

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**RANDY C. HUFFMAN,**  
Secretary, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,<sup>1</sup>

Appellee

v.

No. 34138

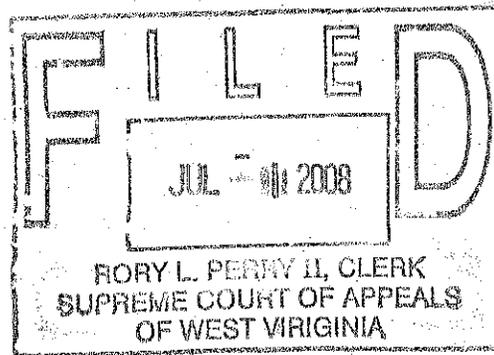
**GOALS COAL COMPANY, and COAL RIVER  
MOUNTAIN WATCH**

Respondents Below,

and

**COAL RIVER MOUNTAIN WATCH,**

Appellant.



**APPELLANT'S BRIEF**

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<sup>1</sup> Pursuant to West Virginia Rule of Appellate Procedure 27(c)(1), Randy C. Huffman is automatically substituted for Stephanie Timmermeyer as the Appellee in this matter.

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## I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The question presented by this appeal is simple: Whether the “permit area” of a surface mining operation is defined solely by the maps submitted with the original application. Resolving that question requires nothing more of this Court than the performance of the routine task of construing a statute. The question arises in the context of an administrative decision of the West Virginia Department of Environmental Protection (“WVDEP”). Goals Coal Company wants to build a coal silo within 300 feet of Marsh Fork Elementary School. The proposed site is outside the permit area as defined by the boundaries on the map that the company’s predecessor submitted with its permit application. The company argues, however, that the boundary drawn on the map does not define the permit area. Rather, Goals Coal Company insists that the proposed site is within its permit area because of the location of a steel pipe driven into the ground on the site.

WVDEP accepted Goals Coal Company’s arguments, and issued an order concluding that the permit area was not defined solely by the map. The West Virginia Surface Mine Board (“SMB” or “the Board”) affirmed that decision, erroneously concluding that federal and state law “require a permit area to be established by reference to both a map and boundary markers.” Goals Coal Company v. Timmermeyer (Goals Coal II), SMB Appeal Number 2006-15-SMB, Final Order at 7 (March 13, 2007). Coal River Mountain Watch filed an administrative appeal of the Board’s order under the Administrative Procedures Act. The Kanawha County Circuit Court affirmed the Board’s order. Remarkably, the Circuit Court did so with little more than a pro forma attempt to construe the relevant statutes.

The Circuit Court’s affirmation of the Board’s order should be reversed for the following reasons. First, it is contrary to the plain language of the relevant statutes and

regulations. Second, it is contrary to the manner in which the federal government has consistently interpreted and implemented those provisions. Third, it misconstrues State law and would render State law inconsistent with federal law. Fourth, it is contrary to Congressional intent. Finally, its absurd result simply runs afoul of common sense.

## II. STATEMENT OF FACTS

In 1982, Armco Steel Company received a permit under the West Virginia Surface Coal Mining and Reclamation Act (“WVSCRMA”) to conduct surface mining operations at a location adjacent to Marsh Fork Elementary School. Certified Record for Revision 9 to Surface Mining Permit Number D-66-82 (hereinafter “Rev. 9 C.R.”) at 1, 22, 37. That permit, Surface Mining Permit Number D-66-82, is now held by Goals Coal Company. It includes an area within 300 feet of Marsh Fork Elementary School because, by providing the permitting agency with a copy of its water pollution permit, Armco demonstrated to the agency that it had been operating in that area prior to the enactment of the surface mining laws. Goals Coal Company v. Timmermeyer (Goals Coal I), SMB Appeal No. 05-23-SMB, Final Order at 4 (May 15, 2006).<sup>2</sup>

In 2005, Appellee Goals Coal Company submitted an application to revise the permit—Revision 8—to allow it to build a coal storage silo within 300 feet of Marsh Fork Elementary. Goals Coal I, Final Order at 3. The application for Revision 8 generated tremendous controversy, and the affected community submitted multiple objections to the proposed silo. Id. at 3-4. WVDEP initially approved that application, but later rescinded it when it became apparent that the proposed silo was going to be constructed outside of the permit area

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<sup>2</sup> The record from that appeal is incorporated by reference into the Certified Record for Revision 9.

authorized by Surface Mining Permit Number D-66-82. Id. at 4-5.

Coal River Mountain Watch brought it to WVDEP's attention that the boundaries of the permit area depicted in the application for Revision 8 were inconsistent with the boundaries of the permit area depicted in the map submitted with the original permit application, notwithstanding the fact that the permit area had never been amended or modified. The proposed location for the coal silo was outside the boundaries depicted in the unamended map submitted with the original permit application, although it was within the boundaries depicted on the inaccurate maps that Goals Coal Company submitted with its application for Revision 8. Goals Coal I, Final Order at 3-5.<sup>3</sup>

Goals Coal Company appealed WVDEP's rescission to the SMB, which affirmed the rescission, but allowed the applicant to submit a revised application with a "corrected map." Id. at 7.<sup>4</sup> Goals Coal Company subsequently submitted a second application to construct the controversial silo, dubbed Revision 9. Goals Coal II, Final Order at 4-5. That application asserted that the boundaries depicted on the unamended map submitted with the original permit

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<sup>3</sup> Contrary to Goals Coal's protestations in its response to Appellant's petition for appeal, there is substantial, reliable, and probative evidence in the record to support a factual finding that the location of the proposed silo is outside the boundaries of the permit area as indicated on the application map. Specifically, at the hearing in Goals I, Secretary Huffman—then Director of the Office of Mining and Reclamation within DEP—expressly stated that his review of the application for Revision 8 and the pertinent maps revealed that the proposed location for the second silo was outside the boundaries indicated on the 1982 map. Transcript of 3/14/2006 Hearing at 142.

