



## COALEX STATE INQUIRY REPORT - 288

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### **TOPIC:** RIGHT OF ENTRY ON NAVIGABLE WATERWAY

**INQUIRY:** An operator plans to mine through a stream. The operator has leases with all of the property owners on both sides of the stream. Does the state own the stream bottom? If it does, must the operator pay royalties to the state? Does the operator have the right to "enter" the stream bed? Is this a property dispute which cannot be adjudicated under SMCRA? Please locate any relevant material.

**SEARCH RESULTS:** Research was conducted using the COALEX Library and other materials available in LEXIS. Interior and Pennsylvania administrative decisions as well as state cases were identified that address the various aspects of this Inquiry. The items retrieved as a result of the research are listed below; copies are attached unless noted otherwise.

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### **INTERIOR ADMINISTRATIVE DECISIONS**

#### **PAUL F. KUHN, 120 IBLA, IBLA 89-539 (1991).**

The Board held that resolution of the question whether a state permittee has the legal right to mine private land, either at the time of permit issuance or during the permit term, is not subject to resolution by a state mining regulatory authority where adjudication of a private dispute is required. Here, the private landowner claimed that he had not authorized the mining company to conduct surface coal mining operations on his land.

#### **MARION A. TAYLOR, 125 IBLA 271, IBLA 92-184 (1993).**

Kentucky DSMRE was aware that the private dispute whether COAL-Mac had the legal right to mine the subject land by surface means, which was the subject of pending litigation. This ongoing dispute meant Coal-Mac was unable to demonstrate that it had the legal right to mine the subject land by surface means. Since the permit was issued despite the fact that the legal right to mine property dispute was in litigation, "DSMRE, in



response to the TDN, should have suspended mining of the disputed land under the permit pending the outcome of the dispute."

**LYDIA DEMSKI v OSM, Docket No. NX 92-2-PR (1993).**

The ALJ ruled the Gatliff's permit and subsequent revisions were properly issued. Gatliff deleted the tract of land where the right of entry was in dispute from the permit application. Subsequent revisions excluded any of Demski's property which may have been initially include in the permit. Demski failed to prove she had been damaged by the issuance of the permit or any of the revisions.

**TURNER BROS., INC. v OSM, 92 IBLA 381, IBLA 85-529 (1986).**

Turner Brothers failed to indicate anywhere in its permit application that it was negotiating for the right to mine part of the permit property nor did they delete this property from its permit after it became apparent that negotiations for the right to mine would be unsuccessful. While Turner Brothers alerted ODOM employees to the status of the lands orally, it made no attempt to modify its permit in writing.

**PENNSYLVANIA ADMINISTRATIVE DECISIONS**

**GEORGE M. LUCCHINO v PADER, EHB Docket No. 91-117-MJ, 1994 Pa Envirn LEXIS 11 (1994).**

SYNOPSIS. "[A]n applicant for a mining permit must obtain the written consent of a landowner for entry upon land to be affected by the permit.... Where a dispute exists between the applicant and landowner as to the rights granted o the applicant by the underlying agreement, the Department may not rely solely on the existence of a signed landowner consent form as proof of the applicant's right of entry to the property for the purposes set for the in the permit application. The Department's role in ensuring that the applicant has obtained landowner consent as required by the Surface Mining Act and the regulations is more that simply ministerial and requires that the Department exercise discretion in ensuring that the consent is valid and effective as of the date of the issuance of the permit."

**CRONER, INC. AND POPOVICH V PADER, EHB Docket No. 91-460-E, 1993 Pa Envirn LEXIS 35 (1993).**

The haulroad leading to Croner's coal preparation facility traverse property whose title is in dispute. The Board found that PADER did not abuse its discretion in issuing a renewal permit containing a special condition which required Croner "to obtain a court determination establishing the claim of title by adverse possession, to obtain the landowner's agreement to its entry on the disputed property, or to reclaim and abandon the affected portions of the disputed property."



**EMPIRE COAL MINING AND DEVELOPMENT, INC. v PADER, 615 A 2d 829 (Pa Commw Ct 1992). EMPIRE COAL MINING AND DEVELOPMENT, INC. v PADER, DOCKET No. 91-115-MR, 1992 Pa Envirn LEXIS 8 ( 1992).**

The Board held that DER was justified in denying Empire's permit application. The applicant based its right to enter and mine on a written agreement with the surface owner and a written agreement with the mineral owner. While the application was pending, the agreement with the surface owner expired. Empire submitted revisions to its application which included a Pennsylvania Supreme Court interpretation of virtually identical clauses regarding the same tract of land and asserting that it could enter the tract and strip mine without the consent of the surface owner. The state court reversed the Board's ruling and remanded the case stating that Empire was not given the opportunity to present evidence on its claim that it did comply with statutory requirements.

**MACKEY, ET AL. v PADER, EHB Docket No. 86-078-G, 1988 Pa Envirn LEXIS 24 (1988).**

"Before incremental phase approval is granted for any parcel on the permitted area, the landowner(s) of the parcel must give DER a so-called 'Supplemental C' granting written approval of mining on that parcel...."

