



COALEX STATE INQUIRY REPORT - 194

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TOPIC: PERMITTING OF UTILITY LINES

INQUIRY: An operator, who has the right to mine under a coal severance deed, is installing utility lines to supply power to the mine. The landowner is inquiring if the construction of utility lines over his land requires permitting under SMCRA. Please locate case law and other materials which address this issue.

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. No materials were identified which specifically stated that utility lines require permitting under SMCRA. The cases identified discuss the operator's right, as owner of the mineral estate, to utilize the surface by constructing transmission or utility lines. Preambles to regulations discuss the need to include information on utility lines and other "support facilities" as part of the permit application, in protection of fish and wildlife, and under the performance standards. Copies of the materials listed below are attached.

STATE CASES

BUFFALO MINING COMPANY V MARTIN, 267 SE 2d 721 (W Va 1980).

The court ruled that the deed severing the mineral estate gave Buffalo Mining the "right to utilize the surface for purposes reasonably necessary to the extraction of the minerals." The implied easement for surface rights - for the construction of an electric transmission line - is a right that must be "exercised without any substantial burden to the surface owner."

CABOT OIL & GAS CORP. OF W. VA. AND CRANBERRY PIPELINE CORP. v POCAHONTAS LAND CORP., 376 SE 2d 94 (W Va 1988).

When the original parties entered into a lease in 1945, the court determined that they contemplated there would be mining of the coal under the property in the future and that such coal mining might require the relocation of oil and gas production facilities. The court affirmed the ruling that the oil and gas interests were subservient to the coal estate and that according to the original lease, Cabot Oil & Gas was responsible for the costs of relocating the pipes at its own expense.



ELK HORN COAL CORP. v KENTUCKY-WEST VIRGINIA GAS CO., 317 SW 2d 472 (Ky Ct App 1957).

On the issue of whether the construction and operation of a gas pipeline "invaded" the property rights of the coal corporation, the court concluded that the ability of the gas company to build its pipeline over certain tracts were determined by the type of deed covering that tract. For tracts covered by the "Northern" form mineral deed, the pipeline would infringe upon the property rights of the coal corporation; the court sustained the right of the gas company to build the pipeline over tracts not covered by the "Northern" form mineral deed.

TRIVETTE v CONSOLIDATION COAL CO., 177 SW 2d 868 (Ky Ct App 1944).

The court ruled that Consolidation, owner of the minerals, could "construct an electric transmission line in opposition to the wishes of the surface owner". The language of the 1910 deed giving Consolidation "the right to construct a transmission line necessary or convenient in the prosecution of its mining operations, was absolute, though not literally expressed.... Surely, it is the duty of the court to adopt a construction of the deed which will not defeat the obvious purpose for which it was executed."

FEDERAL CASE

COLUMBIA GAS TRANSMISSION CORP. v LIMITED CORP., 759 F Supp 343 (E.D. Ky 1990).

The 1930 lease designated the coal as the dominant estate and the oil and gas as subservient; however, the lease did not require the gas corporation to remove or relocate its pipelines. In conducting its surface mining operations, Limited damaged Columbia's pipelines. The court held that Limited's activities amounted to a "trespass" on Columbia's estate and that Limited was liable for the damage to the pipelines and for the costs of creating roadways over and relocating portions of the lines.

BACKGROUND MATERIALS RE: OWNERS OF MINERAL RIGHTS

AKERS v BALDWIN, 736 SW 2d 294 (Ky 1987).

The court discussed the legal effects of the "broad form deeds" on the conflicting rights of the owners of the surface land and the owners of the mineral rights under that land.

Also see:

SKIVOLOCKI v EAST OHIO GAS CO., 313 NE 2d 374 (Ohio 1974).

PHIPPS v LEFTWICH, 222 SE d. 536 (Va 1976).



Excerpts from the ANNOTATION, "Right of owner of title to or interest in minerals under one tract to use surface, or underground passages, in connection with mining other tract", 83 ALR d. 665.

REGULATORY MATERIALS

44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.97 Protection of fish and wildlife.

"3. Commenters expressed major concern that the proposed regulations covering transmission lines and facilities were too broad, thereby including facilities over which operators have no control. The Office has changed the language of the rule, to limit the regulation to 'lines and facilities used for or incidental to surface mining activities.'"

44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.181 Support facilities and utility installations.

"All comments received on Subsection (a) expressed concern that the mine operator should not be held responsible for environmental damage from support facilities when the operator has no control over their design, construction or use. These comments state that public utility systems are constructed, reconstructed and maintained by the utility, are regulated under the other statutes, and are not subject to the jurisdiction of the Act. These commenters suggested that the operators be held responsible only for those support facilities at or near the mine site which are under their direct control. These suggestions were not accepted because the Act does not limit its applicability to the identity of the owner of the offending facility. If the facilities are used in the mine operation, they must comply with the regulations. The operator can assure compliance in the context of contracting for those facilities even though the operator will not own them outright. On the other hand, facilities removed from the mine and not exclusively serving mines may not be subject to the Section, because the operators could not reasonable be expected to influence their performance or design. If the commenters' suggestions were accepted, the regulations under the Act could too easily be avoided by separating ownership of the facilities." [Emphasis added]

48 FR 20392 (MAY 5, 1983). Final rule. Support facilities.

Secs. 816.181(b) and 817.181(b) which provided standards for the protection of utility installations was redesignated Secs. 816.180 and 817.180. Secs. 816.181 and 817.181 set standards for support facilities.

