

FEDERAL REGISTER: 46 FR 36758 (July 15, 1981)

DEPARTMENT OF THE INTERIOR

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

Determination of Valid Existing Rights; Daniel Boone National Forest

ACTION: Findings on Greenwood Land and Mining Company's request for a determination of valid existing rights to conduct underground coal mining operations in the Daniel Boone National Forest in Pulaski and McCreary Counties, Kentucky.

SUMMARY: The Greenwood Land and Mining Company is seeking a determination that its underground coal mining operations on Federal lands in the Daniel Boone 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. 1227(e). Specifically, Greenwood Land and Mining 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 these findings determining valid existing rights and requesting public comments thereon. These findings will be subject to public comment for a period of 30 days. At the end of the public comment period, these findings will become the final decision of OSM, unless otherwise ordered by the Director.

DATE: Interested persons may submit written comments on these findings. Comments must be received on or before August 14, 1981.

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 Acting Regional Director, Office of Surface Mining, Region II, U.S. Department of the Interior, 530 Gay Street, S.W., Knoxville, Tennessee 37902. Copies of the Greenwood Land and Mining Company's "Request for Determination Pursuant to Section 522(d) of the Surface Mining Control and Reclamation Act of 1977" are available for inspection in the OSM Region II, Knoxville, Tennessee, and in Room 153, South Interior Building, Washington, D.C. {36759}

FOR FURTHER INFORMATION CONTACT: W. Hord Tipton, Acting Regional Director, Region II, Office of Surface Mining, 530 Gay Street, S.W., Knoxville, Tennessee 37902, (615) 971-5100; 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:

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 9, 1981, the Greenwood Land and Mining Company requested of the Office of Surface Mining, Region II, a determination of valid existing rights for their underground mining activities on Federal lands in the Daniel Boone National Forest in Pulaski and McCreary Counties, Kentucky. Greenwood Land and Mining Company's request was filed with the Regional Director in which the lands involved are located (Region II) pursuant to informal procedures previously prepared by OSM to implement 30 CFR 761.4(a)(2).

The Director has made findings that Greenwood Land and Mining Company does have valid existing rights and, subject to public comment, 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 Greenwood to mine in areas where Greenwood has been determined to have valid existing rights. The determination of valid existing rights will also exempt those specified areas from any petition to designate Federal lands in the Daniel Boone National Forest as unsuitable for all underground coal mining. 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(a)(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 phases is discussed in the preamble to the permanent regulations, 44 FR 14991 (March 13, 1979). There it is made clear that valid existing rights is a greater property right than significant financial and legal commitments:

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 Greenwood 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 the physical extent of the valid existing rights claimed by Greenwood. OSM is considering basically two alternatives in delineating the exact extent of the VER: (1) have VER over the surface area affected by the face-up and support activities incident to the underground mining; or (2) have VER cover 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.

The geographical extent of the VER should be as precisely defined as feasible. OSM considers that Greenwood's valid existing rights should have the same geographical extent as the mining Greenwood contemplated and was committed to on August 3, 1977. OSM will work closely with the Forest Service and Greenwood to secure complete documentation. The degree of difficulty in determining geographical limits will be a function of the amount of information on each mine required by Forest Service operating plans during the involved period.

Because the geographical limits of VER will depend on the evidence available, OSM has decided to reserve the right to use either or both of these alternatives in defining the extent of Greenwood's VER. Again, the Office is not unmindful of the fact that as a result of limited State and Federal regulation prior to the passage of the Act, some of which was discussed above, there is a limited amount of information relevant to a precise definition of the extent of VER. While the second alternative is preferable and precise geographical limits will be determined wherever possible, there may be cases where such a determination is impossible. In those cases, the first alternative would have to be used.

Finally, pursuant to 30 CFR 761.5(b) OSM's findings include a determination of VER for haul roads serving the mines and existing as of August 3, 1977. This determination would not extend to new roads constructed after that date. The following letter-decision reflects the Director's findings. It will be forwarded by OSM to the addressee at the expiration of the 30-day public comment period unless otherwise ordered by the Director, and it will thereby become effective.

Dated: July 10, 1981.

J. Steven Griles, Acting Director .

Mr. Rudolph L. Ennis,
Suite 2021 United American Plaza, Knoxville, Tenn .
Re: Greenwood Land and Mining Company

Dear Mr. Ennis:

I have reached a final decision on your request of March 9, 1981, written on behalf of your client, Greenwood Land and Mining Company, for certain determinations pursuant to Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, relating to Greenwood's underground mining activities on Federal lands in the Daniel Boone National Forest in Pulaski and McCreary Counties, Kentucky. Our analyses and determination of the existence of valid existing rights for Greenwood's mining operations are described below: {36760}

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 coalhaul 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.

Greenwood 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 land within the scope of Greenwood's request was once owned by William J. O'Brien, Jr. As a result of condemnation proceedings, O'Brien conveyed the involved tracts of land to the United States by two deeds dated September 20 and October 30, 1937, respectively. The mineral interests, however, were reserved to O'Brien in perpetuity. He conveyed these to Kentucky Land Shares, Inc., by deed of February 26, 1938, and Greenwood in turn received them by deed dated October 20, 1974.

