



DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

**[S1D1S SS08011000 SX064A000 256S180110; S2D2S SS08011000 SX064A000
25XS501520]**

Determination of Valid Existing Rights Within the Monongahela National Forest, West Virginia

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice of decision.

SUMMARY: This notice announces our decision on a request for a determination of valid existing rights (VER) under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). We have determined that South Fork Coal Company, LLC (SFCC) possesses VER for a haul road within the boundaries of the Monongahela National Forest (MNF), West Virginia. This decision will allow SFCC to maintain a West Virginia 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.

DATES: Effective Date: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**

FOR FURTHER INFORMATION CONTACT: Mr. Justin Adams, Director,
Charleston Field Office, Telephone: (304) 977-7177 E-mail: osm-chfo@osmre.gov.

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I. What Is the Nature of the VER Determination Request?

On September 18, 2024, Babst/Calland Attorneys at Law (Babst/Calland) submitted a request for a determination of VER on behalf of South Fork Coal Company, LLC (SFCC) from the Office of Surface Mining Reclamation and Enforcement (OSMRE) that SFCC has valid existing rights to receive and hold a mining permit for the northern 1.2-mile portion of an existing road located within the Monongahela National Forest (MNF), known as Forest Service Road 249. Babst/Calland is seeking a determination that SFCC has VER under paragraph (c)(1) and/or (c)(2) of the Federal definition of VER in the SMCRA implementing regulations in 30 CFR 761.5 to use the existing road as an access and haul road for its Rocky Run Surface Coal Mine, which is on property adjacent to the MNF.

On March 20, 2025, we published a notice in the *Federal Register* (90 FR 13194) in which we provided an opportunity for the public to comment on the request for a determination of VER to use an existing United States Forest Service (USFS) road as a coal mine access and haul road across Federal lands within the boundaries of the MNF. The comment period closed on April 21, 2025. We received numerous comments that we discuss in Part VI, below.

II. What Legal Requirements Apply to This Request?

Section 522(e)(2) of SMCRA, 30 U.S.C. 1272(e)(2), prohibits surface coal mining operations on Federal lands within the boundaries of any national forest, with two exceptions. The first exception pertains to surface operations and impacts incidental to an underground coal mine. The second relates to surface operations on lands within national

forests west of the 100th meridian. Neither of those exceptions applies to the request now under consideration.

The introductory paragraph of section 522(e) also provides two general exceptions to the prohibitions on surface coal mining operations in that section. Those exceptions apply to operations in existence on the date of enactment of SMCRA (August 3, 1977) and to land for which a person has VER. Because SMCRA does not define VER, we subsequently adopted regulations defining VER. On December 17, 1999 (64 FR 70766), we adopted a revised definition of VER, established a process for submission and review of requests for VER determinations, and otherwise modified the regulations implementing section 522(e). At 30 CFR 761.16(a), we published a table clarifying which agency (OSMRE or the State regulatory authority) is responsible for making a VER determination and which definition (State or Federal) will apply. That table specifies that OSMRE is responsible for VER determinations for Federal lands within national forests and that the Federal VER definition in 30 CFR 761.5 applies to those determinations.

Paragraph (c) of the Federal definition of VER contains the standards applicable to VER for roads that lie within the definition of surface coal mining operations. 30 CFR 761.5. SFCC is seeking a VER determination under paragraph (c)(1) or, in the alternative, paragraph (c)(2). Paragraph (c)(1) provides that a person who claims VER to use or construct a road across the surface of lands protected by 30 CFR 761.11 or section 522(e) of SMCRA must demonstrate that the “road existed when the land upon which it is located came under the protection of 30 CFR 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.” *Id.* Paragraph (c)(2) allows the applicant to demonstrate that a properly recorded right of way or easement existed when the land came under such protection and, under the document creating the right of way or easement and subsequent conveyances, the applicant has a

legal right to use a road across the right of way or easement for surface coal mining operations. *Id.*

III. What Information Is Available Relevant to the Basis for the Request?

The following information has been submitted by Babst/Calland or obtained from the USFS or the West Virginia Department of Environmental Protection (WVDEP):

1. The 1.2-mile segment of road designated as Forest Service Road 249 exists on land to which the VER determination pertains.

