administrative and judicial review of decisions on permits.

Summary of Petition

The petitioner supports his rulemaking petition by citing the experience of a former client, a Mrs. Caudill, who faced the possibility of having her property mined in accordance with an approved mining permit despite the fact that she had not granted the mining company the right to mine, and despite the fact she had brought this information to the attention of the regulatory authority. In that case, her ownership of the property was not reflected in the documentation provided to the regulatory authority by the permit applicant. Rather, the application and accompanying maps asserted that neighbors on either side of her property were the owners of her property. The situation faced by Mrs. Caudill was exacerbated by the fact that the regulatory authority, when presented with information contradicting the ownership representation of the permit application, took the position that the new information presented by Mrs. Caudill established a property title dispute and it lacked the authority to resolve such disputes.

The petitioner's letter further states that, subsequent to representing his client before the Kentucky Department for Surface Mining Reclamation and Enforcement, he learned that "very often coal companies knowingly submit permit applications which fail to identify all of the surface owners of record." He further states this is done, at least in part, because real estate negotiations relative to the potentially affected properties are continuing subsequent to submission of the permit application. Thus, there is incentive for permit applicants to present real estate information as they expect, or at least hope, it will be at the time of permit issuance. The petitioner concludes: "(s) ince the states require neither documentation of the ownership of the surface of the property proposed for surface mining, nor verify the information provided by coal companies in the permit application review process, the coal companies have little incentive to accurately identify the surface owners of the property." To rectify the problems for landowners associated with this scenario, the petitioner "proposes a new regulation which would require all permit applications for surface mining include documentation with public records (emphasis included) identifying the surface owners of the property they propose to mine as well as the property

contiguous to the proposed mining property."

Analysis and Comments

OSM's summary analysis of the petition and comments received indicates that:

The problem of regulatory authorities issuing permits to mine land for which the permit applicant has not established the right to enter and mine is generally limited to the State of Kentucky;

The implementation of the petitioner's request that public right-of-entry records be included in all cases in the permit application would often create a significant and unnecessary paperwork burden, particularly for regulatory authorities and mining companies in the West;

Including public right-of-entry records in permit applications would not change the decision of the regulatory authority in most instances. For example, of the five Ten Day Notice appeals under 30 CFR 842.15 involving right-of-entry that occurred between 1991 and the present (all appeals were in Kentucky), only one probably would have been decided differently if the public records requested by the petitioner has been available to the regulatory authority.

Kentucky's current right-of-entry permitting procedures, which were implemented subsequent to the incident involving Mrs. Caudill's property, require that whenever a landowner files a protest contesting a permit applicant's right to enter his property, the Natural Resources and Environmental Protection Cabinet must determine whether the applicant has made a *prima facie* case that he has the right to enter and mine.

OSM can respond to the problem raised by the petitioner most efficiently by monitoring Kentucky's protection of landowner rights through oversight of the Kentucky program.

Nine commenters responded to the notice of the Kringlen petition. Two commenters did not provide substantive comments. One of these two responded with a "no comment." The other apparently misread the petition and stated that the existing regulations already contain the provisions sought by the petitioner. Two commenters representing environmental associations concurred in the existence of the problem cited to by the petition. One of these two commenters supported the issuance of the petitioner's requested rulemaking. The other commenter supported the general goals of the petition but did not endorse the requested rule as effectively addressing the basic right-of-entry problem underlying the petition. These two commenters raised issues and made several suggestions which will be discussed below.

Five other commenters argued against the requested rulemaking viewing the right-of-entry problem described by the petitioner as either not being possible

within the context of the regulatory programs with which they were familiar or representing merely an isolated aberration to an otherwise adequately functioning program. OSM generally agrees with the second of these assessments. Information available from sources within the Agency corroborate that the right-of-entry problems such as described by the petitioner are relatively infrequent events which have, for all intents and purposes, confined themselves to the State of Kentucky. OSM believes that these problems were due in major part to a failure of the Kentucky regulatory authority to properly implement its existing permit regulations.

Subsequent to the incident involving the Caudill property, Kentucky instituted a new right-of-entry policy which requires that whenever a landowner files a protest contesting a permit applicant's right to enter his property, the Natural Resources and Environmental Protection Cabinet must determine whether the applicant has made a prima facie case that he has the right to enter and mine. This new Kentucky right-of-entry policy should dramatically reduce or eliminate the type of problem experienced by Mrs. Caudill. Even if Kentucky had not taken measures to address this problem, OSM submits that one State's problems are not sufficient basis for a national rule. This Office will, however, continue to monitor the protection of landowner rights in Kentucky through its oversight of that program.

One commenter opposing the petition argued that a rulemaking was not necessary in the light of the IBLA decision in Marion H. Taylor (No. 92-189, 125 IBLA 271 (1993)). That commenter characterized the decision as requiring that a pending property title dispute raised during permit or administrative review "* * * must be resolved by the judiciary prior to a final permitting decision by the regulatory authority, in order for the regulatory authority to make the required permit issuance findings (emphasis included)." Another commenter supporting the petition cited the Taylor IBLA decision and an August 9, 1993, ten day notice letter from W. Hord Tipton, Deputy Director, OSM, to David Rosenbaum, Department for Surface Mining, Commonwealth of Kentucky, [which letter also cites the Taylor decision] to argue that where there is a "pending legal challenge" or "dispute" to right-ofentry, the regulatory authority cannot make a prima facie determiniton of a right to mine; rather, the only proper response of the regulatory authority is to withhold permit issuance pending