**STATE CASE LAW: CASES WITH CLOSEST FACT SITUATIONS**

**STATE v LONGYEAR HOLDING CO., 29 NW 2d 657 (Minn 1947).**

Headnotes: "The riparian owners here, holding title to lands bordering on Syracuse Lake under patents from the United States, did not, by virtue thereof, acquire any title to the bed of said lake below low-water mark. Under decisions of this court, it is equally well settled that such riparian owners did not acquire any property established here, other than the ordinary riparian rights of navigation, dockage, wharfage, and similar privileges, or those contingent rights or privileges dependent upon the doctrine of accretions and relictions."

**MORLEY v BERG, 226 SW 2d 559 (Ark 1950).**

Headnotes: "Since the Commissioner had the right to maintain an action to enjoin the illegal taking of sand and gravel from the beds of streams of the state and to collect royalties and penalties for that already taken, the court erred in dismissing his petition or complaint."

**STATE OF TEXAS v BLACK BROS., 297 SW 213 (Texas 1927).**

Headnotes: "Owners of land bounded by a stream made a navigable one by statute... own to the water's edge only and have no title to the bed of the stream nor to minerals



underlying it. The State and those claiming mineral rights in the bed of the stream under its authority could recover same against riparian proprietors interfering with mineral development therein."

### **STATE CASE LAW: QUESTIONS OF OWNERSHIP OF RIVER BOTTOM**

**COASTAL STATES GAS PRODUCING CO. v STATE MINERAL BD., 199 So 2d 554 (La Ct App 1967).**

In reversing the trial court, the court held "that the State of Louisiana instead of the private claimants is the owner" of the beds and bottoms of Bayou Lacassine and that the State owns the royalties attributable to mineral production from the river bottom.

#### **Also see:**

**RYALS v PIGOTT, 580 So 2d 1140 (Miss 1990).**

**STATE OF SOUTH CAROLINA v SLOAN CONSTRUCTION CO., INC., 328 SE 2d 84 (SC Ct App 1985).**

**MADDOX v THREATT, 171 SE 2d 284 (Ga 1969).**

**U.S. v APPALACHIAN ELECTRIC POWER CO., 311 U.S. 377 (1940).**

**SOO SAND & GRAVEL CO. v M. SULLIVAN DREDGING CO., 244 NW 138 (Mich 1932).**

**STATE OF TEXAS v BRADFORD, 50 SW 2d 1065 (Tex 1932). [Excerpts]**

**ARCHER v GREENVILLE SAND & GRAVEL CO., 233 US 60 (1914).**

**STATE OF FLORIDA v BLACK RIVER PHOSPHATE CO., 9 So 205 (Fla 1891).**

### **STATE CASE LAW: NAVIGABLE WATER**

**STATE OF MINNESOTA v ADAMS, 89 NW 2d 661 (Minn 1958).**

Applying "the tests for navigability formulated by the Federal courts ", the court determined that the state was "the owner of certain lake beds...under which lie valuable deposits of iron ore."

### **STATE CASE LAW: ROYALTIES FOR MINERAL DEVELOPMENT**

The following cases address the question of royalties for oil, gas or mineral rights/development on state-owned water bottoms:



**ST. MARY PARISH v PARKER**, 610 So 2d 875 (La Ct App 1992).

**EAST BATON ROUGE PARISH v TREASURER**, 560 So 2d 478 (La Ct App 1990).

**T.L. JAMES & CO., INC. v KENNER LANDING, Inc.**, 550 So 2d 1378 (La Ct App 1989).

**CHEVRON USA, INC. v LORIO**, 496 So 2d 611 (La Ct App 1986).

**AGERTON v CITY OF LAKE CHARLES**, 273 So 2d 353 (La Ct Ap 1973).

**STATE OF OREGON v PORT OF PORTLAND**, 376 P 2d 661 (Ore 1962).

**COASTAL STATES GAS PRODUCING CO. v PATE**, 309 SW 2d 828 (Tex 1958).

**SCURLOCK v CLARK**, 272 SE 2d 58 (Ark 1954).

#### **ALR EXCERPTS INCLUDED FOR BACKGROUND**

**ANNOTATION**, "Deeds: Description of land conveyed by reference to river or stream as carrying to thread or center or only to bank thereof -- Modern status", 65 ALR 3d 604.

**ANNOTATION**, "Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification", 65 ALR 2d 143.

#### **REGULATION HISTORY INCLUDED FOR BACKGROUND**

**48 FR 44344 (SEPTEMBER 28, 1983)**. Final rule. Permitting - Related information requirements of applications.

**44 FR 14902 (MARCH 13, 1979)**. Permanent program final preamble - Final rule. Part 778 Permitting - Related information requirements of applications.

COALEX STATE COMPARISON REPORT - 164, "Right of entry information in permit applications" (1990).

Includes previous Reports on right to subside.

#### **STATE STATUTES AND CODES INCLUDED FOR BACKGROUND**

Attached are sections of state statutes and codes that state the following:

1. State ownership of beds of navigable rivers
2. State responsibility for granting leases and permits to remove coal, oil, gas, and other minerals from beds of navigable rivers.