2. Ownership of the surface property rights to the Forest Service Road 249 (and the surrounding area) was conveyed by Cherry River Boom and Lumber Company to the United States government by deed dated October 9, 1934, which is recorded in the office of the Clerk of Pocahontas County, West Virginia in deed book 70, page 332.8.

3. A chain of conveyances from 1959 through 2016 which show certain property interests transferring from Cherry River Boom and Lumber Company, through several corporate entities, to Weyerhaeuser Company.

4. SFCC has a mineral lease with Highland Mineral Resources, LLC, an affiliate of Weyerhaeuser Company, and a separate mineral lease with WPP, LLC.

5. The land upon which Forest Service Road 249 is located was in Federal ownership as part of the MNF when the land came under the protection of 30 U.S.C. 1272(e) on August 3, 1977, the date of enactment of SMCRA.

6. The Forest Service Road 249 is visible and shown on the United States Geological Survey (USGS) map from 1972, in the lower left-hand portion (beginning near the words, "Sugartree Bench Mtn").

7. The USFS issued SFCC a road use permit for the use of Forest Service Road 249, through Permit No. FS-7700-41 as a coal access and haul road on September 29, 2021.

8. A letter from the USFS dated April 29, 2025, reflecting the USFS's evaluation of SFCC's application, along with accompanying attachments that include, in relevant part, a deed from Preston S. Clark and Josephine Clark to Cherry River Boom and Lumber Company dated October 3, 1900, an opinion from the U.S. Department of Agriculture, Office of General Counsel, dated March 31, 1994, and a warranty deed from Walter D. Helmick and Rita Helmick to the United States of America dated September 30, 1998.

IV. How We Processed the Request

We received the VER request on September 23, 2024, and determined it was administratively complete on September 24, 2024. That review did not include an assessment of the technical or legal adequacy of the materials submitted with the request.

As required by 30 CFR 761.16(d)(1), we published a notice in the *Federal Register* seeking public comment on the merits of the request on March 20, 2025 (90 FR 13194). We also published notices on March 27, 2025, in the *Pocahontas Times*, a newspaper of general circulation in Pocahontas County, West Virginia. By the close of the public comment period on April 21, 2025, we received 2,391 public comments. By letter dated April 29, 2025, we received comments from the USFS about SFCC's application.

After we received the USFS's letter, we reviewed the materials submitted with the request, all comments received in response to this VER and other notices, and other relevant, reasonably available information and determined that the record was sufficiently complete and adequate to support a decision on the merits of the request. We evaluated the record in accordance with the requirements at 30 CFR 761.16(e) as to whether the requestor has demonstrated VER for the proposed access and haul road. For the reasons discussed below, we have determined that the requestor has demonstrated VER.

V. How We Made Our Decision

As we stated above, SFCC sought a VER determination under paragraph (c)(1) or, in the alternative, paragraph (c)(2) of the definition of VER at 30 CFR 761.5. Paragraph (1) provides that applicants have VER if they can demonstrate that 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 they have a legal right to use the road for surface coal mining operations. Accordingly, we first examined all information submitted by SFCC, the USFS, and interested parties for evidence that Forest Service Road 249 existed on August 3, 1977. The primary basis for SFCC's assertion that Forest Service Road 249 existed before August 3, 1977, is a USGS map from 1973, showing Forest Service Road 249 in the lower left-hand portion (beginning near the words, "Sugartree Bench Mtn"). The road starts in Greenbrier County, crosses the border into Pocahontas County and thereafter connects to another road (which current maps indicate is Pocahontas County Route 29/4, also known as Briary Knob Road) northwest of Briery Knob.

We also reviewed a Road Right-of-Way Map from the USFS with the markings "Posted to 9/1/68" and an accompanying record entitled, "ROAD RIGHT OF WAY STATUS TABULAR RECORD," prepared in May of 1972 and last revised July 31, 2001. The USFS Map also appears to show Forest Service Road 249 in the lower left-hand portion (beginning near the words "Sugartree Bench Mountain"), appearing with empty circles and the number 3, also encircled. While the meander of the road on the USFS Map differs slightly from that in the USGS Map, the meander of Pocahontas County Route 29/4 and the border between Pocahontas and Greenbrier Counties are identifiable, and the road's relation to these points is consistent. According to the USFS Map legend, the empty circles over the road indicate a Special Use Permit or easement from the United States, and the number 3 indicates an entry on the Tabular Record. Entry Number 3 on the Tabular Record indicates that in October 1973, the USFS granted a Special Use Permit or Easement for the 1.19-mile portion of road to the Sewell Coal

Company for the purpose of access to private land. Although it is not certain when Forest Service Road 249 was constructed, based upon the USGS and USFS maps, we have determined that the approximately 1.2 mile long road segment exists on the land to which the VER determination pertains, and the road existed when the land on which it is located within the MNF came under the protection of 30 CFR 761.11 and section 522(e) of SMCRA on August 3, 1977, the date of enactment of SMCRA.

