



COALEX STATE INQUIRY REPORT - 342

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TOPIC: 522(a)(6) - "SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENT"

INQUIRY: Certain lands in Ohio were exempted from being designated as "unsuitable for surface mining" due to "substantial legal and financial commitment" (SLFC) which was in existence prior to January 4, 1977. The exempted lands were sold. Does the exemption transfer to the new owners? How do valid existing rights (VER) relate to SLFC - which has priority? Please locate any relevant materials.

SEARCH RESULTS: Using the COALEX Library and other LEXIS materials, a number of relevant items were identified. These include congressional reports and Federal Register preambles to proposed and final rules discussing SLFC, VER, the relationship between SLFC and VER, and the transferability of VER. Pertinent excerpts, in chronological order, follow. Copies of the materials are attached.

LEGISLATIVE HISTORY

The discussion of SMCRA section 522 (Designating Areas Unsuitable for Surface Coal Mining) from the HOUSE OF REPRESENTATIVES REPORT 95-218, 95th Cong. 1st Session (April 22, 1977) provides a good description of congressional intent on the issues in question. A quotation from the "Elements of Mine Regulation Program" section appears below; excerpts from other legislative history material are attached for background.

"The designation process is not intended to be used as a process to close existing mine operations, although the area in which such operations are located may be designated with respect to future mines. The committee recognized that an existing mine might not be one actually producing coal, because it was in a substantial stage of development prior to coal production. Thus the meaning of existing operations is extended to include operations for which there are 'substantial legal and financial commitments.'



"The phrase 'substantial legal and financial commitments' in the designation section and other provisions of the act is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in powerplants, railroads, coal handling and storage facilities and other capital-intensive activities. The committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute 'substantial legal and financial commitments.'

"It should be noted that the designation process is structured to be applied on an area basis, rather than a site by site determination which presents issues more appropriately addressed in the permit application process. The committee believes that the area by area approach of section 522 thus serves the industry since such a process may, in advance of application, identify lands which are either not open to surface mining or where surface mining is subject to restrictions."

REGULATORY HISTORY

43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. 762.5 Definitions.

The discussion of the proposed definition of SLFC included a definition of the phrase "major investments". This definition was omitted from the 1979 final rules because it did not accurately reflect the legislative history. (See below)

44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 761 Areas designated by Act of Congress. Definition of VER.

"OSM decided that the VER phrase must be distinguished from the definition of substantial legal and financial commitments. See 30 CFR 762.5. The latter exemption applies to the petition process under Section 522(a), whereas VER applies to the Congressional prohibitions of mining under Section 522(e). This distinction suggests that, 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 contact, in powerplants, haulroads, coal preparation, extraction, handling and storage facilities, and other capital intensive activities,' as substantial legal and financial commitments is defined in Section 762.5."

44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 762 Criteria for designating areas as unsuitable for surface coal mining operations. 762.5 Definitions.

The definition of SLFC in the final rules deleted some of the language found in the proposed rules in order to reflect the legislative history. See the quote from H.R. Rep. 95-218, above.



45 FR 52467 (AUGUST 7, 1980). Preliminary findings on Mower Lumber Co.'s request for determination of VER to conduct underground coal mining operations in the Upper Shavers Fork Sub-unit of the Monongahela National Forest, in Randolph County, WV.

The Director, in his preliminary decision that Mower Lumber did have VER, cited to the 1979 final rule defining VER, above, and added:

"[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 [VER and SLFC] 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...."

The determination of VER was upheld in IBSMA 81-64, 4 IBSMA 192 (December 10, 1982).

See, also, 46 FR 36758 (July 15, 1981) and 46 FR 50422 (October 13, 1981).

Findings and Decision on Greenwood Land and Mining Co.'s request for a determination of VER to conduct underground coal mining operations in the Daniel Boone National Forest in Pulaski and McCreary Counties, KY.

47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas unsuitable, etc.