<sup>4</sup> WVDEP argued to the Circuit Court that the Board's decision in Goals Coal I precludes Coal River Mountain Watch's current administrative appeal. The Circuit Court's final order did not address that argument. That is not surprising considering that the preclusion argument is wholly meritless. That is so for two reasons. First, the Secretary waived the defenses of res judicata and collateral estoppel by not raising them before the Board. Hoover v. W. Va. Bd. of Medicine, 216 W. Va. 23, 26, 602 S.E. 2d 466, 469 (2004). Second, as Coal River Mountain Watch explained in its Reply Brief to the Circuit Court, the requisite elements for the application of the res judicata and collateral estoppel doctrines are not present in this case. Reply Brief of Coal River Mountain Watch at 4-8.

application were inaccurate because they conflicted with the location of a pipe driven into the ground at the western end of the mine site in 1981 by an employee of Armco Steel. Rev. 9 C.R. at 49-57. Goals Coal Company submitted what it purports to be a “corrected” map with its application for Revision 9. Rev. 9 C.R. at 110.

In an order dated August 11, 2006, WVDEP denied the application for Revision 9 with regard to the construction of the storage silo. Rev. 9 C.R. at 6. However, WVDEP approved Revision 9 “as to the location and placement of the permanent boundary markers proposed therein.” *Id.* (emphasis in original). That is, WVDEP concluded that, although the proposed silo location was not located within the permit area boundaries shown on the unamended map that Armco Steel submitted with its permit application in 1982, the proposed silo location did fall within the permit area boundaries as purportedly established by a site marker on the western end of the permit area—the pipe driven into the ground 25 years earlier. *Id.* at 2-4.

Goals Coal Company appealed WVDEP’s August 11, 2006, order to the SMB as it related to the construction of the coal storage silo. That appeal was docketed as SMB Appeal Number 06-15-SMB. Coal River Mountain Watch appealed the same order to the extent that it approved the location and placement of the permanent boundary markers and that it concluded that the permit area was not solely defined by the unamended map submitted with the permit application. That appeal was docketed as SMB Appeal Number 06-16-SMB. The SMB issued its final order in the two appeals on March 13, 2007. It ruled in favor of Goals Coal Company in SMB Appeal Number 06-15-SMB and in favor of WVDEP in SMB Appeal Number 06-16-SMB.

WVDEP appealed to the Kanawha County Circuit Court the SMB’s order to the

extent that it reversed WVDEP's order denying Goals Coal Company permission to construct the silo. Coal River Mountain Watch filed its own appeal to the Circuit Court of Kanawha County, arguing that the SMB erred in concluding that the permit area is not defined solely by the unamended map submitted with the permit application. By order of the Court, WVDEP's appeal was consolidated with Coal River Mountain Watch's appeal on May 1, 2007.

After briefing and oral argument, the Kanawha County Circuit Court affirmed the SMB's decision in an order issued on September 25, 2007. It is that order that Coal River Mountain Watch respectfully requests that the Court now reverse.

### III. ASSIGNMENT OF ERROR

THE CIRCUIT COURT ERRED IN AFFIRMING THE ORDER OF THE SURFACE MINE BOARD BECAUSE, UNDER FEDERAL AND STATE LAW, THE PERMIT AREA OF A SURFACE MINING OPERATION IS DEFINED SOLELY BY BOUNDARIES INDICATED ON THE MAP APPROVED IN THE APPLICATION PROCESS.

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**V. DISCUSSION OF LAW**

**A. Legal Framework**

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (“SMCRA”) in order to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. § 1202(a). SMCRA encourages “cooperative federalism” by allowing states to adopt their own programs for the

regulation of mining, so long as those programs are at least as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia's state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates surface mining operations under Article 3 of Chapter 22 of the West Virginia Code and issues surface mining permits pursuant to that statute.

In order to obtain a surface mining permit, the operator's application "shall contain . . . [a]ccurate maps to an appropriate scale clearly showing . . . [t]he land to be affected as of the date of the application." W. Va. Code § 22-3-9(a)(12); 30 U.S.C. § 1257(b)(9). Each permit includes a condition, under federal and state law, that

[t]he permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the bond or other equivalent guarantee in effect pursuant to section 11 and 12 of the Act and section 11 of this rule.

38 C.S.R. § 2-3.33(a); 30 C.F.R. § 773.17(a) (emphasis added).

To serve the statutory goal of protecting society from the adverse effects of coal mining operations, Congress drew a bright line around certain areas and designated them as unsuitable for surface mining operations as a matter of law. Specifically, Congress provided that

no surface coal mining operations except those which exist on August 3, 1977, shall be permitted . . . within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

30 U.S.C. § 1272(e) (emphasis added). The corresponding state law provision is found in Section 22(d) of Article 3 of Chapter 22 and includes substantially the same restrictions as its

federal counterpart.

In sum, unless the area where Goals Coal Company wants to construct its coal storage silo is within the permit area of Surface Mining Permit Number D-66-82, the company cannot build the silo. As explained below, the permit area of Surface Mine Permit Number D-66-82 does not include the proposed site of the coal storage silo because the proposed site is outside the permit area boundaries as indicated on the application map. The Circuit Court committed reversible legal error in concluding otherwise.

### **B. Standard of Review**

This Court has explained that, “[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of laws presented de novo; findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus Point One, Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996). Under the West Virginia Administrative Procedures Act,

[t]he court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g). The Court is to review questions of law de novo. C&H Taxi Co. v.

Richardson, 194 W. Va. 696, 701, 461 S.E.2d 442, 447 (1995).

### **C. Argument**

As noted above, the legal question presented in this case is quite straightforward:

Whether the “permit area” of a surface mining operation is defined solely by the maps submitted with the original application. As explained below, the federal and state surface mining statutes and regulations provide that the permit area is to be defined only by the maps submitted with the permit application. That conclusion is required by the statute and the regulations, as well as Congressional intent and common sense.

#### **1. The Statutory Definitions of “Permit Area” Define the Term by Reference to the Application Map**

This statutory construction endeavor must begin with the definition sections of the state and federal statutes. The state statute defines “permit area” to mean “the area of land indicated on the approved proposal map submitted by the operator as part of the operator’s application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site.” W. Va. Code § 22-3-3(q). The federal statute defines “permit area” to mean “the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator’s bond as required by section 1259 of this title and shall be readily identifiable by appropriate markers on the site.” 30 U.S.C. § 1291(17).

