



COALEX STATE INQUIRY REPORT - 332

July 1995

Interstate Mining Compact Commission
459-B Carlisle Drive
Herndon, Virginia 20170

TOPIC: VALID EXISTING RIGHTS [VER] (Update)

INQUIRY: Update the existing COALEX Reports with the most recent materials.

SEARCH RESULTS: Copies of COALEX Reports addressing various aspects of VER are attached along with recently retrieved decisions. The earlier COALEX Reports are included without attachments.

COALEX REPORTS

COALEX STATE INQUIRY REPORT - 91, "Continually created valid existing rights" (1987).

COALEX STATE INQUIRY REPORT - 139, "Valid existing rights (VER) [Update of Report No. 13]" (1990).

Includes proposed and final rules and preambles published in the Federal Register; state statutes and regulations; and state case law discussing the definition of VER.

COALEX STATE INQUIRY REPORT - 149, "Haul roads and valid existing rights" (1990).

COALEX STATE INQUIRY REPORT - 155, "Lands unsuitable for mining and valid existing rights in a severed mineral situation" (1990).

The fact situation researched involved an operator in possession of a deed dating back to 1924 who was conducting underground coal mining within 300 feet of an occupied dwelling without permission of the surface owner.

COALEX STATE COMAPRISON REPORT - 210, "Definition of or test for 'valid existing rights' (VER)" (1992).



IMCC member states were surveyed to determine whether the states use the "good faith/all permits" test, the "takings" test or some other measure to determine VER.

COALEX STATE INQUIRY REPORT - 213, "Lands unsuitable; valid existing rights; takings" (1992).

This includes and updates Reports 139, 155, 156 and 189.

COALEX STATE INQUIRY REPORT - 250, "VER: Rights-of-way or easements for railroads" (1993).

A Federal Register notice, OSM Directive and West Virginia case update Report 149.

COALEX STATE INQUIRY REPORT - 255, "Definition of 'adversely affect any publicly owned park'; prohibition against mining within 300 feet of a public park" (1993).

Legislative and regulatory history items, plus federal, state and administrative decisions attached to this Report discuss various aspects of the issue in question.

COALEX STATE INQUIRY REPORT - 283, "Transferability of valid existing rights" (1994).

No documents were identified that discussed the expiration of a permit before the completion of its proposed transfer and the resulting effect on the VER attached to the original permit. Included with the Report are materials providing a general background on transfer of permit rights and continuing permittee obligations when permits expire.

ADDITIONAL MATERIALS

OSM TEMPORARY DIRECTIVE, Subject No. 92-10, Transmittal No. 779, "Interim Procedures for Determination of Valid Existing Rights" (Issued 5/3/93).

"Pursuant to the court order, on November 20, 1986, OSM suspended those portions of the definition to the extent that they were based on a 'takings' standard or defined 'needed for' (51 FR 41952). The notice of suspension stated that the suspension had the effect of removing the 'takings' standard from the Federal regulations, and leaving in place the 'good faith/all permits' standard and the 'needed for and adjacent to' standard, which were both in use before the 'takings' standard was promulgated. The portion of the definition concerning VER for haul roads and 'continually created' VER for operations in existence on the date the land comes under the protection of section 522(e) remain in effect."

BELVILLE MINING CO. v U.S., 999 F 2d 989 (6th Cir 1993). [Updates case in Report - 213]



In this case involving "a dispute as to whether strip mining rights were reserved by certain Ohio landowners who conveyed four tracts of land to the federal government some years ago." The district court determined that "the grantors of three of the tracts did reserve such rights and that the grantor of the [fourth tract] did not. We find no error in these determinations. contrary to a conclusion reached by the district court with respect to the [fourth] tract, however, we conclude that the Department of the Interior possessed authority to reconsider an administrative determination wherein the agency had erroneously recognized the existence of private strip mining rights in that tract. We shall therefore reverse the judgment of the district court insofar as it allowed private strip mining on the [fourth] tract."

LOIS J. ARMSTRONG, ELIZABETH HILLMAN, 130 IBLA 228, IBLA 92-342 (1994).