"OSM has been presented with questions regarding the transferability of [SLFC] from one coal operator to another, for a given operation and land area. OSM preliminarily believes that [SLFC] may be transferred as part of the rights and commitments sold along with a business. Once established, this right is similar to others which are ordinarily transferred in the sale of businesses and properties. Not to allow such a transfer would diminish the value of the property."

48 FR 41312 (SEPTEMBER 14, 1983). Final rule. Areas unsuitable, etc.

Excerpt from VER's "Relationship to 'Substantial Legal and Financial Commitments'"

"OSM reexamined the definition of VER and determined that the relationship between VER and [SLFC] is not suggested by the legislative history. Both concepts were covered repeatedly in the long legislative history. Each was discussed separately in every case. Nowhere in the legislative history does Congress compare the two concepts. Thus, the two concepts are separate and distinct."

From 762.5 Definitions:



"OSM proposed to revise the definition of [SLFC]. The existing definition requires both investments and commitments in capital-intensive activities and a long-term coal contract. The proposed revision would have recognized that substantial commitments can be made with or without a long-term coal contract.

"Following a review of the legislative history, OSM has decided to retain the existing definition."

52 FR 39186 (OCTOBER 20, 1987). Proposed rule. Unsuitability criteria; SLFC.

See below.

53 FR 26582 (JULY 13, 1988). Final rule. Unsuitability criteria; SLFC.

"The proposed rule would revise the definition of [SLFC] to clarify that an existing mine is not necessary for SLFC." The revision was proposed in response to the court's ruling in *In re: Permanent Surface Mining Regulation Litigation II*, Civil Action No. 79-1144 (DDC, July 15, 1985)."

The final rule adopted the "proposal to delete all language describing 'an existing mine' requirement for a finding of [SLFC].

54 FR 11576 (MARCH 21, 1989). Decision on BHP-Utah International Inc. (UII)'s request for determination of SLFC for lands in Kane County, UT.

The Director determined that UII did not meet the criteria for SLFC: "the information submitted by UII does not state to what extent [the enumerated] expenses and actions are attributable solely to lands within the area designated unsuitable for surface mining. In addition, the information provided by UII indicates that these actions and investments were not made on the basis of a long-term coal contract prior to January 4, 1977".

COALEX STATE INQUIRY REPORT - 283, "TRANSFERABILITY OF VALID EXISTING RIGHTS (VER)" (1994).

This Report addresses the question of transferring the permit of a tipple with VER where there was a break in the permit. The following Federal Register Notice on VER was included as part of the Report:

56 FR 33152 (JULY 18, 1991). Proposed rule. Areas unsuitable for mining; areas designated by act of Congress.

Transferability of VER:

"OSM believes that to interpret SMCRA to impose or authorize a limit on VER transferability would not comply with the intent of Congress in enacting SMCRA. Thus,



the property rights requirement in this proposed section incorporates the concept that VER is transferable."

"[I]f a person with a property interest in the coal on the applicable effective date had VER, that person could, if permitted by applicable laws and regulations, transfer the VER to a successor after the effective date. The transferred right would suffice as the basis for a finding of VER for the successor in interest. The determination of VER takes into account the nature of the rights applicable on the applicable effective date. Subsequent property transactions cannot be used to create VER if it did not exist on the effective date."

57 FR 62207 (DECEMBER 30, 1992). Final rule. Approval of amendment to Indiana program.

The enclosed excerpt discusses the approval of Indiana's definition of SLFC and how it differs from the federal counterpart, e.g., Indiana's proposed rule "provides examples of 'other capital intensive activities' which qualify under the proposed definition [of SLFC] because they are based on a long term coal contract."