Next, we examined all information submitted by SFCC, the USFS, and interested parties for evidence that SFCC has a legal right to use the road for surface coal mining operations. The “legal right” standard 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, we stated that a person must demonstrate a legal right to use the road for surface coal mining operations. *See* 64 FR 70791. That is, even though a road existed on August 3, 1977, that fact alone does not give the applicant the right to use the road for surface coal mining operations. In prior determinations, we have also explained that the term “legal right” is not defined, and, therefore, various circumstances, such as holding a permit or obtaining a legal easement, would qualify as a “legal right.” *See* 71 FR 70531 (Dec. 5, 2006) (approving VER on the basis of a valid USFS Road Use Permit); 74 FR 57699 (Nov. 9, 2009) (same with USFS Special Use Permit). Here, SFCC applied for and received USFS Road Use Permit No. FS-7700-41 on September 29, 2021 (RUP). Through Road Use Permit No. FS-7700-41, the USFS granted SFCC use of Forest Service Road 249 “from intersection with County Route 29/4 to terminus (total length 1.2 miles)” for commercial hauling. Therefore, we conclude that the September 29, 2021, Road Use Permit from the USFS is sufficient to prove that SFCC has a legal right to use the road for surface coal mining operations. Our findings and conclusion were corroborated by the USFS’s evaluation.

SFCC also claims it has VER under the standard in 30 CFR 761.5(c)(2), which allows the applicant to demonstrate that a properly recorded right of way or easement existed when the land came under the protection of 30 CFR 761.11 or 30 U.S.C. 1272(e) and, under the document creating the right of way or easement and subsequent conveyances, the applicant has a legal right to use a road across the right of way or easement for surface coal mining operations. To analyze this claim, we first examined all information submitted by SFCC, the USFS, and interested parties, as well as our own records.

SFCC claims that it has a properly recorded right of way or easement by virtue of the reservation of mineral rights and related right to use roads for the purpose of mining and timber operations by the Cherry River Boom and Lumber Company in a deed dated October 9, 1934, conveying the surface property rights to the USFS. SFCC then asserts that Cherry River Boom and Lumber Company conveyed its remaining surface and mineral interests to W.M. Ritter Lumber Company by deed dated June 22, 1959. From there, SFCC set forth in its application a chain of conveyances through various corporate entities that it asserts demonstrate that it currently holds these rights.

According to the USFS in its April 29, 2025, letter, the mineral rights on the subject property were reserved prior to the conveyance to Cherry River Boom and Lumber Company and could not have been (and was not) conveyed from Cherry River Boom and Lumber Company to W.M. Ritter Lumber Company in 1959. The USFS also explained that, through civil litigation, USFS reunified the property under Federal ownership by deed recorded in 1998. While the opinion of the USFS is not binding on our determination, its conclusions are consistent with our own records and our review of SFCC's submission materials. In our examination, we found that the property on which the majority of Forest Service Road 249 lies (excluding only a small portion near the intersection with County Route 29/4) was the subject of several VER determinations in

the 1980s and 1990s, *see, e.g.*, 55 FR 51355 (Dec. 13, 1990), 62 FR 53798 (Oct. 1997), and 62 FR 66126, n.1 (Dec. 17, 1997). The property is known in various documents as the Clark 179-acre tract, Tract 372, or the Killingsworth Tract. According to the USFS's review, in those prior VER requests, owners of the 179-acre tract Preston S. and Josephine Clark had reserved for themselves the mineral rights when they conveyed the surface estate to Cherry River Boom and Lumber Company by deed dated October 3, 1900. Therefore, the mineral rights were outstanding at the time of the 1934 conveyance by Cherry River Boom and Lumber Company to the USFS, and Cherry River Boom and Lumber Company could neither have reserved the mineral interest in the 179-acre tract for itself nor did it have that interest to convey to W.M. Ritter Lumber Company in 1959. This is also consistent with our reading of the legal description and accompanying maps of the 1959 deed, which omits the Clark 179-acre tract in its property line description and accompanying map. Accordingly, we conclude that SFCC did not make a demonstration that it has VER under the standard provided at 30 CFR 761.5(c)(2).

