

FEDERAL REGISTER: 45 FR 52467 (August 7, 1980)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

Determination of Valid Existing Rights within Monongahela National Forest

ACTION: Preliminary findings on Mower Lumber Company's request for determination of valid existing rights to conduct underground coal mining operations in the Upper Shavers Fork Sub-Unit of the Monongahela National Forest, in Randolph County, West Virginia.

SUMMARY: The Mower Lumber Company is seeking a determination that its proposed underground coal mining operations on Federal lands in the Monongahela National Forest are not prohibited or limited by Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1272(e). Specifically, Mower Lumber Company has requested the Director of OSM to determine that the Company has "valid existing rights" under that Section of the Act. The Director is giving notice of this preliminary finding determining valid existing rights and requesting public comments thereon.

DATES: Interested persons may submit written comments on the preliminary findings. Comments must be received on or before August 22, 1980.

ADDRESSES: Written comments should be addressed to the Director, Office of Surface Mining, U.S. Department of the Interior, Room 233, South Interior Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, with one copy to the Regional Director, Office of Surface Mining, Region, I, U.S. Department of the Interior, 950 Kanawha Boulevard, East, Charleston, West Virginia 25301. Copies of the Mower Lumber Company's "Request for Determination Pursuant to Section 522(e) of the Surface Mining Control and Reclamation Act of 1977" are available for inspection in the OSM Region I, Charleston, West Virginia, office and in Room 153, South Interior Building, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Patrick Boggs, Regional Director, Region I, Office of Surface Mining, 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, (304) 342-8125, or Carl Close, Assistant Director, State and Federal Programs, Office of Surface Mining, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, (202) 343-4225.

SUPPLEMENTARY INFORMATION:

BACKGROUND.

Section 522 of the Surface Mining Control and Reclamation Act of 1977 prohibits "surface coal mining operations" on Federal lands within the boundaries of any national forest subject to "valid existing rights" and another exemption not relevant here. The term "surface coal mining operations" is defined in Section 701(28) of the Surface Mining Control and Reclamation Act (30 U.S.C. 1291 (28)) and 30 CFR 700.5 and includes the surface impacts incident to underground coal mining operations. The term "valid existing rights" is defined at 30 CFR 761.5, as modified by the February 26, 1980, opinion of the District Court for the District of Columbia, In re: Permanent Surface Mining Regulation Litigation, No. 79-1114, Slip Opinion at p. 17-18.

By letter dated March 13, 1980, the Mower Lumber Company requested the Office of Surface Mining, Region I, for a determination of valid existing rights for their planned underground mining activities on Federal lands in the Upper Shavers Fork Sub-Unit of the Monongahela National Forest in Randolph County, West Virginia. Mower Lumber Company's request was filed with the Regional Director in which the lands involved are located [Region I] pursuant to informal procedures previously prepared by OSM to implement 30 CFR 761.4(a)(2). The geographical area of the Company's request is also included within the area which is the subject of a petition to designate all federally owned lands in the Shavers Fork Basin as unsuitable for all types of coal mining filed by the West Virginia Highlands Conservancy under Section 522(c), 30 USC 1272(e), and 30 CFR Part 769. Notice of receipt of that petition was published by OSM at 45 FR 41542, June 19, 1980.

Mower Lumber Company alleges that it owns the mineral rights including coal under approximately 28,000 acres of Federal lands in the Monongahela National Forest. The Company's March 13, 1980, filing contains three separate and alternative requests for determinations that the development plan submitted for the entire mineral estate by the Company to the U.S. Forest Service and described in the Forest Service's Upper Shavers Fork Sub-Unit Plan and Environmental Impact Statement is: (1) within the "valid existing rights" of Mower as that term is used in Section 522(e) of the Surface Mining Control and Reclamation Act; or (2) is an "existing" surface coal mining operation as that term is used in the Section 522(e)

of the Surface Mining Control and Reclamation Act; or (3) is "not incompatible" with the values enumerated in Section 522(e)(2) of the Surface Mining Control and Reclamation Act.