The Court should note that there is an unusual characteristic to those definitions. Specifically, in addition to defining the term “permit area,” the definitions also include statutory mandates. That is, first “permit area” is defined to mean “the area of land indicated on the approved map submitted by the operator with his application.” Next, the statutes mandate that the permit area, in the case of the federal statute, “shall be covered by the operator’s bond as

required by section 1259 of this title and shall be readily identifiable by appropriate markers on the site,” and, in the case of the State statute, “shall be readily identifiable by appropriate markers on the ground.” As explained below, the context of the statutes makes clear that the statutes’ mandates are directed toward the applicant.

At this stage of the statutory construction, the important point is that the definitions have two elements. The first is a definition; the second is a mandate.<sup>5</sup> The definition element of the statute provides that a “permit area” is “the area of land indicated on the approved map submitted by the operator with his application.” 30 U.S.C. § 1291(17) (emphasis added); see also W. Va. Code § 22-3-3(q).

#### **a. The State Statute**

As discussed above, West Virginia law provides that “‘permit area’ means the area of land indicated on the approved proposal map submitted by the operator as part of the operator’s application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site.” W. Va. Code § 22-3-3(q). That statute unambiguously defines the term permit area to mean “the area of land indicated on the approved proposal map submitted by the operator as part of the operator’s application.” Id. The statute further requires that the map show the location of perimeter markers and monuments. Finally the

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<sup>5</sup> The Secretary argued to the Circuit Court that it is “absurd” to think that a provision in a statute labeled “definitions” could possibly prescribe a legal obligation or mandate. That argument overlooks the fact that headings are not part of the statute as adopted by a legislature. This Court and the federal courts have explained that headings are not part of the statute as adopted by a legislature. Headings are largely irrelevant to statutory construction. See, e.g., Holland v. Williams Mountain Coal Co., 256 F.3d 819, 922 (D.C. Cir. 2001) (citing Bhd. of R.R. Trainment v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29 (1947), for the proposition that there is a “customary reluctance to give great weight to statutory headings”); Rhodes v. J.B.B. Coal Co., 79 W. Va. 71, 90 S.E. 796, 797 (1916) (holding that a “heading is no part of the statute”). See also Woodrum v. Johnson, 210 W. Va. 762, 773, 559 S.E.2d 908, 919 (2001) (Albright, J., dissenting) (explaining that, under W. Va. Code § 2-2-10(z), which provides that headings are not part of the statutes, the terms in headings are of “no significance”).

statute provides that the permit area “shall be readily identifiable by appropriate markers on the site.” Although the verb the statute uses—shall be—is in the passive voice and obscures its subject, the subject must necessarily be the permit applicant.

Absolutely nothing in the definition in the state statute defines the permit area by the location of physical boundary markers. Rather, the statute limits the permit area to the area of land shown on the application map. Consequently, the Circuit Court should have held that the plain language of the state statute provides that the permit area of a surface mining operation is defined solely by the boundaries indicated on the application map. By not doing so, the Circuit Court committed reversible error.

Even if the plain language of the statute were not so clear, the appropriate conclusion would remain that the permit maps control and that the location of physical boundary markers on the ground is irrelevant. WVDEP argued to the Circuit Court that the Court should defer to its contrary interpretation under Appalachian Power Co. v. State Tax Dept. of W. Va., 195 W. Va. 573, 466 S.E.2d 424 (1995). Although Appalachian Power adopted the “Chevron doctrine,” this Court recognized that the deference to be afforded to an agency interpretation of an ambiguous statute under that doctrine is limited to agency interpretations set out in legislative rules. Appalachian Power, 195 W. Va. at 586.

Here, no state legislative rule defines the term “permit area.” Nor does any legislative rule support the Secretary’s position. In other words, the WVDEP has never bothered to codify its “interpretation” in the only manner deserving deference. Consequently, it would be wholly improper for the Court to apply Appalachian Power and to defer to the Secretary’s interpretation.

Equally problematic is Goals Coal Company’s argument to the Circuit Court that

it should defer to the Secretary's position under the doctrine commonly referred to as the Seminole Rock doctrine, articulated by the United States Supreme Court in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). The Seminole Rock doctrine applies to a federal agency's interpretation of its own regulations. As noted above, there are no regulations that the Secretary is purporting to interpret, nor are there any rules that support his interpretation.

If the plain language of the statute were ambiguous, then the doctrine attributed to Skidmore v. Swift & Co., 323 U.S. 134 (1944), would provide the appropriate treatment of the Secretary's position. See Appalachian Power, 195 W. Va. at 583; see also Cookman Realty Group, Inc. v. Taylor, 211 W. Va. 407, 413-18, 566 S.E.2d 294, 301-05 (2002) (Starcher, J., concurring). Under Skidmore, although an agency's interpretation in a ruling or other adjudicative decision "constitutes a body of experience and informed judgment to which a reviewing court should properly resort for guidance," the agency's interpretation is not controlling and is only given weight to the extent that it is persuasive. Cookman Realty Group, Inc., 211 W. Va. at 417 (Starcher, J., concurring). In other words, the agency's proposed interpretation is treated no differently than any other party's argument as to how the court should interpret a particular statute.

Here, the agency's construction of the statutory scheme is not only unpersuasive, it is inherently unreasonable. A proposed interpretation cannot contravene the legislature's intent and be deemed reasonable. With regard to the surface mining laws, the West Virginia Legislature intended for the state act to be consistent with the federal program. As explained below, the federal definition of permit area without doubt limits the permit area to that area identified on the maps submitted with the application.

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## b. The Federal Statute

As discussed above, SMCRA provides that

“permit area” means the area of land indicated on the approved map submitted by the operator with his application, which area of land shall be covered by the operator’s bond as required by section 1259 of this title and shall be readily identifiable by appropriate markers on the site.

30 U.S.C. § 1291(17). The plain language of that statute defines a “permit area” as “the area of land indicated on the approved map submitted by the operator with his application.” *Id.* The plain language of the statute further requires that the operator bond the entire permit area and identify the site with appropriate markers.

Nothing following the first comma in 30 U.S.C. § 1291(17) modifies, limits, qualifies, or otherwise defines the term “permit area.” That is so because everything following that comma is in a nonrestrictive clause, set off by the comma and the pronoun “which.”<sup>6</sup> Consequently, the plain language of the federal statute unambiguously requires that the boundaries of a permit area be defined solely by the boundaries shown on the application map. Accordingly, the Secretary’s proposed construction is in conflict with the unambiguous federal law, and the Circuit Court erred in not rejecting it.

