



COALEX STATE INQUIRY REPORT - 182

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Myra Spicker, Esquire
Division of Reclamation
Department of Natural Resources
309 W. Washington Street, Suite 201
Indianapolis, Indiana 46204

TOPIC: DEFINITION OF SOIL AND MINERAL [Update of COALEX Report No. 113]

INQUIRY: Please locate materials that discuss the definition of "mineral". In particular, are there any cases which rule that "soil" is considered a mineral for regulatory purposes? [This Inquiry is part of the case for which COALEX Report No. 134, on the 16 2/3 exemption, was researched.]

SEARCH RESULTS: An existing COALEX Report on the definition of "soil" and "dirt" is included. The Report is updated by the addition of the Virginia court's ruling on the case. Several administrative and federal decisions were retrieved using LEXIS that relate to cases included in COALEX Report 134 on the 16 2/3 exemptions. These are discussed below; copies are attached.

This Report was updated to include the Indiana decision for which this research and that of Report 134 were conducted. See below.

COALEX STATE COMPARISON REPORT - 113, "Definitions of soil and mineral" (June 12, 1989).

This Report addresses the question of whether clay extracted from a borrow pit and used for fill dirt is a "mineral", requiring permitting, or "dirt". Included is a table summarizing state definitions of "mineral" and "clay" and a discussion of relevant case law.

COMMONWEALTH OF VIRGINIA v MAY BROTHERS, INC., 11 Va App 115, 396 SE 2d 695 (Va Ct App 1990).

The May brothers were hired to excavate and remove excess dirt from a planned construction site being graded for construction of a warehouse facility. The dirt was removed and transported, without any processing, to the Virginia Baptist Hospital construction site. The court ruled that "the simple removal of dirt from a construction site, without more, does not constitute 'mining' as contemplated by the legislature in Code sec. 45.1-180."



ADDITIONS TO REPORT No. 134: 16 2/3 EXEMPTION [McNabb cases]

**OKLAHOMA WILDLIFE FEDERATION v MCNABB, 642 F Supp 569 (ND Okla 1986).
OKLAHOMA WILDLIFE FERERAITON v HODEL, slip op. (ND Okla 1986).**

The plaintiffs sought a declaratory judgment that McNabb was conducting a surface and mining operation without a coal mining permit. The court found that the evidence was insufficient to establish that McNabb was in violation of "any rules, regulation, order or permit issued" pursuant to SMCRA. 30 USC Sec. 1270(a)(1) does not provide for an action against persons who are in violation of the Act itself.

MCNABB COAL CO., INC. v OSM, 105 IBLA 29, IBLA 86-1454 (1988). MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).

"A permittee must comply with the surface and ground water monitoring requirements of [SMCRA] and its implementing regulations until the successful completion of all reclamation necessary and incident to its past surface coal mining operations and appropriate release of its performance bond, even where current mining operations might be considered exempt from regulation under that Act."

STATE COURT RULING

INDIANA DEPT. OF NATURAL RESOURCES v KRANTZ BROTHERS CONSTRUCTION CORP., 581 NE 2d 935 (Ind Ct App 1991).

The court found that Krantz did not present substantiating evidence to prove that it qualified for the 16 2/3 exemption. Citing to OSM's language in the Federal Register, the court determined that the phrase "other minerals" does not include topsoil.

ATTACHMENTS

1. COALEX STATE COMPARISON REPORT - 113, "Definitions of soil and mineral" (June 12, 1989).
 - A. List of State Codes and Statues researched on LEXIS
 - B. State Code Sections that define "mineral" and mention "clay"
 - C. State Code Sections that define "borrow pit"
 - D. State Code Sections that define "soil" or "dirt"
 - E. GINTER COAL CO. v ENVIRONMENTAL HEARING BD., 306 A.2d 416 (Pa. Commw. Ct. 1973)
 - F. W.S. NEWELL, INC. v RANDALL, 373 So. 2d 1068 (Ala. 1979)
 - G. CUMBERLAND MINERAL CO. v. U.S., 513 F.2d 1399 (Ct. Cl. 1975)
 - H. HEINATZ v ALLEN, 217 S.W.2d 994 (Tex. 1949)
 - I. POVERTY FLATS LAND & CATTLE CO. v U.S., 788 F.2d 676 (10th Cir. 1986)



- J. WATT v WESTERN NUCLEAR, INC., 462 U.S. 36 (1983)
 - K. STATE LAND BD. v STATE, 408 P.2d 707 (Utah 1965)
 - L. SPURLOCK v SANTE FE PACIFIC RAILROAD CO., 694 P.2d 299 (Ariz. Ct. App. 1984)
 - M. NORTHERN PACIFIC RAILWAY CO. v SODERBERG, 188 U.S. 526 (1903)*
 - N. FARRELL v SAYRE, 270 P.2d 190 (Colo. 1954)*
 - O. HARPER v TALLADEGA COUNTY, 185 So.2d 388 (Ala. 1966)*
 - P. ACKER v GUINN, 464 S.W.2d 348 (Tex. 1971)*
 - Q. STORM ASSOC., INC. v TESACO, INC. 645 S.W.2d 579 (Tex. App. 1982)*
 - R. PAYNE v HOOVER, 486 So.2d 426 (Ala. 1986)*
 - S. State Code Sections that define "overburden"***
2. COMMONWEALTH OF VIRGINIA v MAY BROTHERS, INC., 11 Va App 115, 396 SE 2d 695 (Va Ct App 1990).
 3. OKLAHOMA WILDLIFE FEDERATION v MCNABB, 642 F Supp 569 (ND Okla 1986).
 4. OKLAHOMA WILDLIFE FEDERATION v HODEL, slip op. (ND Okla 1986).
 5. MCNABB COAL CO., INC. v OSM, 105 IBLA 29, IBLA 86-1454 (1988).
 6. MCNABB COAL CO., INC. v OSM, Docket Nos. TU 4-23-P, TU 4-24-P, TU 5-24-P, TU 4-37-R, TU 4-38-R, TU 5-1-R (1986).
 7. INDIANA DEPT. OF NATURAL RESOURCES v KRANTZ BROTHERS CONSTRUCTION CORP., 581 NE 2d 935 (Ind Ct App 1991).

* These cases are relevant but were not quoted in the Report.

*** These code sections were not quoted in the report but are provided for your review