Because SFCC only needed to demonstrate VER under either paragraph (c)(1) or (c)(2) of the definition of VER in 30 CFR 761.5 and based upon the information above, we have determined that SFCC does have VER under paragraph (c)(1) to use the 1.2-mile portion of road, known as Forest Service Road 249, across a portion of the MNF, for surface coal mining operations. This decision is based solely on the finding that the road was in existence at this location and within the MNF before the enactment of SMCRA, and that the applicant has a legal right to use this road for surface coal mining operations under the road use permit issued by the USFS on September 29, 2021.

This finding is in accordance with the definition of VER pertaining to roads found at 30 CFR 761.5(c)(1).

VI. What Public Comments were received?

We accepted public comments for 30 days ending on April 21, 2025. In that time, we received 2,391 written comments opposing the approval of the VER determination; most of the submissions were identical or contained only slight variations. Most of the remaining comments were more individualized but raised similar concerns or were generally opposed to the proposed mining operation without providing any information relevant to determining the VER claim. One commenter raised additional specific objections to the VER claim, which we will address in detail below. Most of the comments expressed issues with previous mining violations by SFCC and considered that to be evidence of future violation. They also alleged that SFCC has not provided any credible or specific evidence to meet the standard for VER required under SMCRA. Specifically, commenters asserted that under Federal law, operators must show a recorded haul-road easement or equivalent property interest existing before SMCRA took effect in order to haul coal through the national forest, and that SFCC cannot substantiate such a claim. Commenters also assert that the USFS allowed SFCC to haul coal without issuing the Road Use Permit in compliance the National Environmental Policy Act (NEPA) or the Endangered Species Act (ESA).

We appreciate the comments received and reiterate that we must follow the regulatory process for VER determination requests as outlined in 30 CFR 761.16(e)(2), which requires us, OSMRE, as the responsible agency, to determine whether the applicant has demonstrated VER. The standards for determining whether an applicant has valid existing rights for mine roads are articulated at 30 CFR 761.5(c), discussed above, and reiterated at 30 CFR 761.16(b)(4). Regarding comments raising SFCC's compliance with SMCRA, an applicant's SMCRA compliance history is not mentioned in the VER regulations as a factor for our consideration and, thus, is outside the scope of our review; our determination is strictly an analysis of whether an applicant has made a demonstration that a particular legal right exists as set forth in the Federal regulations.

Next, as we discuss above, the term “legal right” is not defined and may be satisfied by something like a Road Use Permit or other permit or grant issued by an authorizing agent even after SMCRA’s enactment. Therefore, comments alleging SFCC’s lack of “easement or equivalent property interest” fail to account for SFCC’s Road Use Permit from the USFS.

Regarding compliance with NEPA and the ESA in issuing the Road Use Permit, such an independent evaluation of the USFS’s compliance with those statutes is outside the scope of our authority and the analysis required in 30 CFR part 761. The record before us indicates that the USFS issued the permit to SFCC on September 29, 2021. Nothing in the record indicates that the permit has been revoked by the USFS or its validity otherwise enjoined by a court of competent jurisdiction. Absent evidence of those events, we must accept the permit as lawfully issued. One commenter noted that the Road Use Permit is currently subject to legal challenge in the United States District Court, District of Columbia (Civil Action No. 1:24-cv-00087) based on alleged noncompliance with Federal laws. While the current litigation could impact the validity of the permit, our determination is based on the present validity and only extends so long as the permit remains valid.