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<sup>6</sup> The term “which,” when used in the manner that it is used in 30 U.S.C. § 1291(17), indicates that the clause that follows it is nonrestrictive. Bryan A. Garner, The Elements of Legal Style 140-41 (1991). Nonrestrictive clauses “are so loosely connected with the essential meaning of the sentence that they might have been omitted without a change in that essential meaning.” *Id.* at 141.

Federal courts routinely interpret federal statutes by applying the grammatical difference between restrictive and nonrestrictive clauses. See U.S. v. Indoor Cultivation Equipment from High Tech Indoor Garden Supply, 55 F.3d 1311, 1315-16 (1995) (holding that “Congress’s use of the pronoun ‘which’ is significant; it introduces a nonrestrictive clause . . . that does not limit the meaning of the word it modifies”). The United States Supreme Court has held that Congress is presumed to know the rules of grammar. U.S. v. Goldenberg, 168 U.S. 95, 102-03 (1897). Consequently, when it enacted 30 U.S.C. § 1291(17), Congress intended to use a nonrestrictive clause that would not limit or modify the definition of permit area.

**i. The Federal Office of Surface Mining Interprets the Statute to Define “Permit Area” Strictly by the Boundaries on the Permit Application Map**

If the federal statute were ambiguous, the proper course would be to look to the federal agency’s construction of the statute to resolve the ambiguity. Congress has charged the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) within the Department of Interior with the administration of SMCRA. See generally 30 U.S.C. § 1211. Consequently, deference is due that agency’s interpretations of the provisions of SMCRA. Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Under Chevron, when a federal statute is ambiguous, the agency charged with interpreting the statute through rule-making is entitled to deference to its interpretation as embodied in its duly promulgated rules, so long as that interpretation is reasonable. To understand the agency’s interpretation, courts consider not only the rules promulgated by the agency, but also the agency’s contemporaneous explanations of those rules, such as those published in the Federal Register. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 714-16 (1985). Although this case is in a slightly different posture than most cases in which Chevron is invoked, OSMRE’s position remains important. Chevron, 467 U.S. at 842-43. This Court has explained that “state mining laws have to be interpreted consistently with federal law.” DK Excavating, Inc. v. Miano, 209 W. Va. 406, 411, 549 S.E.2d 280, 285 (2001). Consequently, when OSMRE speaks on the appropriate construction of a federal surface mining statute, its statements are due deference by the courts. In other words, if the statute were ambiguous, OSMRE’s interpretation of 30 U.S.C. § 1291(17)—gleaned from the agency’s regulations and the preambles to those regulations—would be controlling in a federal court and, thus, represents the federal law with which W. Va. Code § 22-3-3(q) must be consistent.

OSMRE has consistently construed SMCRA to define “permit area” strictly by

the boundaries depicted on the map accompanying the permit application. In the preamble to its first interpretive rule, OSMRE expressly stated that “defining permit area as land designated on maps is expressly required by [30 U.S.C. §§ 1257(b) and 1291(17)].” 44 Fed. Reg. 14,902, 14,921 (Mar. 13, 1979) (emphasis added). Thus, from its first efforts to interpret SMCRA, OSMRE has construed the statute to define a permit area solely by the maps submitted with a permit application.

The current regulatory definition of the term “permit area” is

the area of land, indicated on the approved map submitted by the operator with his or her application, required to be covered by the operator’s performance bond under Subchapter J of this chapter and shall include the area of land upon which the operator proposes to conduct surface coal mining and reclamation operations under the permit, including all disturbed areas; provided that areas adequately bonded under another valid permit may be excluded from the permit area.

30 C.F.R. § 701.5. Noticeably absent from the federal agency’s definition of “permit area” is any reference to physical boundary markers. That absence is significant—if not dispositive—and establishes that the federal agency charged with interpreting SMCRA does not consider physical markers to be relevant in defining the boundaries of a permit area.

Further supporting that conclusion is 30 C.F.R. § 773.17(a), which provides that

[t]he permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps submitted with the application and authorized for the term of the permit and that are subject to the bond or other equivalent guarantee in effect pursuant to section 11 and 12 of the Act and section 11 of this rule.

(Emphasis added.). When it promulgated that regulation, OSMRE explained that the rule was intended to “limit[] surface coal mining and reclamation activities to approved and bonded areas shown on the permit application map.” 48 Fed. Reg. 44,344, 44,370 (Sept. 28, 1983) (emphasis

added). Moreover, when it proposed the text of what would become 30 C.F.R. § 773.17(a),

OSMRE stated that its intent was

to insure that operations conducted under permits are limited to those operations which were specifically disclosed on maps submitted to the regulatory authority as part of the permit application. . . . This requirement is important for two reasons. First, it is only with respect to those specific lands authorized for mining under a permit that the regulatory authority will have determined that reclamation of the area to be mined will be feasible, within the term of that permit, as required by the Act. Second, under Sections 506(d) and 511(a) of the Act, mining activities outside the boundary of the lands indicated on maps submitted in the permit applications must be made the subject of a new permit application.

43 Fed. Reg. 41,662, 41,721 (Sept. 18, 1978) (emphasis added).

When considered together, OSMRE's regulations and contemporaneous statements with regard to the term "permit area" and the requirement that mining operations be limited to the lands indicated on the maps submitted with the permit applications conclusively establish that the agency interprets SMCRA to limit a "permit area" to the area indicated on the application maps. Because under federal law OSMRE's reasonable interpretation would control if 30 U.S.C. § 1291(17) were ambiguous, a federal court would be compelled to conclude that federal law does not permit consideration of anything other than the boundaries indicated on the application maps when defining the boundaries of the permit area.

**ii. The Secretary's Chevron Argument Cannot Withstand Scrutiny**

The Secretary argued to the Circuit Court that there was no need to consider OSMRE's interpretation of the statute under Chevron because, in the agency's opinion, the statute's language unambiguously requires reference to the map and the boundary markers. That argument is untenable. SMCRA provides that

"permit area" means the area of land indicated on the approved

map submitted by the operator with his application, which area of land shall be covered by the operator's bond as required by section 1259 of this title and shall be readily identifiable by appropriate markers on the site.