The Director has reached a preliminary decision that Mower Lumber Company does have valid existing rights, and proposes to issue a letter-decision similar to that which appears below. This decision would mean that compatibility determinations under Section 522(e)(2) would be unnecessary in order for Mower to mine in areas with valid existing rights. The proposed determination of valid existing rights will also exempt those specified areas from the petition to designate Federal lands in the Shavers Fork Basin as unsuitable for all underground coal mining filed by the Highlands Conservancy. All of Section 522 concerns the designation of lands unsuitable for mining. Under Section 522(e) and 30 CFR 761.11, those operations with valid existing rights are exempt from the Congressionally mandated prohibitions in Section 522(e); under Section 522(1)(6) and 30 CFR 762.13(e) lands where substantial financial and legal commitments were made in coal mining operations are exempt from designation by the petition process outlined in Section 522(c). The relationship between these two phrases is discussed in the preamble to the permanent regulations, 44 FR 14991-14992 (March 13, 1979). There it is made clear that valid existing rights is a greater property right than significant financial and legal commitments: {52468}

First, OSM decided that the VER phrase must be distinguished from the definition of substantial legal and financial commitments... in order for property owners to qualify for VER and thereby mine in the prohibited areas of Section 522(e), they must have a property interest in the mine that is even greater than the substantial legal and financial commitments needed to mine despite a designation by petition under Section 522(a). Thus, OSM believes that VER must be more than "significant investments, that have been made on the basis of a long-term coal contract, in powerplants, railroads, coal preparation, extraction, handling and storage facilities, and other capital intensive activities," as substantial legal and financial commitments is defined in Section 762.5.

Therefore, a finding of valid existing rights will also include a finding of substantial financial and legal commitments, and thereby exempt those areas with VER from further consideration for designation as unsuitable for mining. However, any finding of valid existing rights and significant financial and legal commitments will in no way affect the responsibility of Mower to comply with the permitting and performance standards requirements of the interim and permanent Federal lands programs, 30 CFR Part 211 and 30 CFR Part 740, respectively.

OSM is in the process of obtaining additional information in order to determine precisely the physical extent of the valid existing rights claimed by Mower and specifically solicits public comment on this issue. As set forth below, even though Mower claims valid existing rights on its entire 28,000 acre mineral holding, OSM's proposed finding of VER is limited to five underground mines for which Mower submitted operating plans to the Forest Service prior to August 3, 1977. These operating plans are on file at the U.S. Forest Service headquarters, Sycamore Street, Elkins, West Virginia. OSM is considering basically two alternatives in delineating the exact extent of the VER: (1) have VER cover only the surface area affected by the face-up and support activities incident to the underground mining; or (2) have VER cover only those areas (including surface overlying underground workings) contemplated to be affected under the operating plans submitted to the Forest Service prior to August 3, 1977.

Finally, pursuant to 30 CFR 761.5(b) OSM is proposing to include a finding of VER for haul roads serving the five mines and existing as of August 3, 1977. This determination would not extend to new roads constructed after that date.

PRELIMINARY DECISION

Mr. Richard A. Flye, Sellers, Conner & Cuneo, 1625 K Street, N.W., Washington, D.C. 20006.
Re: The Mower Lumber Company

Dear Mr. Flye:

This is in response to your letter of March 14, 1980, written on behalf of your client, Mower Lumber Company, in which you requested certain determinations pursuant to Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 relating to Mower's planned underground mining activities on Federal lands in the Upper Shavers Fork Sub-Unit of the Monongahela National Forest in Randolph County, West Virginia. Our analyses and determination of the existence of valid existing rights for mining operations are described below:

LEGAL REQUIREMENTS

Section 522(e) of the Act states:

After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted... (2) on any Federal lands within the boundaries of any national forest (proviso omitted)....

Further, 30 CFR 761.5(a) defines "valid existing rights" as

(a) Except for haul roads,

(1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and

(2) The person proposing to conduct surface coal mining operations on such lands either

(i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands, or

(ii) Can demonstrate to the regulatory authority that the coal is both needed for, and immediately adjacent to, an on-going surface coal mining operation for which all permits were obtained prior to August 3, 1977;

(b) For haul roads, valid existing rights means:

(1) A recorded right of way, recorded easement or a permit for a coal haul road recorded as of August 3, 1977, or

(2) Any other road in existence as of August 3, 1977...