The same commenter also asserts that the permit is “facially” invalid, but provides no support for that assertion, and our review has found nothing on the face of the permit that would undermine its validity. The commenter further asserts that OSMRE and USFS have failed to comply with a Memorandum of Understanding (MOU) executed between the agencies in 1990. The basis for the commenter’s claim appears to be that USFS failed to consult with OSMRE to decide VER before issuing the Road User Permit. However, the MOU does not require such a consultation because, while a current Road Use Permit for a road that existed when the land upon which it is located came under the protection of SMCRA may be necessary to demonstrate VER under 30 CFR 761.5, and

VER is necessary for issuance of a mining permit from the appropriate regulatory authority before coal mining activities may begin, neither a VER determination nor the mining permit are required before the Road Use Permit is issued. Consultation outlined under the MOU is intended to help OSMRE to decide whether VER exists, which may be premised on USFS's property rights or permits. See 71 FR 70531, 70534 (Dec. 5, 2006) (addressing similar comment)

Relatedly, the commenter seems to assert that the Road Use Permit must have been issued prior to time that the land upon which the road is issued came under the protection of SMCRA. However, commenter appears to conflate the four independent bases for a VER determination under 30 CFR 761.5(c)(1)-(4). Even though subsections (c)(2), (c)(3), and (c)(4) may require some form of pre-SMCRA permit or property right, subsection (c)(1), at issue here, requires only that the road pre-exist the protection afforded under SMCRA, and allows for the right to be granted later in time. The commenter repeatedly cites our 2006 and 2009 determinations in the Daniel Boone National Forest to support their opposition to VER in this case but these two determinations in fact support OSMRE's determination here. In our 2006 determination, the USFS Road Use Permit was issued on May 18, 2006, and we found that there was a valid existing right under 761.5(c)(1) because the road pre-existed SMCRA and the applicant demonstrated a legal right to use that road at the time of the VER request. *Id.* at 70533-34 (explaining that the regulations require that the applicant "has" (not "had") a legal right to use the road). Similarly, in our 2009 determination, the road pre-existed SMCRA and the USFS Special Use Permit was issued on June 26, 2009, and was valid at the time of the VER request. See 74 FR 57699, 57700 (Nov. 9, 2009).

The commenter also made several claims related to the lack of specificity in the property records and conveyances submitted by SFCC. Since the available records were sufficient to determine that severance of mineral interests predates the 1934 Deed and

that mineral rights on the subject property could not have been (and was not) conveyed from Cherry River Boom and Lumber Company to W.M. Ritter Lumber Company in 1959, we agree with commenters that the records submitted by SFCC do not support a demonstration under 30 CFR 761.5(c)(2). The commenter's remaining points are that USFS's current processing of a new special use permit application to replace the 2021 road use permit from SFCC is an admission that the 2021 road use permit is invalid, that the appropriate order of authorizations was not followed in this instance, and that our resulting cessation order was appropriately issued and that therefore VER cannot be obtained. As stated above, SFCC currently has a valid road use permit and concerns raised about the special use permit application is outside the scope of our authority to independently determine or are not bases upon which we can deny whether VER exists. Finally, our cessation order related to the company's failure to obtain a VER determination from OSMRE prior to the issuance of a surface coal mining permit does not address the merits of their VER application.

The commenter also argues that SFCC did not demonstrate VER under the remaining subsections of the definition of VER (30 CFR 761.5(a), (b), (c)(3) or (c)(4)), and that SFCC has failed to apply for VER for Forest Service Road 223 (Bear Run Road). SFCC applied for a determination of VER for Forest Service Road 249 under 30 CFR 761.5(c)(1) and (c)(2), and therefore comments related to other roads and other bases of VER are not germane to our determination here. Additionally, OSMRE treated the commenter's assertion about Bear Run Road as a citizen complaint under 30 CFR part 842 and responded accordingly.

Finally, most of the commenters also requested a 30-day extension to the public comment period so that interested parties could more closely review SFCC's application materials and understand the issues at stake. We decided not to extend or reopen the public comment period given the nature of the comments we received, particularly in

light of our findings regarding the relevant property ownership history, those corroborating findings made by the USFS, and the standards controlling our review.

VII. How Can I Appeal the Determination?

Our determination that VER exists is subject to administrative and judicial review under 30 CFR 775.11 and 775.13 of the Federal regulations. *See* 30 CFR 761.16(f).

VIII. Where Are the Records of This Determination Available?

Our records on this determination are available for your inspection at the Charleston Field Office. You may arrange an inspection by contacting the Field Office Director listed under FOR FURTHER INFORMATION CONTACT.

Ben Owens,

Acting Regional Director,

Interior Regions 1 & 2.

[FR Doc. 2025-13558 Filed: 7/17/2025 8:45 am; Publication Date: 7/18/2025]