



COALEX STATE INQUIRY REPORT - 296

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TOPIC: LANDOWNER REFUSING RIGHT OF ENTRY FOR RECLAMATION (Includes COALEX Reports 141 & 172)

INQUIRY: A landowner will not allow an operator to enter and restore the permitted area. It is believed that the landowner wants to use the fact that the land was left unrestored as an excuse to sue the operator for damages. The operator anticipates having to sue the landowner in order to gain entry and perform reclamation. Are there any cases that state that the landowner has an obligation to allow the operator on the land to meet SMCRA requirements?

SEARCH RESULTS: Research was conducted in the COALEX Library and other materials in LEXIS. Several cases with conflicting rulings were retrieved. Also identified were two existing COALEX Reports which indicate that inability to comply may be taken into consideration as a mitigating factor in computing civil penalties, though not the \$ 750/day penalty, but NOV's and CO's cannot be vacated. Copies of the materials listed below are attached.

STATE CASE

DIXSON v C & G EXCAVATING, INC., 364 So 2d 1160 (Ala 1978).

C & G's lease with the Dixsons allowed C & G to strip mine and required reclamation after mining. A termination clause in the lease allowed the Dixsons to terminate the lease in the event C & G remained in breach of any covenant for 60 days following written notice of default.

Mr. Dixon sought cancellation of the lease based on breach of the covenant for failure to reclaim. Relief was denied due to failure to give written notice of the breach as the lease required.

In the second suit, a jury trial, the Dixsons, alleging breach of the lease, sought damages and cancellation of the lease. C & G countersued claiming Mr. Dixon threats



of physical violence prevented C & G's performance under the lease. The jury awarded the Dixsons \$10,000 for breach of covenant and the court held that the lease remained valid and in full force.

The appellate court affirmed the trial court's ruling finding that the two verdicts were not inconsistent. After examining the record, the court found that evidence supported C & G's claim that Dixson had refused them permission to enter the land to continue mining or to reclaim and stated: "a party to a contract who has caused a failure of performance by the other party cannot take advantage of that failure."

STATE ADMINISTRATIVE CASE

N & L COAL CO. v COMMONWEALTH OF PA. DEPT. OF NATURAL RESOURCES, 1991 Pa Envirn LEXIS 140, EHB Docket No. 88-353-F (1991).

N & L appealed the portion of its civil penalty assessed for failure to comply. They argued that their independent contractor prevented them from complying with the DER order by blocking access to the mining property and that the landowner had withdrawn its permission for N & L to be on the site. The Board found assessment of \$ 750 per day for failure to comply proper under state statutes; however, the Board noted:

"this does not leave N & L without a remedy. As DER alluded to in its brief, its contractor is jointly and severally liable for violations due to the actions of the contractor.... N & L cannot avoid the civil penalty, but may have a remedy in a court of equity."

INTERIOR ADMINISTRATIVE CASES

NEW RIVER COALS, LTD. v OSM, Docket No. NX 5-8-R (1985).

"The main problem that the Applicant has is that its lease has been declared void by the Chancery Court of Anderson County and the Applicant can no longer gain access to the subject property in order to do its reclamation work. The dispute is basically between the landowner and the Applicant. There is no way the Respondent can solve the Applicant's problem of access. This is an unfortunate situation because, unless the Applicant can gain access to the property, the Applicant will suffer a \$ 32,500 fine, but the subject property will not be reclaimed and the purpose of the Act will be defeated.

"It would appear to the undersigned that the Applicant would have a legal right of entry for the purpose of reclamation work on the subject property regardless of its cancellation of the lease because the Act requires the reclamation work to be done, and this was well known to the lessor when the lease was entered into. The undersigned has no authority to enforce this right of re-entry for this limited purpose."

The application for temporary relief was denied.



LOST MOUNTAIN MINING, INC. v OSM, Docket No. 92-35-R (1994).

Among Lost Mountain's arguments for vacating the NOV or excusing remedial measures was the fact that the landowner would not allow access to the site unless he receives monetary compensation. The ALJ stated:

"The dispute concerning the access to the mine site between the Applicant and the landowner is to be resolved between those two parties. If the Applicant cannot obtain access after a good faith effort in the state forums available to it, the OSM should consider requesting the NOV be vacated."

PARAMONT COAL CORP. v OSM, Docket No. NX 89-47-R (1990).

Language in this consent decree, Sec. IV Representations and Undertakings includes the following statement:

"Should Paramont be denied the right-to-enter any site for the purpose of reclamation under this Agreement, by the landowner, OSM agrees to assist Paramont, as necessary, in obtaining the right-of-entry for the purpose of reclamation. Paramont's obligation to complete reclamation will be suspended until the right-of-entry is obtained. The time periods herein stated are subject to any extension or modification of the abatement period which OSM may authorize in accord with applicable law...."

VIRGINIA IRON, COAL & COKE CO. v OSM, Docket No. NX 7-46-P (1988).

Similar language appears in this settlement agreement.

COALEX STATE INQUIRY REPORTS

COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (1991).

All of the materials retrieved as part of this Report indicate that no matter how legitimate the cause, NOV's and CO's cannot be vacated because of an operator's inability to comply. The reason for the inability to comply may be taken into consideration as a mitigating factor in computing civil penalties.

Includes COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty".

Both Reports are included without attachments.

ATTACHMENTS

- A. DIXSON V C & G EXCAVATING, INC., 364 So 2d 1160 (Ala 1978).



- B. N & L COAL CO. V COMMONWEALTH OF PA. DEPT. OF NATURAL RESOURCES, 1991 Pa Envirn LEXIS 140, EHB Docket No. 88-353-F (1991).
- C. NEW RIVER COALS, LTD. v OSM, Docket No. NX 5-8-R (1985).
- D. LOST MOUNTAIN MINING, INC. v OSM, Docket No. 92-35-R (1994).
- E. PARAMONT COAL CORP. v OSM, Docket No. NX 89-47-R (1990).
- F. VIRGINIA IRON, COAL & COKE CO. v OSM, Docket No. NX 7-46-P (1988).
- G. COALEX STATE INQUIRY REPORT - 172, "Inability to comply" (1991). [Includes COALEX STATE INQUIRY REPORT - 141, "Reduction of the mandatory civil penalty".]