



COALEX STATE INQUIRY REPORT - 13

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TOPIC: VALID EXISTING RIGHTS (VER)

INQUIRY: Do a search on the interpretation of the phrase "valid existing rights" as it is used under SMCRA. Include within the search, Congressional intent and federal and state cases that have interpreted its meaning. Of special interest is the use of the phrase in Secs. 522(e)4) and (5).

SEARCH RESULTS:

In Sec. 522(e) of the Surface Mining Control and Reclamation Act (SMCRA) of 1977, 30 USC Sec. 1272(e), Congress enunciated a broad prohibition against conducting surface coal mining operations on certain areas of land. However, the statutory prohibition does not apply when an operator can establish "valid existing rights (VER)". Congress did not statutorily define the term "VER". A search of the COALEX Library for legislative intent of VER produced the following insight from a Senate Committee Report:

"This language ['subject to valid existing rights'] is intended to make clear that the prohibition of strip mining on the national forests is subject to previous state court interpretation of valid existing rights. The language...is in no way intended to affect or abrogate any previous state court decisions. The party claiming such rights must show usage or custom at the time and place where the contact is to be executed and must show that such rights were contemplated by the parties. The phrase subject to valid existing rights' is thus in no way intended to open up national forest lands to strip mining where previous legal precedents have prohibited stripping. (S. Rep. No. 128, 95th Cong., 1st Sess. 94-95 (1977))

Similar language was also located in H. Rep. No. 95-218 (See Attachment B).

On September 14, 1983, the Office of Surface Mining Reclamation and Enforcement (OSM) adopted a definition for VER to implement the Congressional goal. (48 FR 41313 (1983)) "Valid existing rights", as used in Part 761 of the Code of Federal Regulations (CFR), means:

"[T]hat a person possesses valid existing rights for an area protected under Sec. 522(e) of the Act [SMCRA] on August 3, 1977, if the application of any of the prohibitions contained in that section to the property interest that existed on that date would effect a taking of the person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments to the United States Constitution." (30 CFR Sec. 761.5)

During a Congressional debate of a proposed amendment to delete the phrase, Congressman Udall argued in support of this definition, declaring that inclusion of "subject to valid existing rights" was necessary in order to preserve rights protected by the Fifth Amendment. (Cong. Rep. No. H-3827 (April 20, 1977), cited at 44 FR 14992 (1979))



In formulating its definition of VER, OSM evaluated the courts' case-by-case approach to takings under the Fifth and Fourteenth Amendments. Conforming to the courts' procedure and the continuing development of takings law in the courts, OSM has stated that it plans to apply its standard on a case-by-case basis also. (48 FR 14993 (1979))

OSM's analysis of VER determination consists of two steps. First, the actual property rights an applicant possesses must be determined. This analysis requires close examination of documents being relied upon by the applicant to establish property rights. Interpretation of terms of such documents must be based upon state statutory or case law. If neither of these exist, OSM will look to custom and usage at the time and place where the document originated. (30 CFR Sec. 761.5 (definition of VER, paragraph (c))

The second step of VER determination involves applying OSM's definition of VER to the applicant's particular claim. If the prohibitions of Sec. 522(e) of SMCRA would constitute a taking of the applicant's property which would require compensation under the Fifth and Fourteenth Amendments, then VER must be found. If the conclusion is that no taking would occur within the meaning of the Fifth Amendment, then two prohibitions of Sec. 522(c) apply. (30 CFR Sec. 761.5(d)(2))

Other documents generated during the COALEX search include a Congressional hearing wherein VER was discussed and Federal Register notices referencing VER in the West Virginia and Kentucky state programs. Excerpts of these are attached with this Report.

A COALEX search was performed with regards to subsections 522(e)(4) and (5). Two documents were located from the Congressional Record which characterize subsection 522(e)(5) of the 1975 version of SMCRA as "weak" (See Attachments I and J) Furthermore, "cemetery", as used in 522(e)(5), is defined at 30 CFR Sec. 761.5. OSM adopted this definition to reflect the decision in HOLMES LIMESTONE CO. v WATT, 655 F 2d 732 (6th Cir 1981), cert. denied, 456 US 995 (1982). (48 FR 41320 (1983))

The COALEX Library does not contain court opinions. A follow-up search in the LEXIS Library did not reveal any cases which were dispositive of this Inquiry.

ATTACHMENTS:

- A. S. Rep. No. 95-128, containing discussion of intention of VER.
- B. H. Rep. No. 95-218, discussion of intention of VER.
- C. 48 FR 41349, codified at 30 CFR Sec. 761.5.
- D. 48 FR 41314, containing OSM's explanation for its current definition of VER.
- E. Subcommittee Hearing addressing Senate Bill No. 7.
- F. 46 FR 5917.
- G. 45 FR 69949.
- H. 44 FR 67942.
- I. 121 Cong. Rec. 12996-97.
- J. 121 Cong. Rec. 7044-68.