrase "control or the power to control."
>
> OSMRE did not adopt the suggestion. The language contained in the rule is sufficient and is no less inclusive than the suggested phrase.

53 Fed. Reg. 38870-71 (emphasis added).

The preamble further explains: "To the extent that a coal company controls or can exercise control over a contract operator it should

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[23] OHA's decision also cites, as support for the notion that actual authority cannot be. implied, the district court decision in Arch Mineral Corp. v. Babbitt, 894 F. Supp. 974 (S.D. W.Va. 1995), appeal pending, No. 95-2793 (4th Cir. Sept. 27, 1995). That case involved distinctly different facts, including a bankrupt contract miner, acquisition and dissolution of various entities, and is now before the Court of Appeal-s on appeal by the United States. Furthermore, the district court's opinion in Arch does not state that actual authority cannot be implied. Therefore, OHA's reliance on Arch is misplaced.

be held responsible for any outstanding violations of the Act which it could have prevented or corrected." 53 Fed. Reg. 38877 (emphasis added).

F. The Spur Decision Could Eviscerate the Beneficial Effects of the AVS

The thrust of section 510(c), as implemented in OSM's regulations, is that ownership or control of a surface coal mining operation carries with it a responsibility to prevent and to abate violations at those operations if the applicant seeks a new permit. By preventing those who leave unabated violations from obtaining new permits, it encourages owners and controllers to exercise diligence in preventing and abating violations. See, e.g., 53 Fed. Reg. 38875. This levels the playing field for the competent and scrupulous members of the coal mining industry by preventing unfair competition from miners who cut corners and costs by slighting their environmental obligations. 53 Fed. Reg. 38868. The rules also protect mine sites and the coal field communities which benefit from compliance.

As the district court in Ballmer v. Babbitt implicitly recognized, see supra, p. 20, the need to promote prompt abatement of violations by blocking entities controlling those in violation from getting new permits is the same whether the applicant has legitimate reasons for control or seeks only to circumvent the Act. As the preamble states, "[t]o the extent that a coal company controls or can exercise control over a contract operator it should be held responsible for any outstanding violations of the Act which it could have prevented or corrected." 53 Fed. Reg. 38877. Persons who become controllers for benign or prudent purposes are nonetheless required by SMCRA and its implementing regulations to exercise their control to prevent or to abate violations-on the pain of losing the ability to obtain further permits.

If the regulations permitted an applicant to avoid being labelled a "controller" if it could show a legitimate purpose for the control, the salutary purpose of the control presumption would be vitiated. Business enterprises would likely find it easy to circumvent the effect of § 510(c) by expressing the need for control in business terms. Only the most poorly advised owner or controller would arrange its business enterprise in such a way as to show that control did not serve a legitimate purpose.

The Spur opinion in effect supports a distinction between "legitimate control," which it regards as exempt from the ownership and control rule, and "illegitimate control" which it regards as subject to the rule. This distinction is not found in the rule or supported by the statute. Moreover, an inquiry into the "legitimacy" of purposes for control is likely to prove at best elusive, and at worst could fatally undermine the efficacy of section 510(c). The broader the concept of "legitimacy," the

narrower the reach of control, and the more violations of the Act that would go unabated. If any reason for control that protected the controller's business or financial interests were regarded as legitimate, little would be left to be regarded as illegitimate and subject to the ownership and control rule. Moreover, applicants would be motivated to find and offer such business or financial interests to justify control, and it would be difficult if not impossible for OSM to challenge such reasons.

The failure to exercise one's ability to control in order to prevent or to abate violations can be at least as damaging to the environment or as dangerous to the public as actively causing violations. Accordingly, once OSM proves facts which support a presumptive ownership or control link under section 773.5(b), an applicant must'show that it "does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted." 30 C.F.R. § 773.5(b) (emphasis added).

III. CONCLUSION

For the reasons stated above, showing "legitimate purposes" for indicia of control does not rebut a presumption of control. The relevant inquiry, as established in the regulations, is whether the applicant has the ability to control the operation.

This Opinion was prepared with the substantial assistance of Richard McNeer and Glenda Owens of the Branch of Surface Mining, Division of Mineral Resources.

John D. Leshy
Solicitor

I concur: _____
Secretary of the Interior

12/5/96
Date