[In Sec. 700.5, "support facilities" is defined as "those facilities resulting from, or incident to, an activity identified in Paragraph (a) of the definition of 'surface coal mining operations' in Sec. 700.5 of this chapter and the areas upon which such facilities are located." Utility or transmission lines are not listed as examples of support facilities.]

48 FR 22110 (MAY 16, 1983). Final rules. Roads.



Roads are regulated under Secs. 816.150, 816.151, 817.150 and 817.151. All "other transportation facilities" such as railroads, surface conveyor systems, chutes, aerial tramways, etc. are regulated as "support facilities".

48 FR 30312 (JUNE 30, 1983). Final rule. Fish, wildlife, and related environmental values. Sec. 816.97(e)(1) [previous Sec. 816.97(c).]

"The overwhelming majority of commenters urged OSM to retain specific criteria for design and construction of powerlines on the permit area."

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 21 ERC (BNA) 1193, 14 ELR 20617 (D.C. D.C. July 6, 1984).

The court determined that there was no lawful basis for a geographic limitation in the definition of "support facilities" and that the SMCRA language "resulting from or incident to" connotes a functional relationship.

50 FR 28186 (JULY 10, 1985). Interim final regulation. Suspension of the definition of "support facilities".

NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (D.C. Cir January 29, 1988).

The Court of Appeals overturned the District Court's ruling and affirmed the Secretary's incorporation of a consideration of proximity in the 1983 definition of "support facilities". The court stated that the phrase "resulting from or incident to" suggests a causal connection.

53 FR 45190 (NOVEMBER 8, 1988). Final rule. Roads. Secs. 780.38 and 784.30 Support facilities.

"This rule expands new Sec. 780.38 to cover support facilities in general. Although existing 30 CFR Part 780 contains a number of requirements applicable to support facilities, the existing rules do not contain a general requirement that a permit application include plans and drawings for support facilities that would be sufficient to demonstrate compliance with Sec. 816.181. To remedy this deficiency, Sec 780.38 applies to all support facilities in addition to the conveyors and rail systems covered by previous Sec. 780.37."

53 FR 47378 (NOVEMBER 22, 1988). Final rule. Definitions: Support facilities.

The definition of "support facilities" was removed from 30 CFR 701.5. OSM "believes that the term 'resulting from or incident to,' in the context of the rest of the language of section 701(28) of SMCRA, provides adequate guidance to regulatory authorities in the identification of facilities that support surface coal mining operations."

ATTACHMENTS



- A. BUFFALO MINING COMPANY v MARTIN, 267 SE 2d 721 (W Va 1980).
- B. CABOT OIL & GAS CORP. OF W. VA. AND CRANBERRY PIPELINE CORP. v POCAHONTAS LAND CORP., 376 SE 2d 94 (W Va 1988).
- C. ELK HORN COAL CORP. v KENTUCKY-WEST VIRGINIA GAS CO., 317 SW 2d 472 (Ky Ct App 1957).
- D. TRIVETTE v CONSOLIDATION COAL CO., 177 SW 2d 868 (Ky Ct App 1944).
- E. COLUMBIA GAS TRANSMISSION CORP. v LIMITED CORP., 759 F Supp 343 (E.D. Ky 1990).
- F. AKERS v BALDWIN, 736 SW 2d 294 (Ky 1987).
- G. SKIVOLOCKI v EAST OHIO GAS CO., 313 NE 2d 374 (Ohio 1974).
- H. PHIPPS v LEFTWICH, 222 SE 2d 536 (Va 1976).
- I. ANNOTATION, "Right of owner of title to or interest in minerals under one tract to use surface, or underground passages, in connection with mining other tract", 83 A.L.R. 2d 665. [Excerpts]
- J. 44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.97 Protection of fish and wildlife.
- K. 44 FR 14902 (MARCH 13, 1979). Permanent Program Preamble - Final Rules. Sec. 816.181 Support facilities and utility installations.
- L. 48 FR 20392 (MAY 5, 1983). Final rule. Support facilities.
- M. 48 FR 22110 (MAY 16, 1983). Final rules. Roads.
- N. 48 FR 30312 (JUNE 30, 1983). Final rule. Fish, wildlife, and related environmental values. Sec. 816.97(e)(1) [previous Sec. 816.97(c).]
- O. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 21 ERC (BNA) 1193, 14 ELR 20617 (D.C. D.C. July 6, 1984). [Excerpts]
- P. 50 FR 28186 (JULY 10, 1985). Interim final regulation. Suspension of the definition of "support facilities".
- Q. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (D.C. Cir January 29, 1988). [Excerpts]
- R. 53 FR 45190 (NOVEMBER 8, 1988). Final rule. Roads. Secs. 780.38 and 784.30 Support facilities.
- S. 53 FR 47378 (NOVEMBER 22, 1988). Final rule. Definitions: Support facilities.