30 U.S.C. § 1291(17). The Secretary's construction, and particularly the application of it to this case, requires an assumption that is not at all clear from the face of the statute. Specifically, when faced with a conflict between the permit map and the boundaries on the ground, the Secretary assumes that the map must yield to the boundary marker. That is, despite the Secretary's assertion that the map and boundary markers are equal under the statute, he treats some (the boundary markers) as more equal than others. Nothing in the language of the federal or state definitions of "permit area," however, addresses the question of relative weight. That alone establishes that the Secretary relied on more than the "plain meaning" of the statutes in making the decision that Coal River Mountain Watch has challenged.

Contrary to the Secretary's assertions, the statute cannot reasonably be read to give the markers a superior or even equal status to the maps. Although the Secretary nowhere has stated it clearly, he reads this provision to say that the markers and the map have equal status and then suggests, remarkably, that if there is a conflict, the statute states that the markers control. There is simply no way to wring that meaning from the language of the statutory provision. Furthermore, giving the map and the markers equal status would be incoherent unless the statute provided some way to resolve a conflict between the markers and the maps if one arises, as it does here. Again, it is preposterous to suggest that the unambiguous meaning of the statute gives priority to the markers when there is a conflict.

## **2. The Secretary Misconstrues the Statute and Would Render West Virginia Law Inconsistent with Federal Law**

As explained above, under federal law, a permit area is defined solely by the

boundaries indicated on the application map. Although there are minor differences between the federal and state statutory definitions of “permit area,” those differences are not material. The two statutes must be interpreted consistently. Only Coal River Mountain Watch’s proposed construction accomplishes the task of giving effect to every word in both statutes and complying with the requirement under West Virginia law that the state statute be read consistently with the federal.

The Secretary relies heavily on the phrase “shall be readily identifiable by appropriate markers on the site.” That phrase is found in both the federal and state definitions. As noted above, in the federal definition, the phrase is part of a nonrestrictive clause set off by a comma and the pronoun “which,” indicating that it does not define the term “permit area.” In the state statute, however, there is no clear indication that the phrase is part of a nonrestrictive clause.

Nonetheless, the West Virginia legislature used the word “shall,” just as Congress did. This Court has explained that the legislature’s use of the word “‘shall’ commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.” State v. Allen, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999). Consequently, the phrase commands behavior, rather than defining a term.

To make this even clearer, when the use of the word “shall” is combined with this Court’s mandate that the state surface mining law must be interpreted consistently with federal mining law, it is incontrovertible that the phrase “shall be readily identifiable by appropriate markers on the site” is not intended to define the term “permit area.” Rather, the phrase plainly prescribes a legal duty.

The well settled law in this state is that state surface mining laws must be

interpreted to be consistent with federal mining law. Marfork Coal Co. v. Callaghan, 215 W. Va. 735, 601 S.E.2d 55 (2004); Antco, Inc. v. Dodge Fuel Corp., 209 W. Va. 644, 550 S.E.2d 622 (2001); DK Excavating, 209 W. Va. at 411; Schultz v. Consolidation Coal Co., 197 W. Va. 375, 475 S.E.2d 467 (1996); Rose v. Oneida Coal Co., Inc., 195 W. Va. 726, 466 S.E.2d 794 (1995); Russell v. Island Creek Coal Co., 182 W. Va. 506, 389 S.E.2d 194 (1989); Cogar v. Sommerville, 180 W. Va. 714, 379 S.E.2d 764 (1989); Canestraro v. Faerber, 179 W. Va. 793, 795, 374 S.E.2d 319, 321 (1988). In those cases, this Court recognized a rule of statutory construction that identifies the intent of the West Virginia Legislature. See Canestraro, 179 W. Va. at 793, Syll. Pt. 1 (“When a provision of the West Virginia Surface Coal Mining and Reclamation Act . . . is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, . . . the state act must be read in a way consistent with the federal act.” (Emphasis added; internal citations omitted.)); Antco, 209 W. Va. at 654 (explaining that the Canestraro rule is “entirely consistent with the fundamental law of our State”). The intent of the West Virginia Legislature was to adopt a state program to regulate surface mining, and in order to do so it had to adopt a program that is consistent with federal law. See DK Excavating, 209 W. Va. at 411 n. 11 (noting that the “Legislature has elected to provide for, and the Executive has opted to apply for and has obtained approval of this state plan” and that “[i]t is for the Legislature and the Executive, not this Court, to determine when, and if, it is preferable to revert to federal regulation of this state’s surface coal activities”). In other words, this Court has held that the intent of the West Virginia Legislature in adopting the WVSCMRA was to adopt a law that is consistent with the federal program.<sup>7</sup>

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<sup>7</sup> To avoid the consequences of that settled rule, Goals Coal Company argued in its response to Appellant’s petition for appeal that a federal court has somehow “effectively overruled” this Court on a question of state law. Specifically, Goals Coal Company cites Bragg

Accordingly, the intent of the West Virginia Legislature when it enacted the definition of permit area must be presumed to have been to enact a statute consistent with the federal definition. For the reasons explained elsewhere in this brief, the plain language, regulatory history, legislative intent, and common sense compel the conclusion that, under federal law, the boundaries of a permit area are to be defined solely by the map submitted with the application. Notwithstanding any minor linguistic or grammatical differences, the West Virginia statute must be interpreted to require the same. Consequently, the Circuit Court erred in affirming the final order of the SMB and concluding that state law uses the markers and monuments on the ground to define the permit area. The federal law limits the definition of a permit area to the application maps. By affirming the SMB's legal error on that point, the Circuit Court places the state law in the untenable position of being inconsistent with the federal

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v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001), for the proposition that the federal statutes have "drop[ped] out" of the equation. Reliance on Bragg is misplaced for at least two reasons. First, in multiple decisions issued after the Fourth Circuit handed down the Bragg decision on April 24, 2001, this Court has reaffirmed the principle that state surface mining laws must be interpreted to be consistent with federal mining law. See Marfork Coal, 215 W. Va. at 745 (opinion issued on March 15, 2004); Antco, Inc., 209 W. Va. at 653-54 (opinion issued on July 6, 2001). Consequently, Canestraro and its progeny remain good law.

