



COALEX STATE INQUIRY REPORT - 344

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TOPIC: TRANSFERABILITY OF VER FOR HAUL ROADS

INQUIRY: Please locate any relevant materials that discuss transferability of valid existing rights (VER) for haul roads.

SEARCH RESULTS: The COALEX Library, other LEXIS materials and existing COALEX State Inquiry Reports were used to research this inquiry. Research retrieved a number of Federal Register preambles to proposed rules regarding VER. The preambles discuss VER together with haul roads and separately address the transferability of VER; none of the materials identified specifically address the transferability aspect of VER for haul roads.

The full text of the preambles to the VER proposed rules are attached. Excerpts from the preambles appear below. Also included here are Notices of Determinations of VER for haul roads, two prior COALEX Reports and a West Virginia state case on VER for haul roads.

REGULATORY HISTORY

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

6. VER for Access and Haul Roads.

"As in 1991, OSM is proposing to revise the paragraph (b) of the definition of VER to incorporate the concept of continually created VER, which was previously promulgated as paragraph (d) of the September 14, 1983 definition and upheld in subsequent litigation. The revised definition would recognize VER for the use or construction of an access or haul road as part of a surface coal mining operation if (1) the road was in existence on the date the land upon which it is located came under the protection of section 522(e), (2) a right of way or easement for the road was properly recorded as of that date, (3) the regulatory authority had issued a permit for an access or haul road in



that location as of the applicable date, or (4) the person can demonstrate the existence of VER under the standards of paragraph (a) of the definition. The last alternative is a new addition intended to clarify that, because the definition of surface coal mining in operations in 30 CFR 700.5 includes access and haul roads, a person may also demonstrate VER for such roads using the same criteria applicable to other types of surface coal mining operations and activities.

"OSM also is proposing to expand the scope of paragraph (b) to apply to access roads. Previous versions of this definition have applied only to haul roads. None of the earlier preambles explains why access roads were not included, but a reading of the 1979 preamble suggests that this failure may have been an accidental by-product of the fact that the comments received focused exclusively on haul roads. That preamble sets forth the following rationale for allowing existing roads to be used as haul roads, regardless of location or prior use: 'OSM believes that it is less damaging [to the environment] to use existing roads, whether or not previously used for coal haulage, than to require construction of additional roads. Therefore, all roads in existence as of August 3, 1977, have valid existing rights.' [44 FR 14993, March 13, 1979.]

"This line of reasoning would apply equally well to the use of existing roads as access roads-perhaps more so, since roads used solely for access generally involve less massive construction impacts and are usually used less intensively than haul roads. Consequently, the environmental impacts of access roads are usually less severe than those associated with haul roads, which often carry heavy truck and equipment traffic resulting in significant noise, dust, vibration, and other problems. In addition, permits and recorded rights of way for access roads are no less legitimate than permits and recorded rights of way for haul roads. Accordingly, OSM is proposing to apply the standards of paragraph (b) to both access and haul roads."

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."

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

Section 76.5(b) - Haul roads



"OSM's initial analysis of haul roads revealed that there were two situations in which VER might be established for haul roads. This analysis was discussed in the preamble to the first definition of VER, promulgated in 1979 at 30 CFR 761.5(b). 44 FR 14933 (March 13, 1979). Except for renumbering, this provision has been unchanged since that promulgation. The only change proposed here is the addition of language clarifying that the continually created VER' provision applies to haul roads. OSM believes that VER would exist if any of the prohibitions of section 522(e) of SMCRA were applied to existing haul roads in cases where the prohibitions came into effect at some time subsequent to the date SMCRA was passed. Therefore, OSM is proposing to amend the haul road portion of the VER definition to provide that VER means (1) a recorded right of way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977, or as of the date the protection under section 522(e) came into effect, or (2) any other road in existence on August 3, 1977, or as of the date the protection under section 522(e) came into effect."

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."

Also see:

1. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules. Areas unsuitable, etc.
2. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas unsuitable, etc.
3. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas unsuitable, etc.

44 FR 41662 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 761 Areas designated by Act of Congress. Definition of VER.

"What would constitute VER for haul roads?...OSM's analysis indicated that there are two situations in which VER might be established for haul roads. First, an applicant or operator could have a specific right to construct and use a haul road, established by a recorded right-of-way, recorded easement or permit for a coal haul road as of August 3, 1978. The second situation which could establish VER for a haul road is the actual existence of a road as of August 3, 1977, which is being or could be used for coal



haulage, including haul roads used for timber, stone or other minerals. Their use for hauling is established.... It would be less damaging to the environment to continue the use of such a road than to require that a completely new road be constructed... Therefore, all roads in existence as of August 3, 1977, have valid existing rights."

