



DANIEL M. MOLLOY  
KENTUCKY RESOURCES COUNCIL, INC.

174 IBLA 196

Decided April 14, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

DANIEL M. MOLLOY  
KENTUCKY RESOURCES COUNCIL, INC.

IBLA 2007-67, 2007-68

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Requests for review of a determination of the Office of Surface Mining Reclamation and Enforcement that Sturgeon Mining Company, Inc., has valid existing rights to use a road on Federal land within the boundaries of the Daniel Boone National Forest in Owsley County, Kentucky, in connection with surface coal mining operations on adjacent privately-owned land.

Requests for review denied.

1. Surface Mining Control and Reclamation Act of 1977:  
Generally--Surface Mining Control and Reclamation Act of  
1977: Valid Existing Rights

When a person seeks to use a road that traverses Federal land within a national forest in connection with a surface coal mining operation on adjacent privately-owned property, OSM properly determines that the person has valid existing rights upon a demonstration that (1) the road existed when the Federal land upon which it is located became protected under SMCRA, and (2) the person has a legal right to use the road for surface coal mining operations, as under a road use permit issued by the U.S. Forest Service.

APPEARANCES: Daniel M. Molloy, Bonneville, Kentucky, *pro se*; Tom FitzGerald, Esq., Frankfort, Kentucky, for Kentucky Resources Council, Inc.; Steven C. Barclay, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

## OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Daniel M. Molloy and Kentucky Resources Council (KRC) (together, Petitioners) have each filed a request for review<sup>1</sup> of a determination by the Office of Surface Mining Reclamation and Enforcement (OSM) that Sturgeon Mining Company, Inc. (Sturgeon Mining or Sturgeon), possesses valid existing rights (VER) for a coal haul road on Federal land within the boundaries of the Daniel Boone National Forest in Owsley County, Kentucky. OSM's decision was published in the *Federal Register* on December 5, 2006. 71 Fed. Reg. 70531. OSM stated that its "decision will allow Sturgeon to obtain a Kentucky surface coal mining and reclamation permit for the road in question and to use the road to access and haul coal from a surface mine located on adjacent private lands." *Id.* at 70532.

*BACKGROUND*

On February 23, 2006, QORE Property Sciences (QORE) submitted to OSM on behalf of Sturgeon a request for a determination of VER to use the haul road. Sturgeon is proposing to conduct surface coal mining operations on approximately 424 acres of privately-owned land near Watches Branch of Laurel Fork in the southeast corner of Owsley County, Kentucky. The property to be mined is adjacent to the Daniel Boone National Forest. QORE sought a "determination that Sturgeon has VER under paragraph (c)(1) of the definition of VER in 30 CFR 761.5 to use an existing road across Federal lands within the Daniel Boone National Forest as an access and haul road for the proposed mine." 71 Fed. Reg. at 70532. Paragraph (c)(1) of the definition of VER at 30 C.F.R. § 761.5 provides:

*Valid existing rights* means a set of circumstances under which a person may, subject to regulatory approval, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e)[<sup>2</sup>] and [30 C.F.R.]

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<sup>1</sup> The Board docketed the requests for review filed by Molloy and KRC as IBLA 2007-67 and IBLA 2007-68, respectively.

<sup>2</sup> Section 522 (e)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e)(2) (2000), provides that "[a]fter August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted . . . on any Federal lands within the boundaries of any national forest . . ." Subsection (e)(2)(A) and (B) provide for exceptions to the prohibition on mining within the boundaries of any national forest, inapplicable to Sturgeon's request for a determination of VER.

§ 761.11<sup>3]</sup> would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e) . . . .

. . . .

(c) *Roads*. A person who claims valid existing rights to use or construct a road across the surface of lands protected by § 761.11 or 30 U.S.C. 1272(e) must demonstrate that one or more of the following circumstances exist if the road is included within the definition of “surface coal mining operations” in § 700.5<sup>4]</sup> of this chapter:

(1) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface coal mining operations.

Sturgeon does not contemplate conducting any other surface coal mining operations on Federal lands within the Daniel Boone National Forest that would constitute surface coal mining operations. 71 Fed. Reg. at 70532.

As provided by 30 C.F.R. § 761.16(d)(1), OSM published notice in the *Federal Register* seeking public comment on the merits of QORE’s request. 71 Fed. Reg. 35,448 (June 20, 2006). OSM also published notices on June 22 and 29, and July 6 and 13, 2006, in *The Booneville Sentinel*, Booneville, Kentucky, a newspaper of general circulation in Owsley County, Kentucky. Upon close of the comment period on July 21, 2006, OSM evaluated the record, in accordance with 30 C.F.R. § 761.16(e), and determined that QORE had demonstrated VER on behalf of Sturgeon.

