



COALEX STATE INQUIRY REPORT - 290

July 1994

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Division of Reclamation
402 W. Washington Street
Room 295
Indianapolis, Indiana 46204

TOPIC: DEFINITION OF "HIGHER AND BETTER USE"

INQUIRY: A mine operator, who is also the landowner, desires to change a sites' post-mining land use from cropland to pastureland, claiming it is a "higher and better use" of the land. Is there any material defines "higher and better use" or provides a hierarchy of uses?

SEARCH RESULTS: Using the COALEX Library and LEXIS, some SMCRA legislative history and regulatory information was retrieved that discusses post-mining land use in general, as well as variances from pre-mining land use. These findings are discussed below. Copies of the materials are attached. Also included are several Interior administrative decisions that address some aspect of alternative post-mining land use.

LEGISLATIVE HISTORY MATERIALS

Discussions on post-mining land use printed in the Congressional Record, presentations made at congressional hearings, and committee reports on proposed bills from 1974 through 1977 indicated the following:

1. The importance of agriculture, including "commercial agricultural enterprises", and the need to restore primeland after mining.
2. The hierarchy of what is "higher and better" may depend on the geographic area:
 - a. Appalachia has lack of level land suitable for building and development; using the land for housing or industrial development rather than restoring steep slopes may be considered a "higher use".
 - b. For the Northern Great Plains, "intensive agriculture", such as growing wheat, may be considered a "higher use" than "native range agriculture", such as grazing.



3. In proposing an alternative post-mining land use, the operator must demonstrate in the plans that the proposed use is "economically viable and politically acceptable", more beneficial, and is a "reasonable and environmentally sound reclamation option".

PREAMBLES TO FINAL RULES

Permanent Program Final Rules. 44 FR 14902 (MARCH 13, 1979).

Section 701.5 Definition of "land use". These rules provide basic categories for post-mining land use plus (limited) variance determinations to provide some flexibility while controlling land use decisions. "Higher or better land use" will be determined on a site-by-site basis by the individual landowner or manager and regulatory authority. Cropland, pastureland and grazingland are all viable agricultural land uses.

Section 785 Prime farmland. There is less flexibility here in post-mining land use. Land use must remain agricultural and must provide equal or higher production to pre-mining production.

Section 816.133 Post-mining land use. Proposed post-mining land use must be reasonable, feasible and be "planned in accordance with the particular needs of the area". The land use must maintain or enhance "the potential utility of land for a variety of purposes, ensure consistency in land use decisions" and provide sufficient flexibility to the operator and the regulatory authority and be approved by the landowner.

Section 824 Mountaintop removal.

Also see these attached Federal Register preambles to final rules:

1. 48 FR 39892 (SEPTEMBER 1, 1983). Variances from AOC
2. 56 FR 6224 (FEBRUARY 14, 1991). Initial Regulatory Program.
3. 59 FR 27932 (MAY 27, 1994). Land Use Information.

INTERIOR ADMINISTRATIVE DECISIONS

BANNOCK COAL CO. v OSM, 93 IBLA 225 IBLA 85-156 (1986). BANNOCK COAL CO. v OSM, Docket Nos. CH 4 27-R, CH 4-28 R, CH 5-1-P, CH 5-2-P (1984).

The post-mining use of the permitted prime farmland was listed as "pastureland". Bannock was required to provide crop yield data showing compliance with state and federal regulations. The regulations require restoration and reclamation of all prime farmland areas to equivalent levels of yields of non-mined land of the same soil type in the area. [Implied: crop land is a higher use than pastureland.]

IN THE MATTER OF WILLIAM H. PULLEN, JR., IBLA 88-452 (1992).



The Pullens, landowners of the permitted site, objected to Phase I bond release and permit revisions that changed the intended post-mining land use from pasture to forest in certain areas. The Board quoted the OSM Hearing Officer who had inspected the sites and "believed that the use of some of the land as forest was compatible with the pasture lands, and was perhaps even a higher use of the land."

DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 1-12-P, IN 1-13-P (1983).

David Excavating never followed through on their stated goal "of changing the post-mining land use from pasture and hay either to pasture and hay with impoundments or to residential and thereby precluding the necessity of grading to eliminate highwalls". The permittee remained responsible for reclamation requirements and was subject to the assessed penalty.

DENNIS ZACCAGNINI, 96 IBLA 97, IBLA 85-762 (1987).

The Board found that the permitted area met the requirements of return to AOC: it blended into the surrounding terrain with a surface configuration capable of supporting the proposed post-mining land use (pasture/grazing) and, conceivably, higher or better land uses."

TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).

In a footnote, the Board reported that TBI had applied for a revision in post-mining land use from natural pasture to wildlife habitat, in accordance with the wishes of the landowner.

ATTACHMENTS

A. Legislative History Excerpts

1. HEARING, Senate Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 1386 (March 13, 1973).
2. HEARING, Subcommittee on the Environment and Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 1631 (April 9, 1973).
3. H.R. REP 1072 (H.R. 11500), 93rd Cong, 2nd Sess, Additional, dissenting, separate, and supplemental views (May 30, 1974).
4. CONGRESSIONAL RECORD, 120 Cong Rec 24450 & 24608 (July 18, 1974).
5. CONGRESSIONAL RECORD, 120 Cong Rec 25009, 25012 (July 24, 1974).
6. CONFERENCE REPORT to accompany S. 425, 93rd Cong, 2nd Sess 76 (December 5, 1974).
7. S. REP. 28 (S. 7), 94th Cong, 1st Sess 247 (March 5 1975).



8. HEARING, Subcommittee on Energy and the Environment of House Committee on Interior and Insular Affairs, 95th Cong., 1st Sess. 301 (February 28, 1977).
9. CONGRESSIONAL RECORD, 123 Cong Rec S8083, 8097 (May 20, 1977).
- B. Permanent Program Final Rules. 44 FR 14902 (MARCH 13, 1979).
 1. Section 701.5 Definition of "land use".
 2. Section 785 Prime farmland.
 3. Section 816.133 Post-mining land use.
 4. Section 824 Mountaintop removal.
- C. 48 FR 39892 (SEPTEMBER 1, 1983). Variances from AOC
- D. 56 FR 6224 (FEBRUARY 14, 1991). Initial Regulatory Program.
- E. 59 FR 27932 (MAY 27, 1994). Land Use Information.
- F. BANNOCK COAL CO. v OSM, 93 IBLA 225 IBLA 85-156 (1986).
- G. BANNOCK COAL CO. v OSM, Docket Nos. CH 4 27-R, CH 4-28 R, CH 5-1-P, CH 5-2-P (1984).
- H. IN THE MATTER OF WILLIAM H. PULLEN, JR., IBLA 88-452 (1992).
- I. DAVID EXCAVATING CO., INC. v OSM, Docket Nos. IN 1-23-R, IN 1-7-P, IN 1-11-P, IN 1-12-P, IN 1-13-P (1983).
- J. DENNIS ZACCAGNINI, 96 IBLA 97, IBLA 85-762 (1987).
- K. TURNER BROS., INC. v OSM, 101 IBLA 84, IBLA 85-440 (1988).