



COALEX STATE INQUIRY REPORT - 303

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Myra Spicker, Esquire
Office of Attorney General
Indiana Government Center South, Fifth Floor
402 West Washington Street
Indianapolis, Indiana 46204

TOPIC: RETIREMENT OF PARTNER FROM CONTINUING PARTNERSHIP; COAL REMOVAL INCIDENT TO PRIVATE DEVELOPMENT (Includes COALEX Reports Nos. 173 & 262)

INQUIRY: Coal was found in an area under construction for private commercial development. An individual who was part of the partnership conducting the commercial development pulled out of the partnership before the coal "entered interstate commerce". Is this individual one of the "responsible parties" for mining without a permit?

SEARCH RESULTS: Using the COALEX Library and other LEXIS material, additional material was added to existing COALEX Reports. The items identified discuss different aspects of the Inquiry, e.g., the issues of partnership, responsible parties and commercial development. No cases were identified that matched the specific fact situation of this Inquiry. Copies of the materials listed below are attached.

COALEX REPORTS

COALEX REPORT NO. 173, "Coal removal incident to private development" (1991).

This Report includes a survey accompanied by research. One of the included Interior administrative opinions provides a two-part criteria for determining whether the regulatory authority has authority over a project: (1) What is the underlying purpose of the excavation through which the coal was encountered? (2) Does the coal enter commerce? [See TRIPLE B AND GARY BRANHAM v OSM]

COALEX REPORT NO. 262, "Non-commercial use of 'other minerals'" (1993).

Several Interior administrative decisions and existing COALEX Reports provided some information on whether a landfill operator who occasionally runs into coal while



excavating shale and clay is subject to the 16 2/3 exemption. The shale and clay are used by the landfill operator, not sold for commercial use.

ADDITIONAL OHA DECISIONS

GARY COBB, IBLA 93-415 (1994).

The Board analyzed Cobb's relationship to and resignation from Midwest Coal, operator for the permittee, Poteau Coal, and his responsibility for delinquent reclamation fees and civil penalties.

LLOYD D. LIVESAY D/B/A NU-WAY COAL CO., v OSM, Docket No. NX 7-93-R (1992).

The ALJ found the Livesay was "a partner in, and therefore an owner of, Nu-Way Coal Company. As such, he stood to benefit from the coal sold by Nu-Way Coal Company as the direct recipient of the sale proceeds." Livesay was held liable for fees and for remedying violations.

CHRISTINE COAL v OSM, Docket Nos. NX 90-23-R, NX 90-41-R, NX 90-47-R (1991).

In concluding that Hershell Pennington was a partner with Morgan Lewis in Christine Coal, not merely the recipient of a debt payment for a loan on the purchase of mining equipment, the ALJ discusses various tests, such as profit sharing, as evidence of a partnership.

BILLY P. EVANS v OSM, Docket No. NX 90-58-R (1991).

The ALJ established that Evans was the operator (responsible for abating the violations) on the permit in question and was "the owner of Lynco" as he was the person who stood "to benefit directly from the sale, transfer, or use of the coal."

RED STAR COAL CO., INC. v OSM, Docket No. 90-28-R (1990).

"There are several key elements necessary to finding that an agency relationship existed between Leroy Lackey and Elwood Gibson.... Whether Leroy Lackey and Elwood Jackson had an agency relationship is a question of fact to be proved by prior dealings, circumstances and the conduct of the parties.... Here there was no right to control either the day-to-day mining or the sale of coal."

Cites to U.S. v RAPOCA ENERGY CO., 613 F Supp 1161 (DC Va 1985). [Federal case and OHA decision, G.A. SILER v OSM, Docket No. NX 6-62-P (1986), are attached.]

MCWANE COAL CO., INC. 95 IBLA 1, IBLA 85-621 (1986). MCWANE COAL CO. (On Judicial Remand), 95 IBLA 1, IBLA 85-621 (1987).



SYLLABUS: "'Operator.' Identification of the 'operator' responsible for payment of reclamation fees... does not turn solely upon a literal interpretation of the phrase 'removes or intends to remove' coal... but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes the coal is responsible for payment of the reclamation fees."

Also cites to RAPOCA.

AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1983), amends AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1982).

Watkins claimed that "although he financed the operation, that he had absolutely no control over the acts of Peyton Smith or ownership in Black and White Land Developers. The Applicant asserts that merely financing a venture does not make the Applicant a joint venture with Peyton Smith so as to render the Applicant liable for the alleged environmental damage." The ALJ found that the evidence supported "a conclusion that the Applicant was the sole manager and owner of the enterprise and Peyton Smith was nothing more than a business employee."

MISCELLANEOUS MATERIAL

Excerpts from the September, 1978 Proposed Rules and the March, 1979 Final Rules are attached for background.

ATTACHMENTS

- A. COALEX REPORT NO. 173, "Coal removal incident to private development" (1991).
- B. COALEX REPORT NO. 262, "Non-commercial use of 'other minerals'" (1993).
- C. GARY COBB, IBLA 93-415 (1994).
- D. LLOYD D. LIVESAY D/B/A NU-WAY COAL CO., v OSM, Docket No. NX 7-93-R (1992).
- E. CHRISTING COAL v OSM, Docket Nos. NX 90-23-R, NX 90-41-R, NX 90-47-R (1991).
- F. BILLY P. EVANS v OSM, Docket No. NX 90-58-R (1991).
- G. RED STAR COAL CO., INC. v OSM, Docket No. 90-28-R (1990).
- H. U.S. v RAPOCA ENERGY CO., 613 F Supp 1161 (DC Va 1985).
- I. G.A. SILER v OSM, Docket No. NX 6-62-P (1986).
- J. MCWANE COAL CO., INC. 95 IBLA 1, IBLA 85-621 (1986).
- K. MCWANE COAL CO. (On Judicial Remand), 95 IBLA 1, IBLA 85-621 (1987).
- L. AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1983).
- M. AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1982).
- N. 43 FR 41662 (SEPTEMBER 18, 1978). Proposed rules. [Excerpt on bonding]
- O. 44 FR 14902 (MARCH 13, 1979). Final rules. [Excerpt on bonding]



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U.S. Department of the Interior