



COALEX STATE COMPARISON REPORT – 139
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TOPIC: VALID EXISTING RIGHTS (VER) [Update of COALEX Report No. 13]

INQUIRY: Please locate the following types of materials which discuss the definition of valid existing rights (VER): Proposed and final federal rules, and preambles published in the Federal Register; state statutes and regulations; and state caselaw.

SEARCH RESULTS: Research was conducted using both the COALEX Library and the publicly available materials in LEXIS. Unless otherwise indicated, copies of the materials discussed below are attached. [NOTE: State program materials in COALEX are current through mid-1989.]

REGULATORY HISTORY

The following is an overview of the history of the rule defining VER under 30 CFR 761.5. Much of the summary was taken from the NOVEMBER 20, 1986 (51 FR 41952) preamble to the suspension of certain final rules.

LEGISLATIVE HISTORY [See attached REPORT NO. 13.]

According to legislative materials, Congress created the VER exemption of section 522(e) to avoid potential legislative takings of a person's property which would entitle the person to just compensation under the Fifth and Fourteenth Amendments. The language used in 522(e) ["subject to VER"] was not 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 contract is to be executed and must show that such rights were contemplated by the parties." [S. Rep. No. 128, 95th Cong., 1st Sess. 94-95 (1977)]

[See STATE INQUIRY REPORT - 13 and US v POLINO 133 F Supp 722 (ND W Va 1955). Both documents are attached.]

44 FR 14902 (MARCH 13, 1979). Permanent Program Final Rule. [Excerpts only attached.]

These regulations limited the VER exemption to those property rights in existence on August 3, 1977, where the property owners had obtained all necessary mining permits on or before



August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for, and immediately adjacent to, a mining operation in existence prior to August 3, 1977.

44 FR 67942 (NOVEMBER 27, 1979). Notice of suspension of certain rules in 30 CFR Chapter VII. [Excerpts only attached.]

The 30 CFR 761.5 definition of VER, subsection (c) was not suspended. However, "as an alternate to the present regulatory language," OSM agreed that "existing state law may be applied to interpret whether the document relied upon established valid existing rights."

45 FR 8241 (FEBRUARY 6, 1980). Proposed rulemaking. [Excerpts only attached.]

"Modifications to the Permanent Regulatory Program are proposed to...(4) allow the use of Statecase law for interpretation of documents relied upon to establish valid existing rights...."

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, Civil Action No. 79-1144, Mem ops (D DC February 26, 1980 and May 16, 1980). [Text not included with this report.]

The court remanded that portion of the definition which required the property owner to have obtained all permits necessary to mine ("all permits" test, 30 CFR 761.5(a)(2)(i)). The court indicated that "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test."

45 FR 51547 (AUGUST 4, 1980). Notice of suspension and statement of policy regarding effect on State programs. [Excerpts only attached.]

In response to the District Court Memorandum Opinions, OSM suspended paragraph (a)(2)(i) of the definition of VER under 30 CFR 761.5. Pending further rulemaking, the Secretary would interpret the regulation "as requiring a good faith effort to obtain all permits."

47 FR 25278 (JUNE 10, 1982). Proposed rules. [Excerpts only attached.]

OSM proposed three options for revising the definition of VER. All of the proposed options were attempts to identify the class or classes of circumstances which would operate to effect takings under section 522(e) ("mechanical tests"): Option 1 was a revised "good faith/all permits" test; Option 2 would establish ownership of the coal as VER; Option 3 would make "ownership plus the right to mine by the method to be used as the test for VER."

48 FR 41312 (SEPTEMBER 14, 1983). Final rules. [Excerpts only attached.]

Comments on the proposed rules convinced OSM that none of the "proposed definitions adequately defined VER". The comments led OSM to examine the development of "takings law" in the courts. OSM determined that "because the courts refuse to prescribe set formulas for takings, OSM is convinced that it cannot specifically delineate a class of circumstances with the assurance that the class is neither overinclusive or underinclusive of all potential takings which might result from section 522(e)" prohibitions. Therefore, OSM promulgated a broad definition of VER which relied on a general "takings" standard.

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 22 ERC 1557, Mem op (D DC March 22, 1985).



The court held that the broad takings standard represented such a significant departure from the mechanical tests of the proposed rule that a new notice and comment period was necessary. The definition of VER was remanded to the Secretary for proper notice and comment.