The "all permits" requirement of 30 CFR 761.5(a)(2)(i) was later modified by an opinion rendered by Judge Flannery in *In re Permanent Surface Mining Regulation Litigation*, No. 79-1114, February 26, 1980, such that "... a good faith attempt to obtain all permits before the August 3, 1977, cut-off date should suffice for meeting the all permits test." Slip opinion at 17-18.

Mower Lumber Company has not requested a determination under 30 CFR 761.5(a)(2)(ii). As a result, the Company will qualify for valid existing rights if it possesses a valid conveyance, lease or other document (30 CFR 761.5(a)(1)) and all required permits for operation or can show a good faith attempt to secure all permits prior to August 3, 1977 (30 CFR 761.5(a)(2)(i)). For haul roads, the company will possess valid existing rights on roads which were existing, which were under permit or which were covered by a recorded easement as of August 3, 1977 (30 CFR 761.5(b)).

CONVEYANCE OF RIGHT TO MINE

The area within the scope of Mower's request was previously owned by the West Virginia Pulp and Paper Company. On December 10, 1936, the West Virginia Pulp and Paper Company, by two separate deeds, conveyed the relevant tracts of land to the United States, reserving for 40 years from the 15th day of August, 1935, the right to extract minerals under the land. The deed also stated that at the end of the 40-year period the parcel would revert to fee simple ownership by the United States unless the minerals had been actively extracted for an average of 50 days over the preceding five years. If the minerals were being extracted, then the deed called for automatic five-year extensions of the mineral reservation. The forty-year period was originally scheduled to expire on August 15, 1975. On August 18, 1943, West Virginia Pulp and Paper Company conveyed its mineral rights to F. Edwin Mower. On September 17, 1943, F. Edwin Mower conveyed these rights to the Mower Lumber Company. Underground mining on these tract began in the 1940's and continued until the 1960's.

It is my conclusion that the aforementioned documents validly conveyed to the Mower Lumber Company the right to the coal under these Federal lands, and that they contemplated that the coal would be mined by underground methods, as is seen from the actual mining which took place for approximately thirty years. Therefore, the first element of the valid existing rights test is satisfied.

ALL PERMITS TEST

The next question is whether on August 3, 1977, Mower possessed all permits required to conduct mining operations, or had made a good faith effort to obtain such permits prior to that date. During the late 1960's and early 1970's, Mower and its lessees mined, or made preparation to mine, five separate underground sites. The three sites on Shavers Fork were known as Linan Nos. 1, 2 and 3, while two sites on Glade Run were known as Mower Nos. 1 and 2. At the present time, Mower is attempting to begin mining at two sites known as Enviro No. 1 and Enviro No. 2. Enviro No. 1 is the same mine as Mower No. 2, and Enviro No. 2 is the same mine as Linan No. 2. Mower has already received permits and authorizations to operate these mines from West Virginia Department of National Resources (DNR) Reclamation Division, DNR Water Resources Division and the U.S. Forest Service. Applications for other permits have been made and are presently pending before Environmental Protection Agency (EPA) and the West Virginia Department of Mines.

All of these permit applications outlined above were made after August 3, 1977, and they alone could not constitute valid existing rights. It is the activities of Mower at the same sites prior to August 3, 1977, which must vest Mower with valid existing rights. On March 2, 1973, Mower entered into a moratorium agreement with the Federal Government whereby Mower agreed to suspend its mining operations in the entire upper Shavers Fork Sub-Unit area until September 2, 1978, in order to allow the Forest Service to develop an environmental impact statement concerning all contemplated development in the watershed, including coal mining. The moratorium agreement also acted to toll the running of Mower's forty-year period within which to develop the mineral resources of the area under the terms of the 1936 deed to the United States. At pages 2 and 3 of the moratorium agreement it is stated: {52469}

It is in the interest of the United States that mining operations in the reserved minerals be suspended as hereinafter provided pending completion of the environmental impact statements, the mineral survey and the Shavers Fork unit plan...

2. The United States hereby extends the forty (40) year mineral reservation contained in each of said deeds to the United States and in said condemnation judgment to Midnight, August 15, 1982, and waives performance by Mower of all acts necessary to preserve title to the Reserved Minerals in Mower during the period of suspension from September 3, 1971, to September 2, 1978, inclusive, and agrees that title to the Reserved Minerals is now and will remain vested in Mower until Midnight, August 15, 1982.