The second reason that Goals Coal Company's reliance on Bragg is misplaced is that, even if this Court had not spoken on the matter post-Bragg, a federal court cannot overrule the highest court of a sovereign state on a question of state law. That proposition is so fundamental to the tenets of federalism underlying the union of the fifty states that it scarcely needs to be supported by authority, but the United States Supreme Court expressed that proposition precisely in Johnson v. Fankell, 520 U.S. 911, 916 (1997), by stating, "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." The Canestraro rule is essentially a rule of statutory construction identified by this Court for determining the intent of the West Virginia Legislature. See Canestraro, 179 W. Va. at 793, Syll. Pt. 1 ("When a provision of the West Virginia Surface Coal Mining and Reclamation Act . . . is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, . . . the state act must be read in a way consistent with the federal act." (Emphasis added; internal citations omitted.)); Antco, 209 W. Va. at 654 (explaining that the Canestraro rule is "entirely consistent with the fundamental law of our State"). Because of that state law basis for the Canestraro rule, no decision of any federal court can expressly or implicitly overrule it.

law.

### **3. The Law Requires the Boundary Markers on the Ground to Reflect the Boundaries on the Map, Not Vice-Versa**

Further, whatever question remains of what to make of the statutory mandates in both the federal and state statutes that the permit area “shall be readily identifiable by appropriate markers on the site” is easily answered by reference to the state and federal regulations. The performance standards of the West Virginia Surface Mining Rule provide that, “[p]rior to initial disturbance, suitable markers made of durable material shall be established to permanently mark the perimeter of the area under permit.” 38 C.S.R. § 2-14.1(b). The federal permanent performance standards include a similar requirement. See 30 C.F.R. §§ 816.11(d) & 817.11(d). Those regulations are the regulatory codification of the mandate in the definition of “permit area” that the area “shall be readily identifiable by appropriate markers on the site.” W. Va. Code § 22-3-3(q); 30 U.S.C. § 1291(17). OSMRE made it clear that it understood the language in 30 U.S.C. § 1291(17) to be a mandate, rather than a definition, by explaining that the statutory authority for its sign and markers rule included 30 U.S.C. § 1291(17)—the provision of SMCRA that defines “permit area.” 44 Fed. Reg. at 15,137. In other words, the surface mining law and regulations require that the applicant install markers that reflect the permit area boundaries as shown on the map. The permit markers merely reflect the boundary established by the maps. One of Goals Coal Company’s witnesses admitted as much in the Goals Coal I hearing before the SMB. See Goals Coal I, Transcript of Mar. 14, 2006, Hearing at 50 (“Today you actually would prepare the maps, and then go out and put the features on the ground preferably by survey today.”) (Testimony of Clarence “Toby” Waller).

Additionally, the statutes place the risk of an inconsistency between the markers and the map on the applicant. The statutes provide that “[t]he surface-mining permit application

shall contain . . . [a]ccurate maps to an appropriate scale clearly showing . . . [t]he land to be affected as of the date of the application.”<sup>8</sup> W. Va. Code § 22-3-9(a)(12); 30 U.S.C. § 1257(b)(9). The statutes further provide that “[t]he applicant for a permit, or a revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this article and the rules hereunder.” W. Va. Code § 22-3-18(a) (emphasis added); 30 U.S.C. § 1260(a). Consequently, it is the applicant who bears the burden to provide accurate maps with its application.<sup>9</sup> To the extent that there is a difference between the maps and

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<sup>8</sup> The Court should note that this statute places the burden of providing a map of an appropriate scale on the applicant. Hence, Goals Coal Company deserves little sympathy based on the scale of the maps that it submitted. The Circuit Court was inclined to cut Goals Coal Company some slack based on the scale of the map that it submitted, but nothing prevented Goals Coal Company from submitting a map with a sufficient scale to identify the boundary without confusion.

<sup>9</sup> That the applicant bears the burden to submit an accurate map also renders the Secretary’s argument regarding “absurd results” baseless. The Secretary argued to the Circuit Court that the statutes cannot be construed to define the boundaries of a permit area solely by the boundaries indicated on the application map because that construction would lead to absurd results in this instance. Specifically, the Secretary argued that the permit boundaries as indicated on the map include an area of land that was never disturbed.

The “absurd” or “illogical” result described by the Secretary is not the type of “absurd” result that the canons of statutory construction suggest should be avoided. Any “absurdity” that results from the application of the law as written in this case is the fault of the map drafter solely. It is he who created what the coal company and the Secretary insist is an inaccurate map. West Virginia law places the burden of submitting an accurate application—including an accurate map—on the applicant, and, hence, the applicant bears the risk of any “absurdity” that results from an inaccurate map. W. Va. Code §§ 22-3-9, 22-3-18(a).

Interpreting the statute to define a permit area solely by the boundaries indicated on the application map does not necessarily lead to an absurd result in every instance. This Court has embraced the view that “the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said.” Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 787-88, 551 S.E.2d 702, 709-10 (2001) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46:07, at 199 (6th ed. 2000) (footnote omitted in Taylor-Hurley)). This Court has further explained that “[t]he absurd results doctrine merely permits a court to favor an otherwise reasonable construction of the statutory text over a

the markers, the applicant is bound by the maps because the applicant was responsible for submitting accurate maps. The markers, for purposes of defining the “permit area” as a matter of law, are wholly irrelevant.

#### **4. Defining the Permit Area Solely by the Boundaries on the Application Map is Consistent with Congressional Intent**

That the maps should be the sole controlling factor is also consistent with Congress’s intent when it enacted SMCRA. For example, one of Congress’s purposes was to ensure opportunities for meaningful public participation. See 30 U.S.C. § 1202(i). One avenue available to the public for participation is the review of surface mining permit applications so that the public can fully comprehend the potential effects of the proposed operations. The applications include the maps designating the permit area, and the public relies on those maps in assessing the proposed operation’s potential effects. If the permit area were to include areas of land not designated on the map, then Congress’s intent to allow public participation would be

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more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose.” Id. at 788 (emphasis added).

The result produced by interpreting the statute to require the boundaries of a permit area to be determined solely by the application map is consistent with at least two conceivable legislative purposes. First, as explained in Section V.C.5 of this Brief, defining the permit area solely by the maps submitted with the application provides a permanent and static way to identify the permit area. The legislature could have conceivably sought to prevent a situation in which the permit boundary is fluid, verifiable, and completely within the control of the operator. Limiting a permit area to the area of land within the boundaries indicated on the application map would achieve that goal.