HEADNOTES: "Where OSM has issued a 10-day notice to a state agency pursuant to 30 U.S.C. Sec. 1271(a)(1) (1988) concerning an offsite processing facility operating within buffer zones prohibited under 30 U.S. C. Sec. 1272(e) (1988) and the state agency declines to take action on the ground that the operation was in existence on Aug. 3, 1977, and that it had valid existing rights, the state's response will be found to be arbitrary and capricious when at least one essential factor for a valid existing rights determination is unaddressed."

GATEWAY COAL CO. v OSM, 118 IBLA 129, IBLA 89-158 (1991). [Updates Interior ALJ decision in Report - 155]

In applying the definition of VER that was in effect when the NOV was issued, Gateway had to demonstrate it had property rights authorizing the creation of the surface impacts within the buffer zone prior to August 3, 1977 and had demonstrated good faith efforts to obtain all necessary permits prior to August 3, 1977.

Gateway's November, 1977 lease granted it the necessary rights to create surface impacts within the 100 and 300 foot buffer zones. The 1962 lease, in force on August 3, 1977, did not convey to Gateway those property rights. Affirming the ALJ's ruling, the Board found that Gateway did not meet the property rights condition of the VER definition.

The Board found that the ALJ had employed the "all-permits" test but failed to consider the "good faith efforts to obtain all permits" test. The Board determined that Gateway's efforts satisfied the permits portion of the VER definition. This part of the Judge's decision was reversed.

For a similar analysis of VER with regard to a coal stockpiling operation, see VALLEY CAMP COAL CO. v OSM, 112 IBLA 19, IBLA 84-632 (1989).

Also see:



An extensive discussion of VER may be found in the JOURNAL OF MINERAL LAW & POLICY, Vol. 5, No. 3 (1989-90) which contains papers presented at DOI's "Symposium on Valid Existing Rights" on April 3-4, 1990. [A copy of the Journal's Table of Contents is enclosed for reference.]

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT - 91, "Continually created valid existing rights" (1987).
- B. COALEX STATE INQUIRY REPORT - 139, "Valid existing rights (VER) [Update of Report No. 13]" (1990).,./
- C. COALEX STATE INQUIRY REPORT - 149, "Haul roads and valid existing rights" (1990).
- D. COALEX STATE INQUIRY REPORT - 155, "Lands unsuitable for mining and valid existing rights in a severed mineral situation" (1990).
- E. COALEX State Comparison Report - 210, "Definition of or test for 'valid existing rights' (VER)" (1992).
- F. COALEX STATE INQUIRY REPORT - 213, "Lands unsuitable; valid existing rights; takings" (1992).
- G. COALEX STATE INQUIRY REPORT - 250, "VER: Rights-of-way or easements for railroads" (1993).
- H. COALEX STATE INQUIRY REPORT - 255, "Definition of 'adversely affect any publicly owned park'; prohibition against mining within 300 feet of a public park" (1993).
- I. COALEX STATE INQUIRY REPORT - 283, "Transferability of valid existing rights" (1994).
- J. OSM TEMPORARY DIRECTIVE, Subject No. 92-10, Transmittal No. 779, "Interim Procedures for Determination of Valid Existing Rights" (Issued 5/3/93).
- K. BELVILLE MINING CO. v U.S., 999 F 2d 989 (6th Cir 1993). [Updates case in Report - 213]
- L. LOIS J. ARMSTRONG, ELIZABETH HILLMAN, 130 IBLA 228, IBLA 92-342 (1994).
- M. GATEWAY COAL CO. v OSM, 118 IBLA 129, IBLA 89-158 (1991). [Updates Interior ALJ decision in Report - 155]
- N. VALLEY CAMP COAL CO. v OSM, 112 IBLA 19, IBLA 84-632 (1989).
- O. Table of Contents from JOURNAL OF MINERAL LAW & POLICY, Vol. 5, No. 3 (1989-90) which contains papers presented at DOI's "Symposium on Valid Existing Rights" on April 3-4, 1990.
- P. Copies of LEXIS cite lists for state and federal cases and Federal Register notices for materials discussing VER.