51 FR 41952 (NOVEMBER 20, 1986). Final rule; suspension.

To comply with the court's ruling, OSM suspended the definition of VER at 30 CFR 765.5(a) pending further rulemaking to define VER. The effect of the suspension was to leave in place the 1980 test: To establish VER, a person had to demonstrate both property rights and that the person either had made "a good faith effort to obtain all permits necessary to mine or that the coal was both needed for and adjacent to an ongoing surface coal mining operation." Determinations of VER would be made on a "case-by-case basis after examining the particular facts of each case".

52 FR 2421 (JANUARY 22, 1987). Notice of intent to prepare an Environmental Impact statement (EIS) and a preliminary regulatory impact analysis (RIA).

As a result of the comments received in response to an earlier notice, OSM redefined the scope of the EIS and RIA on "the applicability of the prohibitions set forth in section 522(e)" to include VER issues.

53 FR 52374 (DECEMBER 27, 1988). Proposed rules.

OSM proposed two options for "the standard for VER":

- "(1) VER exists when an applicant for a permit to conduct surface coal mining operations has, or had made a good faith effort to obtain, all necessary permits; or
- (2) VER exists when an applicant has a legal right to the coal resource and has authority to mine by the method intended, as determined by State law."

54 FR 989 (JANUARY 11, 1989). Notice.

OSM announced the availability of the draft supplement to the 1979 EIS which included potential environmental impacts of the proposed rule on VER.

54 FR 4837 (JANUARY 31, 1989). Notice of public hearings.

OSM announced its schedule of hearings to be held on the proposed VER rule and the EIS on the proposed rule.

54 FR 9847 (MARCH 8, 1989). Notice of reopening of public comment period.

Due to the Secretary's "concern about the complex and difficult problem" of VER, the comment period on the proposed rule and EIS were reopened.

54 FR 30557 (JULY 21, 1989). Withdrawal of proposed rule.

After considering the large number of comments on the proposed rule, OSM decided to withdraw the rule for further study.

STATE CASELAW AND STATE ADMINISTRATIVE DECISIONS*

* Only Pennsylvania administrative decisions are available in LEXIS.



DASET MINING CORP. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1981 EHB 109 (1981).

The Environmental Hearing Board (EHB) ruled that Daset Mining met the standards for VER: It had the rights to the coal, had "sustained substantial financial obligations", and had made a "good faith effort" to obtain the two required permits. DER was "incorrect" in denying Daset Mining a permit to mine within 300 feet of a state park boundary.

WILLOWBROOK MINING CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, 92 Pa Commw 163, 499 A 2d 2 (Pa Commw Ct 1985).

The court affirmed the Pennsylvania EHB's decision upholding DER's denial of Willowbrook's request for a variance in order to surface mine within three hundred feet of an occupied dwelling. Willowbrook did not meet the 1979 "all permits" test - the controlling definition of VER. In addition, the court ruled that although the Pennsylvania Surface Mining Act was "an exercise of state police power", Willowbrook failed "to carry its burden of proving the statute unduly oppressive....[T]he statute did not result in an unconstitutional taking of Willowbrook's property".

COGAR et al. v FAERBER AND SPRING RIDGE COAL CO., 371 SE 2d 321 (W Va 1988).

The appellate reversed the lower court and Reclamation Board of Review decisions in ruling that Sandy Spring did not have VER, which, according to the West Virginia Code, required an operator to have "completed its portion of the application process for all the necessary state and federal permits" by August 3, 1977. Spring Ridge had requested a modification to its permit to allow new openings to the underground mine which were within one hundred feet of a public road and three hundred feet of occupied dwellings. The court found that "[s]imply obtaining a lease of mineral rights to an area does not confer [VER] upon an operator....We require more than simply obtaining a mineral lease to constitute 'substantial legal and financial commitments' as contemplated by the [state] statute."

COGAR et al. v SOMMERVILLE; SPRING RIDGE COAL CO., INC.; AND PARDEE & CURTIN LUMBER CO., 379 SE 2d 764 (W Va March, 1989).

This case involves some of the same parties as that immediately above. Here, Spring Ridge contended that the broad form waivers contained in 1907 and 1914 severance deeds were valid under SMCRA and would allow Spring Ridge to obtain a permit to mine less than three hundred feet from an occupied building.

The court determined that "the old severance deed waived only surface damages and did not authorize mining operations within three hundred feet of an occupied dwelling." The waiver contemplated in federal law and regulations is one which is "knowingly made by the owner and which specifies the distance from the occupied dwelling where mining operations may take place."

EVANGELINOS v DIV. OF RECLAMATION, Case No. 88-B-12, 1989 Ohio App LEXIS 3618 (Ohio Ct App September, 1989).