Second, the legislature could have conceivably sought to ensure opportunities for meaningful public participation. See 30 U.S.C. § 1202(i). As explained in Section V.C.4 of this Brief, although the public has access to the application maps, it does not have access to boundary markers on the ground. By requiring the former to trump the latter, the legislature would ensure that the public knew the full scope of the permit area when commenting on an application. Thus, there are two conceivable legislative purposes behind enacting a statute that requires the boundaries of a permit area to be determined solely on the basis of the application map, and the absurd results doctrine is inapplicable to this case.

thwarted. That is, the public would never have the opportunity to assess the effects of surface mining operations in areas of land that are within markers and monuments on the ground, but not designated on the maps that are available for public inspection. Congress had an acute “awareness of the severe difficulty which local people frequently experience in attempting to investigate the nature of impending surface mine operations.” House Report 95-218 at 92 (95th Cong., 1st Sess., 1977). To allow the boundaries designated on an application map—to which the public has had access—to be overridden by the location of a physical marker on the ground—to which the public has no access—would thwart Congress’s efforts to respond to the public’s informational needs.

#### **5. As a Matter of Common Sense, Maps are Permanent but Physical Markers are Transitory**

Defining the permit area solely by the maps submitted with the application provides a permanent and static way to identify the permit area. Physical markers and monuments, however, are neither permanent nor static. Markers can be lost, can shift, or, more nefariously, can be intentionally relocated. The facts of this case demonstrate the transient nature of markers perfectly. See Goals Coal I, Transcript of Mar. 14, 2006, Hearing at 82-85 (March 14, 2006) (testimony of Clarence Waller explaining that new markers may have been placed along the permit boundary in late 1983 or early 1984 to replace markers that “were knocked down and had to be replaced”). The location of markers is solely within the control of the operator. The maps submitted with the application, however, become part of the public record and are not subject to negligent or intentional alteration. Reliance solely on maps to define permit areas avoids the potential expansion, or contraction, of a permit area that could result if the physical markers and monuments on the ground controlled.

WVDEP’s misinterpretation of the statutes and regulations not only conflicts with

the plain language of all of the relevant provisions, but also leads to the absurd result that the permit boundary is dependant on information available only to the operator. To compound that problem, the operator could change the permit boundary at will and there would be no way to verify the original boundary. That would lead to the situation in which the permit boundary is fluid, unverifiable, and completely within the control of the operator.

#### **6. Because this is a Question of Statutory Construction, Common Law Principles are Inapplicable**

It must not be forgotten that the legal question in this appeal is purely a question of statutory construction. The Secretary made two common-law style arguments to the Board and to the Circuit Court that are entirely irrelevant to the correct construction of the relevant statutes. First, the Secretary presented an argument that, to properly resolve this case, one must divine the cartographer's intent. Frankly, that argument is so weak that it warrants no response. However, the Secretary persisted in asserting it before the Circuit Court and Coal River Mountain Watch expects him to assert it again to this Court.<sup>10</sup>

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<sup>10</sup> In fact, the Secretary argued in response to Appellant's petition for appeal that Appellant had somehow failed to perfect its appeal because it did not specifically appeal the Board's contorted reasoning regarding the mapmaker's intent. The Secretary is wrong. In its petition for judicial review to the Circuit Court, CRMW assigned error to the Surface Mine Board's "affirmation of that portion of the West Virginia Department of Environmental Protection's order that determined that the proposal map submitted by Goals Coal Company as part of its Revision 9 application accurately depicts the permit boundary at the western end of permit number D-66-82." Petition of Coal River Mountain Watch for Judicial Review of the Final Order of the Surface Mine Board in Appeal No. 2006-16-SMB at 5. As this Court has explained, "[t]he function of an assignment of error is to bring a judicial ruling to the scrutiny of the reviewing court and to provide the appellate body with an adequate recapitulation of the trial occurrences assigned as error." Parker v. Knowlton Const. Co., Inc., 158 W. Va. 314, 320, 210 S.E.2d 918, 922 (1975). That is, an appellant is to assign error to a tribunal's ruling, not to its reasoning. Id. See also Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc., 199 Or. App. 73, 75 n. 1, 110 P.3d 120, 121 n. 1 (2005); Oak Crest Const. Co. v. Austin Mut. Ins. Co., 137 Or. App. 475, 478 n. 2, 905 P.2d 848, 849 n. 2 (1995) ("The trial court's various reasons for its ruling on the motions for summary judgment are not independently assignable as error. Rulings must be assigned or cross-assigned as error, not the reasons for the rulings." (Internal quotation

There is absolutely no law that supports the proposition that “cartographer’s intent” may override the plain meaning of federal and state statutes and regulations. The comprehensive regulatory scheme created by Congress for surface mining sets the rules in this area and leaves no room for an inquiry into the cartographer’s intent. A mapmaker’s intent is only relevant in one area of law—political gerrymandering—and it may not be relevant there for long. See Vieth v. Jubelirer, 541 U.S. 267 (2004) (four justices announcing that they would reject the common test for whether a state has conducted its redistricting lawfully, which included an intent prong and an effects prong). Moreover, in those cases the intent is not used to identify the boundary between districts, but rather to determine whether districts were drawn with an unlawful intent. Id. at 283-84.

A map is not sufficiently like a contract, deed, or other written instrument to justify a search for the mapmaker’s intent. The written words in a deed, will, or contract are far different from the objective symbols and fixed referents in a map. As Justice Holmes put it, “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” Towne v. Eisner, 245 U.S. 418, 425 (1918). In contrast, maps are relatively objective and constant, political or geological revolution notwithstanding.

In all events, even if it were proper to inquire into the cartographer’s intent, that inquiry would be limited to the four corners of the map. West Virginia law requires the observation of the parol evidence rule. That is, to determine the intent of the author of an instrument, a court is limited to the four corners of the document unless the document is ambiguous. See, e.g., Supervalu Operations, Inc. v. Center Design, Inc., 206 W. Va. 311, 315-

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marks omitted.)). As a result, CRMW’s assignment of error in this administrative appeal easily encompasses all of the various reasons on which the Board based its ruling.