Since the August 3, 1977, cutoff date for valid existing rights occurred during the pendency of moratorium, Mower's valid existing rights, if any, must be determined by its actions to obtain permits prior to the moratorium.

Because of the proliferation of regulatory programs affecting coal mining prior to the passage of the Surface Mining Control and Reclamation Act, the types of permits required for operation of a mine in West Virginia varied according the date the mining was contemplated to begin. When Mower originally applied for approval to mine in the early 1970's, the actions of the following State and Federal Agencies were relevant.

(1) Since 1905, the West Virginia Department of Mines has required a license to operate a deep mine. In 1958 the statute, W. Va. Code , Section 22-2-63, was amended to require an identification number for deep mines. In 1971 the subsection (a) of this statute was again amended to require "prior approval" by the Director of the Department before a mine could be opened. In 1976, subsections (e) and (g) of the statute were amended to require the posting of a reclamation bond to cover surface disturbance at deep mines and vest the West Virginia (DNR), Reclamation Division, with jurisdiction over reclamation and restoration of deep mine sites.

(2) Pursuant to W. Va. Code , Section 20-5A-5, in 1969 the West Virginia DNR, Water Resources Division, received the power to require permits for point source discharges of industrial wastes, which included discharges from coal mines.

(3) In addition to State permits, all mining operations in national forests had to receive authorization to operate from the Forest Service pursuant to the 1911 Rules of the Secretary of Agriculture and their successor, 36 CFR Part 251.

At the Linan Nos. 1, 2 and 3 mines prior to the moratorium agreement, Mower had obtained permits or authorizations to operate from the West Virginia Department of Mines, and the West Virginia DNR, Water Resources Division. Mower also applied for Forest Service authorization, and on September 2, 1971, the operating plan for Linan No. 1 was approved. However, on the same date the Forest Service informed Mower that a federally funded mineral evaluation study and environmental study prescribed by the National Environmental Policy Act of 1969 should be completed before the operating plans for Linan Nos. 2 and 3 were approved, Although Linan No. 1 possessed all necessary authority to operate, Mower

decided not to put the mine into production until approval was received from the U.S. Forest Service to operate Linan Nos. 2 and 3 mines.

Concerning Mower Nos. 1 and 2 mines prior to the moratorium agreement, Mower had received permits and authorizations to operate from the West Virginia Department of Mines and the Forest Service. As in the case of the Linan mines, the Forest Service approved the operating plan for Mower Nos. 1 and 2 and then decided to prepare an extensive environmental impact statement on the entire watershed area. Mower also applied for permits from the West Virginian DNR, Water Resources Division, on March 23, 1972. After requesting and receiving additional information from Mower, the Division took no action on the permit application prior to the moratorium. Additionally, in regard to each of the mines discussed above, Mower has alleged that a number of haul roads were actually constructed in connection with these mines in the early 1970s.

Even though Mower did not actually possess each and every permit required to operate the mines, it is my preliminary decision that Mower Lumber Company made a good faith effort to obtain all such permits and to put its mines into operation prior to August 3, 1977. Based upon the information supplied to OSM by the Company, I conclude that Mower has "valid existing rights" as to these five (5) mines, and their associated haul roads existing as of August 3, 1977. However, OSM reserves the right to further define the parameters of the valid existing rights of these mine sites in my final decision. It should be understood that I have not determined at this time whether or not valid existing rights would extend to the entire 28,000-acre mineral estate. When this determination is made, you will be notified.

This decision does not constitute agreement with or a favorable decision on all of the statements and arguments in Mower's request. However, it should be noted that a final decision granting valid existing rights means that the Company need not seek a determination of compatibility with values pursuant to Section 522(e)(2) of the Surface Mining Act and 30 CFR 761.12(c) prior to commencing operations at these five (5) mines. The Company must still comply with the permitting and performance standards requirements of the interim and permanent Federal lands programs, 30 CFR Part 211 and 30 CFR Chapter VII respectively.

Following the close of the comment period, a final decision will be issued which takes into account additional information and any comments received on the preliminary decision. The Director's final decision will be administratively reviewable under 30 CFR 787.11.

Dated: July 31, 1980.

Paul L. Reeves, Acting Director .

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