The court affirmed prior rulings in finding that the deed signed in 1965 "constituted a waiver



of the restriction against mining within three hundred feet of an occupied dwelling." The deed provided a "legal description" of the property and "included provisions for the removal of structures" in order to permit mining.

RUSSELL v ISLAND CREEK COAL CO. AND FAERBER, No. 19104, 1989 W Va LEXIS 986 (W Va December, 1989); rehearing refused February, 1990.

In a 1972 deed, Russell conveyed the right to surface mine an adjacent tract to Island Creek. The conveyance contained a waiver of liability for damages to the spring located on Russell's tract. The court ruled that the West Virginia Code which "specifically permits owners of an interest in real property to waive their private water rights" is "consistent with the parallel federal provision". An owner who "knowingly waived the requirement that the water supply be replaced" may not maintain "a private cause of action seeking money damages and equitable relief because of a violation" of the West Virginia Code which regulates private water rights.

STATE REGULATIONS

FEDERAL REGISTER NOTICES

Federal Register preambles which discuss amendments to state programs revising the definition of VER are included for the following states:

STATE	FR CITE	FR DATE
ILLINOIS	54 FR 118	JANUARY 4, 1989
KANSAS	53 FR 39467	OCTOBER 7, 1988
OHIO	53 FR 51543	DECEMBER 22, 1988
OKLAHOMA	54 FR 37454	SEPTEMBER 11, 1989
PENNSYLVANIA	54 FR 29704	JULY 14, 1989
TENNESSEE	49 FR 38874	OCTOBER 1, 1984
TEXAS	45 FR 78635	NOVEMBER 26, 1980

SECTIONS FROM STATE REGULATORY PROGRAMS

Sections from state regulatory programs which define VER are attached. A list of the materials included with this Report follows.

TABLE OF REGULATIONS

STATE	REGULATION OR STATE SECTION (DATE)
ALABAMA	Ala. Surface Mining Control And Reclamation Act of 12/31/81, Act No. 81-435, Title III, Sec. 28 (5/82). Rules of the Alabama Surface Mining Commission, Sec. 880-X-2A-.06 (9/86).
ALASKA	Alaska Surface Coal Mining Control And Reclamation Act, Senate Bill No. 843, section I, Sec. 41. 45. 260 (5/83). 11 AAC 90.123 (AAC = Alaska Admin. Code) (5/83)



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

ARKANSAS	Ark. Surface Coal Mining & Reclamation Code, Sec. 761.5 (3/88).
COLORADO	Rules and Regulations of the Colorado Mined Land Reclamation Board, Rule 1, Sec. 1.04 (3/89).
ILLINOIS	Ill. Admin. Code, title 62, Sec. 1701.5 (1/89).
INDIANA	Ind. Code Sec. 13-4.1-14-1 (1987) (4/87). 310 IAC 12-1-3 (IAC = Ind. Admin. Code) (3/86).
IOWA	Iowa Coal Mining Act; 12/31/79 Session, Chap. 29, Sec. 8 (2/80). Iowa Admin. Code r. 4.1(2) (1/81).
KENTUCKY	Ky. Rev. Stat. Ann. Sec. 350.085 (1980) (7/80). 405 KAR 24:040E, Sec. 4 (KAR = Ky. Admin. Regs.) (5/82).
LOUISIANA	La. Surface Mining Regs. Statewide Order 29-0-1, Sec. 100.5 (10/80).
MARYLAND	Md. Regs. Code title 08, Sec. 08.13.09.10 (2/82).
MISSISSIPPI	Miss. Surface Coal Mining & Reclamation Regs., Part 161, Sec. 161.5 (4/80).
MISSOURI	Mo. Rev. Stat. Sec. 444.890 (1980) (2/80). 10 CSR 40-5.010 (CSR = Code of State Regs.) (2/80).
MONTANA	Mont. Code Ann. Sec. 82-4-227 (1980) (4/80). Mont. Admin. R. 26.4.1132 (1980) (4/80).
NEW MEXICO	1979 Laws of N.M. Sec. 26 (5/79).
NORTH DAKOTA	N.D. Cent. Code, Sec. 38-14.1-07 (2/86). N.D. Admin. Code, Sec. 69-05.2-01-02 (10/86).
OHIO	Ohio Admin. Code, Sec. 1501:13-1-02 (8/88). Ohio Admin. Code, Sec. 1501:13-3-02 (8/82).
OKLAHOMA	Coal Reclamation Act of 12/31/79, Enrolled Senate Bill No. 299 Sec. 50, Sec. 783 (1/81). Okla. Permanent Regulatory Program Regs., Sec. 761.5 (1/82).
PENNSYLVANIA	Surface Mining Conservation And Reclamation Act, as amended 10/10/80, Sec. 4.5 (10/80). Coal Refuse Disposal Control Act, as amended 10/10/80, Sec. 6.1 (10/80). Clean Streams Law, as amended 10/10/80, Sec. 315 (10/80). Pa. Dept. of Environmental Resources Coal Mining Regs., Title 25, Sec. 86.1 (7/82).
TEXAS	Tex. Surface Coal Mining and Reclamation Act, H.B. 1424, Sec. 33 (4/79). Railroad Comm. of Tex., Surface Mining and Reclamation Div., Amendments to State Program Regs., Sec. 051.07.04.070 (4/80).
UTAH	Coal Mining & Reclamation Permanent Program, Final Rules of the Utah Bd. & Div. of Oil, Gas & Mining, Chap. I, Sec. UMC 761.5 (1/81).
VIRGINIA	Va. Coal Surface Mining Control & Reclamation Act of 12/31/79, as amended by H.B. 818, Chap. 19, Sec. 45.1-252 (1/85). Va. Dept. of Mines, Minerals, & Energy, Div. of Mined Land Reclamation, Coal Surface Mining Reclamation Regs., Program Amendments, Chap. 19, Sec. 480-03-19.700.5 (6/88).