The aforementioned documents conveyed to Greenwood the right to the coal under these Federal lands and they contemplated that the coal would be removed by underground methods. The deeds from O'Brien to the United States specifically provided for the mining of coal subject to the rules and regulations prescribed by the United States Department of Agriculture. The regulations stated in the deed of severance include special requirements for the conduct of underground coal mining operations. Greenwood has therefore satisfied the first element of the valid existing rights test.

All Permits Test

The next question is whether on August 3, 1977, Greenwood possessed all permits required to conduct mining operations, or had made a good faith effort to obtain such permits prior to that date.

As of August 3, 1977, three permits or authorizations were required to mine private coal on Federal lands in the Daniel Boone National Forest. First, the operator was required to have its mine plan approved by the Forest Service, United States Department of Agriculture. Second, the operator was required to have a license from the Kentucky Department of Mines and Minerals. Third, the operator was required to have a National Pollutant Discharge Elimination System (NPDES) permit.

Greenwood began submitting operating plans to the Forest Service before the 1974 conveyance from Kentucky Lands Shares, Inc., was consummated. By June of 1976, Greenwood had submitted plans to the U.S. Forest Service for all the involved operations.

In December 1975 the Forest Service approved the plan for Mine No. 1. On June 11, 1975, Kentucky's Department of Mines and Minerals issued a license to operate the mine. On June 10, 1975, Greenwood applied for a NPDES permit for this site. That permit was issued on September 23, 1977.

The No. 5 mines viz 5, 5a, 5b, 5c, and 5d, are in fact one mine. Each "mine" is a different face-up directed at the same seam of coal. All the openings will eventually join underground and form one large single operation. The operation has been assigned one Mine Safety and Health Administration identification number. Multiple openings were contemplated in the original mine plan which was submitted to the Forest Service in April of 1976. The plan was approved in October 1977. Mine No. 5 was licensed by Kentucky's Department of Mines and Minerals on April 5, 1976. Greenwood applied for a NPDES permit on November 1, 1976, and it was granted on September 23, 1977. Additional approvals and permits have been obtained simultaneously with each new opening subsequent to the initial entry.

A possible issue could be raised concerning the No. 5 mines. Specifically, it could be argued that each opening is a separate operation for which a separate valid existing rights determination would have to be made. If this argument is adopted, the latest openings possibly would not meet the all permits portion of the valid existing rights test, as some of the permits and licenses associated with openings 5a through 5d were applied for or obtained after the passage of the Act. However, as further discussed below. OSM believes that Greenwood is entitled to valid existing rights to the same geographical extent as the mining Greenwood contemplated and was committed to on August 3, 1977. Furthermore, in pending litigation Greenwood challenges the Forest Service's mine plan approval requirements. *Greenwood Land and Mining Company v. Bob Bergland et al.*, Civil Action No. 76-62 (E.D. Ky.). This action was filed on November 16, 1976. By decision dated October 23, 1978, the district court upheld the Forest Service's right to require Greenwood to submit plans prior to commencing operations. That decision has been appealed by Greenwood. This litigation goes to the very heart of the "all permits" test. It raises the question of whether one of the "permits" is validly required. The time for the running of the all permits test is tolled by this litigation, as it would be unfair to penalize an operator for not having all permits required when the operator is in the process of making a substantial legal commitment to determine if a major part of the asserted permit requirement is valid.

An operating plan for Mine No. 6 was submitted to the Forest Service in June 1976, and the plan was approved in October 1976. A NPDES permit for this mine was applied for in October 1976, and it was issued on October 28, 1977. A license to operate Mine No. 6 was issued on June 18, 1976, by the Kentucky Department of Mines and Minerals.

In view of the foregoing Greenwood has established that it either had all permits required to operate its No. 1, No. 5 and No. 6 mines as of August 3, 1977, or it had made a good faith effort to obtain all the required permits. The company has therefore satisfied the second element of the valid existing rights test.

Conclusion

On consideration of the information supplied to OSM by Greenwood, I conclude that the company has "valid existing rights" with respect to these three operations.

Greenwood has asked that it be determined to have valid existing rights for "later" No. 5 mines, i.e., future openings subsequent to 5d. This raises the question of the precise extent of Greenwood's valid existing rights. The findings at this time are limited to the existing openings and additional information should be sought. Specifically, Greenwood should obtain and submit to OSM copies of the operating plans Greenwood should obtain and submit to OSM copies of the operating plans Greenwood submitted to the Forest Service prior to August 3, 1977. Two alternatives for delineating the exact extent of Greenwood's valid existing rights are: (1) have valid existing rights cover only the surface area affected by the face-up and support activities incident to the underground mining; or (2) have valid existing rights 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. The selection of one or the other alternative will have to await results of an analysis of the additional

materials. This approach conforms to that followed in the Mower Lumber Company valid existing rights determination (45 FR 61798 (1980)). {36761}

To the extent Greenwood has valid existing rights, it will not need to seek a determination of compatibility with values pursuant to Section 522(e)(2) of the Act and 30 CFR 761.12(c) with respect to these mines. Further, these mines will be exempt from any petitions or other action under Section 522 of the Act to designate Federal lands in the Daniel Boone National Forest as unsuitable for mining. Greenwood will still have to comply with the permitting and performance standards requirements of the interim and permanent Federal lands programs in 30 CFR Part 211 and 30 CFR Part 740, respectively.(Wold Illegible) yours,

Andrew v. Bailey, Acting Director .

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