OSM’s application of the definition of VER in 30 C.F.R. § 761.5 to QORE’s request for a determination that Sturgeon has VER to use the haul road in connection with its surface coal mining operation is set forth below:

<sup>3</sup> This regulation, promulgated on Dec. 17, 1999 (64 Fed. Reg. 70832), provides that surface coal mining operations may not be conducted on lands identified in 30 C.F.R. § 761.11(a) through (g) unless the permittee has VER, as determined under 30 C.F.R. § 761.16, or qualifies for the exception for existing operations under 30 C.F.R. § 761.12. Under 30 C.F.R. § 761.11(b), surface coal mining operations are prohibited on “[a]ny Federal lands within a national forest,” subject to limited exceptions not applicable to Sturgeon’s request herein. Section 761.12 sets forth exceptions for existing surface coal mining operations, again inapplicable to this case.

<sup>4</sup> Subsection (b) of the definition of “surface coal mining operations” at 30 C.F.R. § 700.5 includes “the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities . . . .”

We applied this standard by examining all information submitted by QORE, the Forest Service and interested parties for evidence of a road in existence on August 3, 1977. QORE submitted a signed, notarized statement by the property owner of the currently proposed Kentucky surface coal mining permit 895-0171 (for which the applicant has requested VER to use the existing Forest Service road). That statement asserts that the road in question was originally constructed to access the property on Watches Fork in Owsley County, Kentucky. The land owner also stated that the road was used by pre-law permit 6264-77. That permit was issued to River Mining Company of Independence, Kentucky, by the Commonwealth of Kentucky's Department of Natural Resources and Environmental Protection, Division of Reclamation on September 29, 1977.<sup>5</sup>

Based upon the date of the permit alone, it appears that the 1977 surface coal mining permit issued to River Mining Company was issued post-SMCRA (Administrative Record Number KYVER-002). The exact date of construction of the road is not known. Two scanned images of Kentucky Department of Transportation aerial photographs of the same area dated April 11, 1978, clearly show the road in question (Administrative Record Numbers KYVER-005 and KYVER-006). A May 9, 1976, scan of a Forest Service infrared aerial photograph shows the faint trace of a road at the location of the road in question, as does a Forest Service aerial photograph dated April 27, 1974 (Administrative Record Numbers KYVER-002 and KYVER-020, respectively).

Although it is not certain exactly when River Mining Company constructed its access and haul road under the 1976 Special Use Permit issued by the Forest Service, it is clear that a road of unknown origin, perhaps created as a logging road, has existed on the trace of the road in question since at least 1976. Therefore, we have determined that the evidence indicates that a road existed when the land upon which the road is located came under the protection of section 761.11 of the Federal regulations and section 522(e) of SMCRA on August 3, 1977.

The VER standard in the definition of VER at 30 CFR 761.5 also requires that the person seeking VER must have "a legal right to use the road for surface coal mining operations." That "legal right" standard

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<sup>5</sup> The U.S. Forest Service earlier issued a Sept. 24, 1976, nonexclusive Special Use (Road) Permit for improvements to and use of an existing road for hauling coal from private property to a County road. KYVER-019. These permitted improvements were apparently completed in late 1976. *Id.*

was added to the definition of VER on December 17, 1999 (64 FR 70766, 70832). In the preamble to that revision of the definition of VER, OSM stated that a person must demonstrate a legal right to use the road for surface coal mining operations. (64 FR 70791). That is, despite the fact that a road existed on August 3, 1977, that fact alone doesn't give the applicant the right to use the road for commercial purposes. To comply with this requirement, Sturgeon applied for and received a Road Use Permit for the road in question (Watches Fork Road (FSR 1649A)) from the Forest Service dated May 18, 2006 (Administrative Record Number KYVER-008). That permit authorizes Sturgeon to haul "coal from private lands adjacent to National Forest System lands."

Paragraph (c)(1) of the definition of VER at 30 CFR 761.5 merely states that the applicant for VER must have a legal right to use the road for surface coal mining operations. The preamble to the definition of VER published on December 17, 1999, does not provide any additional information regarding the "legal right" requirement. That is, there is no requirement that the legal right to use the road must exist on the date of the enactment of SMCRA. The only requirement is that the applicant has a legal right to use the road. Therefore, we conclude that the May 18, 2006, Road Use Permit from the Forest Service is sufficient to prove that Sturgeon has a legal right to use the road.