WEST VIRGINIA	W. Va. Surface Mining Reclamation Regs., Chap. 20-6, Series III, Sec. 2 (7/83).
WYOMING	Land Quali Div. of the Dept. of Environmental Quality, Chap. I, Sec. 2 (11/86).

ATTACHMENTS

- A. STATE INQUIRY REPORT - 13.
- B. US v POLINO, 131 F Supp 772 (ND W Va 1955).
- C. 44 FR 14902 (March 13, 1979). Permanent Program Final Rule. [Excerpts only attached.]
- D. 44 FR 67942 (NOVEMBER 27, 1979) Notice of suspension of certain rules in 30 CFR Chapter VII. [Excerpts only attached.]
- E. 45 FR 8241 (FEBRUARY 6, 1980). Proposed rulemaking. [Excerpts only attached.]
- F. 45 FR 51547 (AUGUST 4, 1980). Notice of suspension and statement of policy regarding effect on State programs. [Excerpts only attached.]
- G. 47 FR 25278 (JUNE 10, 1982). Proposed rules. [Excerpts only attached.]
- H. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. [Excerpts only attached.]
- I. IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, 22 ERC 1557, Mem op (D DC March 22, 1985).
- J. 51 FR 41952 (NOVEMBER 20, 1986). Final rule; suspension.
- K. 52 FR 2421 (JANUARY 22, 1987). Notice of intent to prepare an environmental impact statement (EIS) and a preliminary regulatory impact analysis (RIA).
- L. 53 FR 52374 (DECEMBER 27, 1988). Proposed rules.
- M. 54 FR 989 (JANUARY 11, 1989). Notice.
- N. 54 FR 4837 (JANUARY 31, 1989). Notice of public hearings.
- O. 54 FR 9847 (MARCH 8, 1989). Notice of reopening of public comment period.
- P. 54 FR 30557 (JULY 21, 1989). Withdrawal of proposed rule.
- Q. DASET MINING CORP. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES (DER), 1981 EHB 109 (1981).
- R. WILLOWBROOK MINING CO. v COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES, 92 Pa Commw 163, 499 A 2d 2 (Pa Commw Ct 1985).
- S. COGAR et al. v FAERBER AND SPRING RIDGE COAL CO., 371 SE 2d 321 (W Va 1988).
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- U. EVANGELINOS v DIV. OF RECLAMATION, Case No. 88-B-12, 1989 Ohio App LEXIS 3618 (Ohio Ct App September, 1989).
- V. RUSSELL v ISLAND CREEK COAL CO. AND FAERBER, No. 19104, 1989 W Va LEXIS 986 (W Va December, 1989); rehearing refused February, 1990.
- W. Illinois: 54 FR 118 (JANUARY 4, 1989).
- X. Kansas: 53 FR 39467 (OCTOBER 7, 1988).
- Y. Ohio: 53 FR 51543 (DECEMBER 22, 1988).
- Z. Oklahoma: 54 FR 37454 (SEPTEMBER 11, 1989).



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U.S. Department of the Interior

- AA. Pennsylvania: 54 FR 29704 (JULY 14, 1989).
- BB. Tennessee: 49 FR 38874 (OCTOBER 1, 1984).
- CC. Texas: 45 FR 78635 (NOVEMBER 26, 1980).
- DD. TABLE OF REGULATIONS (See above).