16, 524 S.E.2d 666 (1999). The map submitted with the application for Surface Mining Permit Number D-66-82 is not ambiguous on its face, so there is no patent ambiguity. See Farmers & Merchants Bank of Keyser v. Farmers & Merchants Bank of Keyser, 158 W. Va. 1012, 1017, 216 S.E.2d 769, 772 (1975) (“A patent ambiguity is defined as one which is apparent upon the face of the instrument.” (Internal quotation marks omitted.)). Nor is the map latently ambiguous. A latent ambiguity arises when the application of the terms of the instrument to the real world reveals that “the terms of the writing are equally applicable to two or more objects.” Id. (internal quotation marks omitted). For example, if a contract were to provide for goods to be delivered to “the green house on Quairier Street,” and if there were more than one green house on Quarrier Street, then a latent ambiguity would arise.

Here, although application of the map to the real world reveals that the end of mine site marker is in a different location than indicated on the map, there is still no latent ambiguity. As one court has explained,

An omission or mistake is not a[ latent] ambiguity. Parol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to, or contradict the plainly expressed terms of this writing, or to substitute a different contract for it, to show an intention or purpose not therein expressed.

Zilwaukee Tp. v. Saginaw Bay City Ry. Co., 213 Mich. 61, 70-71, 181 N.W. 37, 40 (1921).

Because the current physical location of the mine site marker contradicts the plainly expressed terms of the application map, it cannot establish a latent ambiguity. Further, “[i]nherent in this concept is that the alleged latent ambiguity is not created by a party to the contract at issue.”

Kopf v. Lacey, 208 W. Va. 302, 309, 540 S.E.2d 170, 177 (2000) (Maynard, J., dissenting). The problems here were created by one individual, who both drew the map and placed the marker.

Absent any cognizable ambiguity, the intent of the mapmaker must be gleaned only from the

face of the document. Consequently, even if the intent of the cartographer were a relevant inquiry, that inquiry would have to begin and end with the map.

The Secretary's second common-law argument is that he has reached the correct interpretation of the law because it is consistent with the common law of real property. He asserts that, in common law, physical monuments supercede legal descriptions in deeds. Even assuming that that is a valid common law rule of real property, it has no application to the question whether a particular parcel of land is within a permit area. The surface mining laws and regulations create a very complex and comprehensive regulatory structure to be applied to surface mining operations. There is no place within that structure for common law rules, especially when the regulatory structure unambiguously states that the maps define the permit area, notwithstanding the location of physical markers and boundaries. Cf. 30 U.S.C. § 1257(b)(9) (providing that nothing in the surface mining laws "shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes"). The common law of real property developed at a time before surface mining had even been contemplated. Congress did not intend for the interpretation of the surface mining laws to be supplemented by common law traditions that evolved to serve a wholly different purpose. The common law of real property characterized by the Secretary evolved to resolve property disputes; the surface mining laws were passed to, among other things, "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). Consequently, the consistency or inconsistency of SMCRA with the common law of real property is irrelevant.

Further, the proposition that an artificial marker controls over a map is doubtful at best. Under West Virginia law, when dealing with unsurveyed lands such as those at issue here,

a plat is given controlling weight. See Mylius v. Raine-Andrew Lumber Co., 69 W. Va. 346, 71 S.E. 204 (1911) (holding that no rule of law prohibited the trial court from instructing the jury that, in locating a particular lot, the jury should conclude that the lot is located at the place indicated on a plat, unless it believed that the lot had actually been surveyed); Clonch v. Tabit, 122 W. Va. 674, 12 S.E.2d 521 (1940) (stating the general rule that plats and maps control over other descriptions). The Secretary has made no attempt to reconcile his proposed construction with those aspects of the common law of real property.

**7. The Secretary Relies on Dicta in a Federal Administrative Decision that is Neither Binding Nor Persuasive**

The Secretary has argued that WVDEP's proposed construction is consistent with "federal case law." The Secretary is wrong. He seeks to rely on a 1987 Interior Board of Land Use Appeals ("IBLA") decision to support his theory that markers and monuments are relevant to determining the extent of the permit area, but such reliance is misplaced. In A&S Coal Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, 96 IBLA 338 (April 7, 1987), IBLA never concluded as a matter of law that physical markers defined the permit area. Rather, all IBLA decided in the opinion relied on by the Secretary was that the OSMRE had not established a prima facie case that the operator had disturbed areas beyond its permit boundaries. Id. at 345. That holding was based on the sufficiency of the evidence, not on a legal conclusion that the operator had been operating within its permit area. Id. OSM had failed to prove either that the operator was responsible for the disturbance in the off-permit area or that the area was, in fact, off-permit. Id. The former failure would have been a sufficient basis for IBLA's holding. Any statements regarding the permit boundaries were dicta. Consequently, the decision is too weak a reed to support DEP's theory.

Furthermore, the boundary issues present in the IBLA case are distinguishable

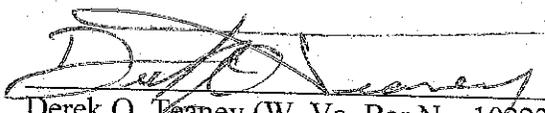
from those in this case. First, OSM had approved a revision of the permit boundary to include the off-permit area, and had received a map so indicating. Id. at 344-45. In this case, neither the Secretary nor any of his predecessors has ever approved a revision to the western boundary. Second, the disturbed area at issue in the IBLA case was not unsuitable for mining. That is, it was within OSM's power to approve mining operations in that area. In contrast, the disputed area in this case is unsuitable for surface mining operations because it is within 300 feet of Marsh Fork Elementary. W. Va. Code § 22-3-22(d)(4); 30 U.S.C. § 1272(e)(5). Hence, it would be unlawful for the Secretary to revise this permit to include the disputed territory. In sum, not only is A&S Coal not binding precedent, it is not particularly persuasive either.

#### VI. RELIEF PRAYED FOR

In sum, the Circuit Court erroneously concluded that the location of the physical boundary markers defined the extent of Goals Coal Company's permit area and, as a result, erred in affirming the final order of the SMB. Accordingly, Coal River Mountain Watch respectfully requests that the Court reverse the final order of the Circuit Court and remand this matter to the Circuit Court with instructions to reverse and remand the final order of the SMB.

Respectfully submitted,

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