71 Fed. Reg. at 70533.

#### *A. Molloy's Request for Review*

Molloy challenges OSM's determination that the "legal right" need not be in existence when SMCRA was enacted in 1977. He appended to his Request for Review a memorandum providing comments in response to OSM's *Federal Register* notice that OSM was seeking a determination that Sturgeon has VER under paragraph (c)(1) of the definition of VER in 30 C.F.R. § 761.5 to use the haul road in connection with its surface coal mining operation. He claims that upon contacting the Forest Service, he "was assured . . . that this permit was on hold until OSM makes a decision on the VER." July 9, 2006, Memorandum to OSM at 2. He states that OSM indicated to the Forest Service "that the VER request would be much easier if . . . USFS just gave them a permit." *Id.* at 2-3. He questions OSM's reference to the fact that the Forest Service issued a permit to River Mining Company, Inc., on September 24, 1976, for construction and use of a road in the location of FSR 1649, stating that such a use permit does not confer VER upon Sturgeon, which "was not even a company in 1976." *Id.* at 3.

*B. KRC's Request for Review*

KRC advances several reasons for arguing that OSM's finding of VER is "arbitrary, capricious and otherwise inconsistent with law . . . ." KRC's Request for Review at 4. First, KRC rejects OSM's claim

that nothing in the 1999 regulation requires that the legal right be in existence as of the date that the land became protected under 30 U.S.C. 1272(e), so that, with respect to the VER finding under 30 CFR 761.5, *unlike every other standard for determining VER*, "existing" would mean existing at the time *not* of the enactment of the Act or the date that the land became protected (i.e. continually created VER) but instead would mean existing as of the date of the VER application.

*Id.* at 5. KRC asserts that OSM's "construction of the regulation does violence to the concept of 'valid existing rights' and is inconsistent with the text of 30 CFR 761.5, and the regulatory and statutory history of 'valid existing rights.'" *Id.*

KRC asserts that in order to show VER to use a road in connection with surface coal mining operations the applicant must demonstrate a "legal right" to use the road when the property became protected under section 522(e) of SMCRA. KRC states that this requirement "was included explicitly in the regulation as part of the December 1999 rulemaking." *Id.* at 6. KRC rejects the notion that the "legal right" to use the road "need not be in existence at the time that the property became protected under Section 522(e) of SMCRA," arguing that such a position

would make this prong of the VER test unique among the standards, for in the case of the "good faith – all permits" and the "needed for and adjacent to" tests of 30 CFR 761.5(b)(1) or (b)(2) (which are made available for roads under (c)(4)), as well as the "permit" standard of (c)(3) and the "right-of-way or easement" standard of (c)(2), the legal right must have existed at the time of enactment, or for those lands which became protected after enactment, at the time the protections attached to the lands.

*Id.* at 6. KRC argues that OSM's interpretation of paragraph (c)(1) of the definition of VER in 30 C.F.R. § 761.5 "should be rejected on its face, since there is no indication in the regulatory preamble that such a radically different interpretation was contemplated or advanced, and since the interpretation would open up to claims of VER, roads for which no such legal right existed at the time that the road became subject to the protections of the Act." *Id.* at 6-7.

According to KRC, the following statement from the preamble to the 1999 definition of VER confirms that OSM's interpretation is erroneous: "[E]ach standard in the definition of VER in the final rule provides for determination of VER based on property rights and other conditions in existence on the date that the land comes under the protections of 30 CFR 761.11 and section 522(e) of the Act." 64 Fed. Reg. at 70791. KRC maintains that the "legal right" contained in the definition of VER must be based on the existence of that right when the protections obtain, "rather than one floating indefinitely into the future and requiring only that the right be extant at the time of application for VER." KRC's Request for Review at 7. KRC again quotes the preamble to the 1999 rule as explaining why, in the interest of "fairness," the agency had crafted the concept of "continually created VER":

Because the lands and features protected by 30 CFR 761.11 and section 522(e) are continually changing, we believe that VER should be determined on the basis of the property rights and circumstances that exist at the time that lands come under the protection of section 522(e) and 30 CFR 761.11, not the date of enactment of SMCRA, which recedes ever further into history.

