# COALEX STATE INQUIRY REPORT – 91
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TOPIC: CONTINUALLY CREATED VALID EXISTING RIGHTS

**INQUIRY:** Whether an operator has valid existing rights (VER) to continue mining when, after operations begin, a third party erects a dwelling or occupies a previously existing but unoccupied residence within 300 feet of the operation.

**SEARCH RESULTS:** The Surface Mining Control and Reclamation Act (SMCRA) designates certain areas as "unsuitable" for mining and prohibits coal operations on those areas. Along with criteria to find certain lands unsuitable for mining based on environmental or cultural characteristics, the Act explicitly prohibits mining on certain lands, subject to an operator having valid existing rights (VER) (30 U.S.C. Sec. 1271). These Congressional prohibitions include coal mining operations within 100 feet of the outside right of way of a public road, (30 U.S.C. Sec. 1271 (e)(4)); within 300 feet from an occupied dwelling (unless waived by the owner); within 300 feet of a public building, school, church, community or institutional building or public park; or within 100 feet of a cemetery (30 U.S.C. 1271 (e)(5)). The Act does not expressly address the situation where, following passage of the Act, the mine operation pre-dates a public road, occupied dwelling or cemetery. To determine the rights of the mine operator in this context, a review of the federal regulations and OSM commentary during the rulemaking process is necessary.

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## LEGISLATIVE HISTORY

The Office of Surface Mining (OSM) proposed to amend permanent program rules which establish procedures for implementing the "Lands Unsuitable" aspects of SMCRA in 1982. (47 FR 25278 (1982)) Final amended rules were adopted in September, 1983 (48 FR 41312). During the rulemaking process, OSM considered several options to define VER (See 47 FR 25279 (1982).) Through this process OSM realized that VER may come into existence at points in time following the passage of the Act.

"...[e]xperience with Section 522(e) of the Act indicates that VER is not static; that is, new VER are continuously being created under certain situations." (47 FR 25281 (1982)

In the proposed rules, OSM defined "continually created VER" and noted:

"OSM believes that an operator who obtains all permits required after August 3, 1977, should be able to mine the permit area even if an adjacent landowner subsequently builds a house closer than 300 Feet." (Id.)

Noting that existing rules could be construed to require termination of such an operation, no matter how long it has been in existence, the proposed rules were designed by OSM to preclude such a result.

OSM proposed that the VER status for an operator would arise when "all permits have been obtained". It also proposed that VER be really limited to the permit boundary. (Id.) The final rules, however, adopted a less specific definition of when continually created VER comes into existence.

Rather than adopt a specific "permit issuance" or "permit filing" standard, OSM adopted a "legal existence" standard. The final rule specifies:

"(d) Where an area comes under the protection of section 522(e) of the Act after August 3, 1977, valid existing rights should be found if --
(1) On the date the protection comes into existence, a validly authorized surface coal mining operation exists on that area; or
(2) The prohibition caused by section 522(e) of the Act, if applied to the property interest that exists on the date the protection comes into existence would effect taking of the persons property which would entitle the person to just compensation...." (30 CFR 761.5(d)(1)(2))

OSM's commentary accompanying the final rules notes:

"Thus, the existence of VER created after August 3, 1977, does not relate specifically to the issuance of or an application for a ... permit, but rather relates to whether on the date the protected activity begins the operation is legally in existence, or if it is not, whether a taking' would occur if it is prohibited." (48 FR 41315 (1983))

Although OSM does not explicitly define "legal existence", it does provide an example of the protection to the operator provided by continually created VER:

"Without the protection provided by this provision, it would be possible for a person who objected to a mining operation to move a mobile home to the edge of the property adjoining a mine, occupy it, thereby forcing the operator to cease all operations within 300 feet." (Id.)

"OSM believes that it would be inconsistent with the Act to allow this type of situation to arise once the operator has made substantial investments required to obtain a permit and begin operation." (Id.)

Accordingly, under the revised Federal rule, a permitted coal mine operation would be protected by continually created VER.

## LITIGATION

OSM's regulation at 30 CFR Sec. 761.5(d), establishing "continually created VER" was challenged in IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, Civil Action No. 79-1144, Memorandum Opinion (DDC March 22, 1985).

