COALEX STATE INQUIRY REPORT - 68
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TOPIC: "SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS"

INQUIRY: Please research the legislative and regulatory history of the phrase "substantial legal and financial commitments".

SEARCH RESULTS: Sec. 522 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires each state wishing to assume primacy to establish a procedure for designating certain areas unsuitable for surface coal mining. Any person having an interest= which is or may be adversely affected has the right to petition the regulatory authority to have an area designated as unsuitable for mining. However, this right to have an area so designated is subject to the savings clause of Sec. 522(a)(6), which provides that "[t]he requirements of [Section 522] shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977." This language is also included in Sec. 510(b)(4) of SMCRA

LEGISLATIVE HISTORY

The savings clause of Sec. 522 was included in every version of SMCRA introduced since 1973, and was retained in essentially the same form throughout the Act's legislative history. The Senate report accompanying S. 425 noted that the passage of the bill, with its provisions for designating lands unsuitable for mining, would place all coal owners and surface mine operators on notice that there was a possibility that lands could be designated as unsuitable for surface mining. However, the report noted, this section was not designed to shut down existing operations; thus, no area was to be designated as unsuitable if "firm plans and financial commitments for such operations were in existence prior to the enactment of the Act." The committee explained the meaning of this language:

"Mere ownership of the coal resource with the intent to surface mine would not qualify for the exemption from designation as unsuitable for surface mining based on firm plans for and substantial legal and financial commitments'. In order to preclude designation, it must be established that specific plans and specific contracts for sale of coal and purchase of necessary equipment for an actual mining operation were in existence on the date of enactment." (S. Rep. No. 402, 93rd Cong., 1st Sess. 68 (1973))

Search conducted by: S. Michele Manning

The 1974 House version of Sec. 522(a)(6) contained language nearly identical to that found in P.L. 95-87; however, no explanation was given as to the meaning of this phrase. (H.R. Rep. No. 1072, 93d Cong., 2d Sess. 10 (1974)) By 1975, both the House and the Senate had adopted the same language found in SMCRA. (See S. Rep. No. 28, 94th Cong., 1st Sess. 122 (1975); H.R. Rep. No. 45, 94th Cong., 1st Sess. 38 (1975).) The House report explained the designation process and the meaning of "substantial legal and financial commitments" as follows:

"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-tem coal contract, investments have been made in power plants, 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'." (H.R. Rep. No. 45, 94th Cong., 1st Sess. 91 (1975))

The 1976 and 1977 House committee reports on the proposed surface mining legislation gave no further explanation of the meaning of the savings clause found in Sec. 522(a)(6); indeed, these reports adopted the identical explanatory language quoted above. (See, e.g., H.R. Rep. No. 896, 94th Cong., 2d Sess. 47 (1976); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 46 (1976); H.R. Rep. No. 218, 95th Cong., 1st Sess. 94 (1977).) The Senate committee reports did not specifically adopt this language, but it was the House bill that was adopted by the Conference Committee and passed by the Senate. Furthermore, the Congressional Record reveals that the identical language found in the House version was quoted in response to a question concerning the meaning of this term. (121 Cong. Rec. 6114 (1975) (statement of Sen. Metcalf).)

REGULATORY HISTORY

The OSMRE definition of "substantial legal and financial commitments", found at 30 CFR Sec. 762.5, reflects the same basic language as that found in the legislative history. OSMRE attempted to expand on this definition in its 1978 proposed regulations, but later revised its language to conform with that found in the House reports.

The 1978 proposed regulations issued by OSMRE defined "substantial legal and financial commitments" as follows:

"Substantial legal and financial commitments in a surface coal mining operation means major investments of money in power plants, railroads, coal-handling or storage facilities and other capital intensive improvements and fixed equipment made on the basis of long-term, legally

enforceable coal sales contracts which cannot be canceled except upon payment of a substantial penalty. Investments are major' if they are substantial both (a) in relationship to the aggregate assets of the proposed operator and the operator's beneficial owners, other than non-controlling shareholders in publicly held corporations, and (b) in relation to the aggregate capital expenditures which reasonably can be anticipated to be made for capital improvements and fixed equipment at the mine site to, and including, completion of all reclamation operations. Costs of the acquisition of the coal in place or of the right to mine it do not constitute substantial legal and financial commitments'." (43 FR 41663, 41828 (1978))

OSMRE noted that it had considered not defining this term, but rejected this alternative after reviewing the legislative history and finding that Congress had intended a specific meaning in using the term. (Id. at 41686).

In the preamble to its final rules, OSMRE noted that it had received more comments on this definition than on any other issue in its regulations on the designation of lands unsuitable for mining.

The references to "major investments", "legally enforceable" and "cancellation penalties" were deleted as inconsistent with Congressional intent. OSMRE also rejected a suggestion that "substantial" be defined by using a specific percentage of anticipated costs or a specific dollar amount, saying that "any fixed dollar amount or percentage would be arbitrary and might impose disproportionate burdens on smaller companies". (44 FR 14901, 14997 (1979)) Several commenters suggested that various preparatory actions by an operator should be defined as substantial, such as the purchase of draglines, exploration costs, and advance royalties. These comments were also rejected. OSMRE noted that, while these commitments were not enough to be considered "substantial" by themselves, they were to be considered as part of the overall costs and commitments to mine. (Id. at 14998). An example was added to the definition, again in keeping with the legislative history of the phrase:

"An example would be an existing mine, not actually producing coal, but in a substantial state of development prior to production. Costs of acquiring the coal in place or of the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments." (44 FR 15311, 15344 (1979))

Thus, instead of expanding and clarifying the definition of "substantial legal and financial commitment", OSMRE chose to keep its regulatory definition of the term within the boundaries set by the legislative history.

In 1982, OSMRE proposed to revise the definition of SLFC. The proposed revision would have recognized that substantial commitments could be made with or without a long-term coal contract. However, several commenters pointed out that the coal contract requirement was repeated throughout the legislative history as a precondition to granting an exemption. Therefore, OSMRE decided to retain the existing definition. (48 FR 41312, 41327 (1983))

ATTACHMENTS

A. S. Rep. No. 402, 93d Cong., 1st Sess. (1973).
B. H.R. Rep. No. 1072, 93d Cong., 2d Sess. (1974).
C. S. Rep. No. 28, 94th Cong., 1st Sess. (1975).
D. H.R. Rep. No. 45, 94th Cong., 1st Sess. (1975).
E. H.R. Rep. No. 896, 94th Cong., 2d Sess. (1976).
F. H.R. Rep. No. 1445, 94th Cong., 2d Sess. (1976).
G. H.R. Rep. No. 218, 95th Cong., 1st Sess. (1977).
H. 121 Cong. Rec. 6114 (1975).
I. 43 FR 41661 (1978).
J. 44 FR 14901 (1979).
K. 44 FR 15311 (1979).M
L. 48 FR 41312 (1983).