64 Fed. Reg. at 70792. KRC concludes that the preamble discussion, as well as paragraph (c)(1) of the definition of VER in 30 C.F.R. § 761.5, makes apparent that the "legal right" claimed by Sturgeon must have been in existence when SMCRA was enacted, since the land in question was part of the Daniel Boone National Forest and has been protected under section 522(e) of SMCRA at all times relevant to this matter. KRC's Request for Review at 7.

KRC argues further that, as used in paragraph (c)(1) of the definition of VER in 30 C.F.R. § 761.5, "legal right" means "some claim of right to use of the road under applicable State law." *Id.*, quoting 64 Fed. Reg. at 70791. KRC contends that the permit issued to Sturgeon by the Forest Service is a "use" permit, conferring a "nonexclusive privilege for a period of one year" that is not a "legal right" arising under State law. KRC's Request for Review at 8. KRC argues that Sturgeon must have possessed a "legal right" to use the road when the area became protected under 30 C.F.R. § 761.11 or section 522(e) of SMCRA, and that OSM's interpretation of that term "as encompassing permits for use of a road for surface coal mining operations obtained 28+ years after the land came under the protection of Section 522(e), is inconsistent with the restrictions imposed under (c)(3)<sup>6</sup> and

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<sup>6</sup> This reference is to paragraph (c)(3) of the definition of VER in 30 C.F.R. § 761.5. Under paragraph (c) of the definition of VER, in order to establish VER to use or construct a road across the surface of lands protected by 30 C.F.R. § 761.11 or section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (2000), a person must demonstrate

(continued...)

undercuts the protections intended to be afforded by that regulation and by Congress.” *Id.* at 9.

KRC then argues that the use permit issued by the Forest Service is insufficient to satisfy the “legal right” standard of paragraph (c)(1) of the definition since the permit by its terms is conditioned on a prior finding of VER. The permit provides:

Improvements to the road or use of the road cannot commence until a Valid Existing Right is shown to exist to use FSR 1649 as a coal haul road for the permittee’s adjacent surface mine and only after all Federal, State, County and municipal laws, ordinances, regulations, and permits have been met or obtained in association with this surface mining project.

KRC’s Request for Review, Appendix C. In addition, the permit provides that “[c]onstruction of required improvements or reconstruction will be completed after Valid Existing Rights is established, all state, local, and federal permits and licences are obtained, and before hauling commences.” *Id.* KRC claims that the

use of the 2006 road use permit to create a “legal right” by OSMRE is the worst form of bootstrapping, and has the effect of significantly undercutting the protections intended to be afforded by the regulations and by 30 USC 1272(e), as well as conflicting with the contemporaneous construction given to the legal right requirement in the 1999 preamble, and conflicting with the constraints of 30 CFR 761.5(c)(3).

*Id.* at 10.

### C. OSM’s Answers

OSM responds that while paragraph (c)(1) of the definition of VER in 30 C.F.R. § 761.5 requires the road be in existence when the lands come under protection, “the applicant must only show that he *has* a legal right to use the road for surface coal mining operations.” Answer to KRC at 5. OSM contends that “OSM could very well have required that the legal right to use the road be in existence when the land comes under the protection of section 522(e) of SMCRA or 30 C.F.R. §

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<sup>6</sup> (...continued)

the existence of one or more of the circumstances set forth in (c)(1) through (c)(4). Paragraph (c)(3) provides that VER exists if the applicant can show: “A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).”

761.11, but it chose not to do so.” *Id.* OSM argues that “only the *road* itself, and not the legal right to use the road for surface coal mining operations, must exist when the land comes under the applicable protection.” *Id.* at 7 (footnote omitted).

OSM rejects KRC’s contention that some claim of right to use the road under State law must be present, arguing that the legal right in this case is based upon a road use permit issued by the Forest Service. *See* 64 Fed. Reg. at 70791. OSM contends that the road use permit constitutes a “legal right to use the road for surface coal mining operations” under paragraph (c)(1) of the definition. OSM concludes that the standard of paragraph (c)(1) “authorizes a finding of VER where the road exists on the date the protection applies, so long as a ‘legal right’ to use the road for surface coal mining operations is obtained at or before the time of application for VER.” OSM’s Answer to KRC at 9. OSM concludes that it properly determined that the road use permit conveys an adequate legal right under paragraph (c)(1), and that “this legal right can be exercised because the other VER requirement, that the road be in existence when the land came under the applicable protection, is also present.” *Id.* at 10.

