



COALEX STATE COMPARISON REPORT - 173

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TOPIC: COAL REMOVAL INCIDENT TO PRIVATE DEVELOPMENT (Includes COALEX Reports 115 & 133)

INQUIRY: During the course of a private commercial construction project, a construction company found coal. Does the company need a SMCRA permit to remove the coal? Are there any decisions, Federal Register preambles, etc. which discuss this issue? Would the other IMCC member states require the construction company to apply for a permit in this circumstance?

SEARCH RESULTS: The IMCC member states, surveyed via faxed questionnaire, were asked these questions:

- A. Has your state encountered bona-fide private construction projects which encounter and must remove coal in the process of excavating for and constructing their facilities?
- B. Must these projects apply for and acquire a full-blown surface mining permit or is there some exemption or simplified approval process for such projects?
- C. If you have either an exemption or a simplified approval process is it approved by OSM?

Eleven states responded to the questionnaire. A summary of responses appears below; a complete table of responses is attached.

In addition to the questionnaire, research was conducted using the COALEX Library and other materials on LEXIS. Most of the relevant decisions identified were Interior administrative decisions dating back to the beginning of SMCRA (1979-1980). One relevant state case from 1981 was also retrieved. Generally, these decisions stated that if the privately funded construction projects fell within the scope of SMCRA, a permit was required. A recent Interior ALJ opinion was identified that reversed precedent: the ALJ used a two-part test to determine that a particular privately funded project was not subject to OSM's jurisdiction (see TRIPLE B, below).

Two COALEX Inquiry Reports are included for background.



SURVEY RESULTS

Five states have encountered privately funded construction projects that required the excavation of coal in order to construct the facilities:

1. Kentucky
2. Ohio
3. Oklahoma
4. Pennsylvania
5. Virginia

None of the states provide exemptions for this situation. Of these five, only Pennsylvania (with tacit approval from OSM) has a simplified permit approval process for such construction projects. The remaining four require the companies to complete the standard permit approval process. Four states that have not encountered such projects stated that if encountered, companies would be required to complete the standard permitting approval process.

INTERIOR ADMINISTRATIVE OPINIONS

TRIPLE B AND GARY BRANHAM v OSM, Docket No. NX 89-28-P (1990). [TRIPLE B AND GARY BRANHAM v OSM, IBLA 91-70, appeal dismissed (1991).]

Triple B was building a shop and office facility and encountered coal within the excavation area. They were cited by OSM for mining without a valid surface mining permit. The ALJ found that coal was recovered and that some had entered commerce; however he ordered the NOV vacated. According to his reading of the Act and regulations, jurisdiction over a project which encounters coal must be determined by a two-part test: (1) Does the coal enter commerce? (2) What is the underlying purpose of the excavation through which the coal is encountered? The ALJ ruled that the purpose of the Triple B project and excavation was clearly not "for the purpose of obtaining coal"; therefore, OSM lack jurisdiction over the project.

[NOTE: OSM's Petition for Discretionary Review and Triple B's response are attached for background.]

DENNIS R. PATRICK, 1 IBSMA 158, IBSMA 79-8 (April, 1979).

Part of Patrick's housing development plan included the excavation of material, including coal to create a level bench for the development. The excavation and sale of the coal was contracted out.

The ALJ ruled that the excavation of coal, even though incidental to the privately funded construction project was not exempt from SMCRA. The Board reversed the ALJ, finding that "the initial federal regulatory program [was] not applicable to a surface coal mining operation which [was] located on state land and which [was] not subject to state regulation within the scope of any of the initial performance standards."



JAMES MOORE v OSM, 1 IBSMA 216, IBSMA 79-10 (July, 1979).

Moore, the builder of a racetrack, was determined to be an "operator" under Kentucky law and a "permittee" as it was defined in the interim federal regulations: he extracted coal for commercial use and failed to prove that he had extracted less than 250 tons during a 12-month period. The Board in reversing the ALJ's decision cited to the legislative history: HR Rep No. 95-493, 95th Cong., 1st Sess 112 (1977) "makes clear that only publicly financed construction projects are exempt from the coverage of the Federal surface coal mining performance standards." Privately funded construction projects are not excluded from coverage of the performance requirements of SMCRA.

CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (April, 1979). CLAYPOOL CONSTRUCTION CO., INC. v OSM, 1 IBSMA 259, IBSMA 79-17 (September, 1979). CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (October, 1979; amends April, 1979 decision). CLAYPOOL CONSTRUCTION CO., INC., 2 IBSMA 81, IBSMA 80-7 (May, 1980).

Claypool extracted coal in the process of transforming a previously mined area, which had become a dump site, into a trailer park. The ALJ, finding in April, 1979 that Claypool had mined coal without a permit, stated:

"The mere fact that the Applicant was improving the property while at the same time removing over 10,000 tons of coal and selling it into commerce does not alter the requirements of the Act since the Act does not consider the beautification of real estate as an exemption."

The Board affirmed this portion of the ALJ's decision; other parts were reversed and remanded to the ALJ. All of the decisions are attached.

SQUIRE BAKER, 1 IBSMA 279, IBSMA 79-26 (October, 1979).

"Syllabus: 1. Where excavation work has taken place and coal exposed, but no coal removed, and the landowner's intent is to create homesites and not to remove coal unless permission to do so is received from the state, [OSM] lacks jurisdiction over the land."

STATE CASE LAW

THE STATE, ex. rel. BROWN, ATTY. GEN. v HOME PRO ENTERPRISES, INC., 438 NE 2d 1175 (Ohio 1982). THE STATE OF OHIO, ex. rel. BROWN, ATTY. GEN. v HOME PRO ENTERPRISES, INC., No. 81-B-10, slip op (Ohio Ct App 1981).

Home Pro obtained a construction permit to prepare a site for commercial development. Home Pro then applied for a strip-mining permit. Prior to approval of their permit, Home Pro began operations on the site. The Ohio Supreme Court reversed a lower court ruling in finding that



"One who removes coal while preparing a site for commercial development is subject to the permit requirements of R.C 1513.07(A)."

RELATED COALEX REPORTS

COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989). [Includes 115, see below.]

The report provides legislative history on exemptions. No material was identified that addressed the issue of whether a request for an exemption for a government-financed construction project (a landfill) must be made at the time the original permit is issued or if it may be authorized after the permit is issued.

COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).

This report provides Interior administrative decisions which discuss the exemption from obtaining a mining permit when the extraction of coal is an incidental part of government-financed construction.

ATTACHMENTS

- A. Table of Responses
- B. TRIPLE B AND GARY BRANHAM v OSM, Docket No. NX 89-28-P (1990).
- C. TRIPLE B AND GARY BRANHAM v OSM, IBLA 91-70, appeal dismissed (1991).
- D. TRIPLE B AND GARY BRANHAM v OSM, Docket No. NX 89-28-P (1990). Petition for Discretionary Review.
- E. TRIPLE B AND GARY BRANHAM v OSM, Docket No. NX 89-28-P (1990). Memorandum in Support of Petitioners' Response to the Petition for Discretionary Review.
- F. DENNIS R. PATRICK, 1 IBSMA 158, IBSMA 79-8 (April, 1979).
- G. JAMES MOORE v OSM, 1 IBSMA 216, IBSMA 79-10 (July, 1979).
- H. CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (April, 1979).
- I. CLAYPOOL CONSTRUCTION CO., INC. v OSM, 1 IBSMA 259, IBSMA 79-17 (September, 1979).
- J. CLAYPOOL CONSTRUCTION CO., INC. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (October, 1979; amends April, 1979 decision).
- K. CLAYPOOL CONSTRUCTION CO., INC., 2 IBSMA 81, IBSMA 80-7 (May, 1980).
- L. SQUIRE BAKER, 1 IBSMA 279, IBSMA 79-26 (October, 1979).
- M. THE STATE, ex. rel. BROWN, ATTY. GEN. v HOME PRO ENTERPRISES, INC., 438 NE 2d 1175 (Ohio 1982).
- N. THE STATE OF OHIO, ex. rel. BROWN, ATTY. GEN. v HOME PRO ENTERPRISES, INC., No. 81-B-10, slip op (Ohio Ct App 1981).