DETERMINATIONS OF VER

57 FR 27269 (JUNE 18, 1992). Notice of contemplated settlement agreement and reconsideration of VER determination within the Wayne National Forest, Ohio.

In its settlement with Belville Mining Co. (BMC), OSM agreed to reconsider its VER determination regarding one tract of the McMullen property and consider recognizing BMC's entitlement to surface mine and use an existing road as a haul road. In return, BMC would surrender its rights to mine the second tract.

In the earlier decision regarding BMC's request for a determination of VER, OSM found that the company did not have VER because "(1) BMC did not own the necessary property rights on August 3, 1977; (2) BMC had not applied for or obtained the necessary permits for a surface coal mining operation by August 3, 1977; (3) even if VER were transferable under the Ohio VER provisions, BMC has not demonstrated that its predecessors in interest had obtained or attempted to obtain the necessary permits for a surface coal mining operation by August 3, 1977."

Also see prior Notices of Decisions regarding VER determinations for Wayne National Forest:

1. 55 FR 45863 (OCTOBER 31, 1990).
2. 54 FR 52465 (DECEMBER 21, 1989).

55 FR 22961 (JUNE 5, 1990). Request for determination of VER within the Daniel Boone National Forest, KY. Notice of decision.

OSM determined that R.W. Coal Co. had VER for a coal haul road within the Daniel Boone National Forest. To make the determination, OSM applied the criteria for VER from the approved Kentucky regulatory program, which corresponds to the federal rule: Haul road "A" had "historically served as a road" and was "not permanently abandoned, but temporarily rerouted". In addition, the purpose of the VER rule, to cause the least amount of damage to the environment, would be "better served by granting VER for the original road" rather than build a new road.

STATE CASE

CHURNETTE v CALLAGHAN, 425 SE 2d 170 (West Virginia 1992).



"SYLLABUS BY THE COURT

"1. Under the definition of valid existing rights for haul roads provided in 38 W. VA C.R.S. sec. 2-2.129 (1992), a permit applicant may establish valid existing rights for a coal haul road if the applicant demonstrates that the proposed road was in existence prior to August 3, 1977."

PRIOR COALEX REPORTS

COALEX STATE INQUIRY REPORT - 342, "522(a)(6) - SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENT" (1998).

This Report addresses the relationship between VER and the SLFC exemption, and the transfer of the exemption when the exempted lands are sold. [NOTE: Only those attachments that relate to the issue of this Report are attached.]

COALEX STATE INQUIRY REPORT - 149, "HAUL ROADS AND VALID EXISTING RIGHTS" (1990).

This is the earlier version of the issue of this Report.

ATTACHMENTS

- A. 62 FR 4836 (JANUARY 31, 1997). Proposed rule. Valid existing rights.
- B. 56 FR 33152 (JULY 18, 1991). Proposed rule. Areas unsuitable for mining; areas designated by Act of Congress, etc.
- C. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules. Areas unsuitable, etc.
- D. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Areas unsuitable, etc.
- E. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Areas unsuitable, etc.
- F. 44 FR 41662 (MARCH 13, 1979). Permanent program final preamble - Final rule. 30 CFR Part 761 Areas designated by Act of Congress. Definition of VER.
- G. 57 FR 27269 (JUNE 18, 1992). Notice of contemplated settlement agreement and reconsideration of VER determination within the Wayne National Forest, Ohio.
- H. 55 FR 45863 (OCTOBER 31, 1990). Notice of Decisions regarding VER determinations for Wayne National Forest.
- I. 54 FR 52465 (DECEMBER 21, 1989). Notice of Decisions regarding VER determinations for Wayne National Forest.
- J. 55 FR 22961 (JUNE 5, 1990). Request for determination of VER within the Daniel Boone National Forest, KY. Notice of decision.
- K. CHURNETTE v CALLAGHAN, 425 SE 2d 170 (West Virginia 1992).
- L. COALEX STATE INQUIRY REPORT - 342, "522(a)(6) - SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENT" (1998).
- M. COALEX STATE INQUIRY REPORT - 149, "HAUL ROADS AND VALID EXISTING RIGHTS" (1990).