#### ANALYSIS

In the absence of OSM’s finding of VER, Sturgeon’s use of the haul road would be prohibited under section 522(e)(2) of SMCRA, 30 U.S.C. § 1272(e)(2) (2000), and 30 C.F.R. § 761.11(b), since the haul road is situated on Federal land in the Daniel Boone National Forest. Section 522(e) of SMCRA provides for two general exceptions to the prohibitions on surface coal mining operations enumerated therein, *i.e.*, the operation was in existence on the date of enactment of SMCRA (August 3, 1977), or the land is subject to VER. Sturgeon rests its right to use the haul road upon its claim to VER.

As we have seen, in its *Federal Register* notice OSM set forth the basis for its determination that the haul road was in existence when the land upon which the road is located came under the protection of section 522(e)(2) of SMCRA and 30 C.F.R. § 761.11(b). OSM deemed it “clear that a road of unknown origin, perhaps created as a logging road, has existed on the trace of the road in question since at least 1976.” 71 Fed. Reg. at 70533. Neither Molloy nor KRC has introduced evidence to counter OSM’s conclusion that the road was in existence when the affected Federal land came under the protection of section 522(e) of SMCRA and 30 C.F.R.

§ 761.11(b).<sup>7</sup> The pivotal question thus becomes whether OSM correctly determined that Sturgeon’s recently-acquired permit from the Forest Service meets the “legal right to use the road for surface coal mining operations” criterion of paragraph (c)(1) of the definition of VER.

In its preamble to the 1999 definition of VER as it concerns roads, OSM responded to one commenter, who argued that “the mere existence of a road should not suffice to demonstrate VER for a road under paragraph (c)(1) of the definition,” by stating that “a separate standard for VER for existing roads is essential as a practical matter,” and that “[u]nless otherwise provided by the agency with jurisdiction over the road, all persons have a right to use a public road for any legitimate purpose, including access and haulage associated with a surface coal mining operation.” 64 Fed. Reg. at 70791. OSM then explained:

The facets of the proposed definition to which the commenter objects (VER for existing roads, regardless of whether the road has ever been used for surface coal mining operations, and the lack of a property rights demonstration requirement for VER for roads) have remained essentially unchanged since we first adopted a definition of VER on March 13, 1979. The deadline for challenging the validity of that definition has passed. The proposed rule did not alter these facets of the definition . . . nor did we seek comment on whether they should be changed.

*Id.* The prior version of the rule defined VER for haul roads used in connection with surface coal mining operations as: “(1) A recorded right of way, recorded easement or a permit for a coal road recorded as of August 3, 1977, or (2) Any other road in existence as of August 3, 1977[.]” 30 C.F.R. § 761.10 (1998); 30 C.F.R. § 761.10 (1980). OSM provides the following explanation of what it intended by adding the “legal right to use the road for surface coal mining operations” under its 1999 amendment to these rules:

[W]e agree with the commenter that the concept of VER presupposes some claim of right to use of the road under applicable State law. Therefore, to avoid misapplication or abuse of the VER standards for roads, we have revised the definition in the final rule to clarify that, to qualify for VER under the existing road criterion in paragraph (c)(1) of the definition, a person must demonstrate a legal right to use the road

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<sup>7</sup> Our review of the record not only confirms that this road existed on Aug. 3, 1977, but also that it had been permitted and improved for use as a coal haul road by that date under the 1976 Special Use Permit issued by the U.S. Forest Service.

for surface coal mining operations. . . . These changes merely make explicit an unstated assumption in both the existing and proposed rules.

64 Fed. Reg. at 70791.

KRC contends that this passage from the preamble to the 1999 rule makes clear that the special use permit issued to Sturgeon by the Forest Service does not meet the terms of paragraph (c)(1) of the definition of VER. However, we are convinced that reading paragraph (c)(1) as requiring Sturgeon to have had a “legal right to use the road for surface coal mining operations” when the Federal land came under the protection of section 522(e) of SMCRA and 30 C.F.R. § 761.11(b) would amount to imposing a requirement that does not appear in the regulation. OSM specified that the road be in existence when the Federal land became protected. It could have included a requirement that the “legal right to use the road” pertain to when the Federal land became protected but it did not. Sturgeon sought a VER determination for use of an existing road, demonstrating a right to use that road under a road use permit issued by the Forest Service. That permit sets forth the specific terms and conditions applicable to Sturgeon’s use of the road. We conclude that OSM’s determination comports with paragraph (c)(1).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the requests for review are denied.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
James K. Jackson  
Administrative Judge