3. Requirement to pay royalties on minerals removed from state-owned navigable river beds.
4. Materials are included for these states:
  - a. Alabama
  - b. Arkansas
  - c. Florida
  - d. Idaho
  - e. Louisiana
  - f. Maryland
  - g. Montana
  - h. Oregon
  - i. Pennsylvania
  - j. South Carolina
  - k. Texas
  - l. Wisconsin

### **RELEVANT FEDERAL CASE LAW NOT INCLUDED**

These cases are referred to in a number of items listed here; however, copies of these cases are not included with this Report:

#### **US v UTAH, 283 US 64.**

The test of navigability to fix ownership of lake beds must be determined as of the date of a state's admission to the union.

#### **BARNEY v KEOKUK, 94 US 324 (1877).**

Ruled that the states' title included the beds of all waters which, upon admission to the union, were actually navigable, whether or not they were affected by the tide.

#### **US v HOLD STATE BANK, 270 US 49.**

"[S]treams or lakes which are navigable in fact must be regarded as navigable in law".

#### **SHIVELY v BOWLBY, 152 US 1.**

The Supreme Court provides a review of the law governing titles to lands under navigable waters.

**Also see:**

#### **DONNELLY v US, 228 US 243 (1913).**

### **ATTACHMENTS**



- A. PAUL F. KUHN, 120 IBLA, IBLA 89-539 (1991).
- B. MARION A. TAYLOR, 125 IBLA 271, IBLA 92-184 (1993).
- C. LYDIA DEMSKI v OSM, Docket No. NX 92-2-PR (1993).
- D. TURNER BROS., INC. v OSM, 92 IBLA 381, IBLA 85-529 (1986).
- E. GEORGE M. LUCCHINO v PADER, EHB Docket No. 91-117-MJ, 1994 Pa Environ LEXIS 11 (1994).
- F. CRONER, INC. AND POPOVICH v PADER, EHB Docket No. 91-460-E, 1993 Pa Environ LEXIS 35 (1993).
- G. EMPIRE COAL MINING AND DEVELOPMENT, INC. v PADER, 615 A 2d 829 (Pa Commw Ct 1992).
- H. EMPIRE COAL MINING AND DEVELOPMENT, INC. v PADER, DOCKET No. 91-115-MR, 1992 Pa Environ LEXIS 8 (1992).
- I. MACKEY, ET AL. v PADER, EHB Docket No. 86-078-G, 1988 Pa Environ LEXIS 24 (1988).
- J. STATE v LONGYEAR HOLDING CO., 29 NW 2d 657 (Minn 1947).
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- M. COASTAL STATES GAS PRODUCING CO. v STATE MINERAL BD., 199 So 2d 554 (La Ct App 1967).
- N. RYALS v PIGOTT, 580 So 2d 1140 (Miss 1990).
- O. STATE OF SOUTH CAROLINA v SLOAN CONSTRUCTION CO., INC., 328 SE 2d 84 (SC Ct App 1985).
- P. MADDUX v THREATT, 171 SE 2d 284 (Ga 1969).
- Q. U.S. v APPALACHIAN ELECTRIC POWER CO., 311 U.S. 377 (1940).
- R. SOO SAND & GRAVEL CO. v M. SULLIVAN DREDGING CO., 244 NW 138 (Mich 1932).
- S. STATE OF TEXAS v BRADFORD, 50 SW 2d 1065 (Tex 1932). [Excerpts]
- T. ARCHER v GREENVILLE SAND & GRAVEL CO., 233 US 60 (1914).
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- V. STATE OF MINNESOTA v ADAMS, 89 NW 2d 661 (Minn 1958).
- W. ST. MARY PARISH v PARKER, 610 So 2d 875 (La Ct App 1992).
- X. EAST BATON ROUGE PARISH v TREASURER, 560 So 2d 478 (La Ct App 1990).
- Y. T.L. JAMES & CO., INC. v KENNER LANDING, INC., 550 So 2d 1378 (La Ct App 1989).
- Z. CHEVRON USA, INC. v LORIO, 496 So 2d 611 (La Ct App 1986).
- AA. . AGERTON v CITY OF LAKE CHARLES, 273 So 2d 353 (La Ct Ap 1973).
- BB. . STATE OF OREGON v PORT OF PORTLAND, 376 P 2d 661 (Ore 1962).
- CC. COASTAL STATES GAS PRODUCING CO. v PATE, 309 SW 2d 828 (Tex 1958).
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- FF. ANNOTATION, "Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification", 65 ALR 2d 143.
- GG. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting - Related information requirements of applications.
- HH. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. Part 778 Permitting - Related information requirements of applications.
- II. COALEX STATE COMPARISON REPORT - 164, "Right of entry information in permit applications" (1990). [Enclosed without attachments.]
- JJ. STATE STATUTES AND CODES FOR:
1. Alabama
  2. Arkansas
  3. Florida
  4. Idaho
  5. Louisiana
  6. Maryland
  7. Montana
  8. Oregon
  9. Pennsylvania
  10. South Carolina
  11. Texas
  12. Wisconsin