62 FR 4836 (JANUARY 31, 1997). Proposed rule. Valid existing rights.

7. Transferability of VER

"As in 1991, OSM is proposing to reaffirm that VER are transferable, primarily because the proposed definition of VER includes a property rights component. In essence, OSM is proposing to consider VER as being attached to the property to which those rights pertain rather than as being valid only for the person claiming such rights or, with the exception of VER under the needed for and adjacent standard, for a specific operation. (VER under the needed for and adjacent standard would attach jointly to both the property and a specific surface coal mining operation.) Once attached to the property, VER would become subject to whatever State property law exists concerning rights of alienation as an element of property ownership. SMCRA (especially section 510(b)(6)) generally defers to State property law.

"The VER exemption is analogous to a zoning variance, which, in the interest of equity, allows an otherwise prohibited use to occur under certain fact-specific circumstances even though that use was not in existence on the land in question at the time the zoning ordinance took effect. Like VER under the proposed rule, zoning variances typically convey with the title to the property even if the rights conferred by the variance have not been exercised.

"However, the alienation or transfer of property is not an absolute right. Certain interests in real property, such as leases, licenses or profits a prendre, may be inherently nontransferable or of limited transferability, either by their terms or by operation of State law. If a person's coal property interests are of this nature, then any VER resting on



those interests would also be nontransferable. Furthermore, it is possible that a State could designate VER under SMCRA as nontransferable as a matter of law.

"In the rule being published today, OSM is proposing to reaffirm the transferability of VER to the extent that the underlying property rights are transferable under State law. Therefore, to the extent that State law allows the sale or other transfer of the underlying coal rights or other pertinent property rights, a person with VER may sell or transfer the VER to another person as an appurtenance to the coal or other property rights. Nothing in this rule is intended to create rights that do not already exist in State law or expand upon those that do. Individual States may prohibit VER transfers to the extent that they have the authority to do so under State law."

ATTACHMENTS

A. Legislative History

1. H. R. REP. 95-218, 95th Cong., 1st Sess. pp 94-95, 156-157(April 22, 1977).
2. H.R. REP. 95-128, 95th Cong., 1st Sess. pp 78-79 (May 10, 1977).
3. 123 CONG. REC. S8083 (May 20, 1977).
4. HEARING (House), 94th Cong., 1st Sess. pp 91-92 (June 3, 1975).
5. H.R. REP. 93-1072, 93rd Cong., 2nd Sess. (May 30, 1974).

B. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. 762.5 Definitions.

C. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 761 Areas designated by Act of Congress. Definition of VER.

D. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 762 Criteria for designating areas as unsuitable for surface coal mining operations. 762.5 Definitions.

E. 45 FR 52467 (AUGUST 7, 1980). Preliminary findings on Mower Lumber Co.'s request for determination of VER to conduct underground coal mining operations in the Upper Shavers Fork Sub-unit of the Monongahela National Forest, in Randolph County, WV.

F. IBSMA 81-64, 4 IBSMA 192 (December 10, 1982).

G. 46 FR 36758 (JULY 15, 1981) and 46 FR 50422 (OCTOBER 13, 1981). Findings and Decision on Greenwood Land and Mining Co.'s request for a determination of VER to conduct underground coal mining operations in the Daniel Boone National Forest in Pulaski and McCreary Counties, KY.

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J. 52 FR 39186 (OCTOBER 20, 1987). Proposed rule. Unsuitability criteria; SLFC.

K. 53 FR 26582 (JULY 13, 1988). Final rule. Unsuitability criteria; SLFC.

L. 54 FR 11576 (MARCH 21, 1989). Decision on BHP-Utah International Inc. (UII)'s request for determination of SLFC for lands in Kane County, UT.

M. COALEX STATE INQUIRY REPORT - 283, "TRANSFERABILITY OF VALID EXISTING RIGHTS (VER)" (1994).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

1. 56 FR 33152 (JULY 18, 1991). Proposed rule. Areas unsuitable for mining; areas designated by act of Congress.
- N. 57 FR 62207 (DECEMBER 30, 1992). Final rule. Approval of amendment to Indiana program.
- O. 62 FR 4836 (JANUARY 31, 1997). Proposed rule. Valid existing rights.