- O. COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989). [Includes 115, see below.]
- A. Excerpts from 119 Cong Rec S1357 (daily ed. Jan. 18, 1973)(statement of Sen. Jackson).
 - B. Excerpts from Regulation of Surface Mining, Hearings on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 852 (April, 1973)(statement of Dr. Darnell Whitt, Deputy Administrator for Field Services, Soil Conservation Service).
 - C. Excerpts from Regulation of Surface Mining, Hearings on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 1189 (April, 1973)(statement of Frank C. Wachter, National Industrial Sand Association).
 - D. Excerpts from Surface Mining Control and Reclamation Act of 1977, S Rep No 95-128, 95th Cong, 1st Sess 98 (May 10, 1977).
 - E. Excerpts from Surface Mining Control and Reclamation Act of 1977, HR Rep No 95-493, 95th Cong, 1st Sess 112 (July 12, 1977).
 - F. HARDLY ABLE COAL CO., 2 IBSMA 270, IBSMA 80-31 (1980).
 - G. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, 86 I.D. 446 (1979).
 - H. Excerpts from MONONGAHELA POWER CO. v MARSH, 809 F2d 41 (D D C 1982).
 - I. 53 FR 5430 (FEBRUARY 24, 1988). Notice of reopening of public comment period on all issues of "Exemptions for Coal Extraction Incidental to the Extraction of Other Mineral", 30 CFR 702.
- P. COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).
- A. WILDER COAL CO. v OSM, Docket No. NX 5-86-R (1987)
 - B. CONCORD COAL CORP. v OSM, 3 IBSMA 92 (1981)
 - C. CONCORD COAL CORP. v OSM, Docket Nos. CH 0-314-R, CH 0-335-R, CH 0-249-R (1980)
 - D. LEROY SEXTON v OSMRE, Docket No. NX 7-89-R (1987)
 - E. LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-R (1985)
 - F. LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-P (1982)
 - G. WEST VIRGINIA ENERGY, INC., 3 IBSMA 301 (1981)
 - H. OSM v WEST VIRGINIA ENERGY, INC., 4 IBSMA 120 (1982)
 - I. WEST VIRGINIA ENERGY, INC. v OSM, Docket Nos. CH 0-5-R, CH 0-11-R, CH 0-72-R, CH 0-63-P, CH 0-94-P (1980)
 - J. MOUNTAIN ENTERPRISES COAL CO. v OSM, Docket Nos. CH 1-88-R, CH 1-109-R (1981)
 - K. H.C. BOSTIC COAL CO. v OSM, Docket Nos. NX 4-78-R, NX 5-26-P (1986)
 - L. CLAYPOOL CONSTRUCTION CO. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979)
 - M. DENNIS R. PATRICK, 1 IBSMA 158 (1979)



N. SQUIRE BAKER v OSM, Docket No. NX 9-25-R (1979)
O. 53 FR 13896 (APRIL 25, 1988)

Survey conducted by: IMCC

Additional research conducted by: Joyce Zweben Scall

TABLE OF RESPONSES TO SURVEY

STATE	A. ENCOUNTERED PRIVATELY-FUNDED CONSTRUCTION PROJECTS?	B. FULL PERMIT PROCESS, SIMPLE PERMIT PROCESS, OR EXEMPTION?	C. OSM APPROVAL?
ALABAMA	NO	N/A	N/A
ARKANSAS	NO	FULL	N/A
ILLINOIS	NO	FULL	N/A
INDIANA	NO	N/A	N/A
KENTUCKY	YES	FULL	N/A
MARYLAND	NO	FULL	N/A
OHIO	YES	FULL	N/A
OKLAHOMA	YES	FULL	N/A
PENNSYLVANIA	YES	SIMPLIFIED	TACIT
NEW MEXICO	NO	N/A	N/A
VIRGINIA	NO	FULL	N/A