The environmental and citizen group plaintiffs argued that the concept of continually created VER is inconsistent with the Act since, inter alia, the term "existing" in valid "existing" rights leaves no room for the possibility that VER could be created after August 3, 1977. OSM argued that the adopted rule is in accord with Congress' desire to avoid takings. Judge Flannery, agreeing with OSM, held:

"Given the language of the Act, and Congress' concern with takings, the court finds that continually created VER' is in accord with the law." (MEMORANDUM OP. at 12)

The court remanded that portion of the definition which incorporates the takings test of Sec. 761.5(a) for further notice and comment. Operatively, however, the court adopted the protections afforded by continually created VER to coal operations which "are deemed to legally exist".

The district court's concurrence with the OSM definition of "continually created VER", is still being litigated. As part of the ongoing appeal of the district court rulings, the National Wildlife Federation, et al., have presented arguments to the U.S. Court of Appeals for the District of Columbia Court, inter alia, erred in that "the District Court finding that Congress intended to allow VER within the meaning of Section 522(e) to be created after the Surface Mining Act was passed." (IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, Appeal Docketed, No. 84-5743 (DC Cir March 18, 1986). The outcome of this appeal is pending.)

## ADMINISTRATIVE CASES

A recent administrative decision regarding a Kentucky case addressed an analogous issue and resolved it by relying on the information found in the approved surface mining permit. In A.L. PHIPPS v OSM AND AM-LE-CO AND NEW BIG CREEK MINING COMPANY, NX 4-39-R (November 10, 1986, amending the July 24, 1986 decision), ALJ Torbett held that:

"Once the permit process is completed and a dwelling has been established as either occupied or unoccupied, the rights of the parties are fixed." (PHIPPS at 6)

In PHIPPS case, the operator's permit erroneously showed that a dwelling was "occupied" even though during later operations, the dwelling had become vacant. Based on field observations of vacancy, the Kentucky inspector did not cite the coal company for mining within 60 feet of the dwelling. If the dwelling is legally "occupied", then there is a clear violation of the protections offered under Sec. 522(e)(5) and state regulations pursuant to the Congressionally designated lands unsuitable for mining. ALJ Torbett framed the issue as whether or not the out house in question was an "occupied" dwelling under the relevant provisions of Kentucky law. (Id. at 5) He also noted that OSM considers occupied dwellings to include both full-time and part-time

occupancy (44 FR 14991 (1979)), and the Kentucky law tracks the federal statute and regulations involved. (Id.)

The time to determine "occupancy" is the time the permit is issued. Holding that the building was legally occupied because the permit application showed that the building is occupied, Judge Torbett noted that "It is during the permitting process that a land owner or renter can protect himself by making sure that a permit is not approved which will allow mining within 300 feet of the owner or renter's home." (Id. at 6)

The judge recognized the ludicrous situations which could arise if he held otherwise. For example, "[a] permittee who had mined within 300 feet of a vacant dwelling could suddenly find the dwelling occupied and the permittee would thus be in violation of the Act through no fault of his own." (Id. at 6)

This logic should obviously pertain to a situation where no dwelling exists at the time of permit approval and an operator, "through no fault of his own", finds a dwelling within 300 feet of his operation.

**ATTACHMENTS**

A. 47 FR 25278 (JUNE 10, 1982). Proposed rules: Areas unsuitable for Surface Coal Mining.
B. 48 FR 41312 (SEPTEMBER, 1983). Final rules and regulations: Areas unsuitable for Surface Coal Mining, codified at 30 CFR Sections 736, 760, 761, 762, 764, 765, 769, 783.
C. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, Civil Action No. 79-1144, Memorandum Opinion (DDC March 22, 1985).
D. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, Appeal Docketed, No. 84-5743 (DC Cir March 18, 1986). Appelants Brief - cover sheet and index.
E. A.L. PHIPPS v OSM AND AM-LE-CO AND NEW BIG CREEK MINING COMPANY, NX 4-39-R November 10, 1986, amending the July 24, 1986 decision).