



## COALEX STATE INQUIRY REPORT - 307

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**TOPIC:** DEFINITION OF "OCCUPIED DWELLING"; ADJUDICATION OF PROPERTY RIGHTS (Includes COALEX Reports Nos. 72 & 288)

**INQUIRY:** Is a 30-foot trailer on wheels which is used occasionally and is not hooked up to any utilities considered an "occupied dwelling"? What is the state regulatory authority's responsibility when the operator owns the land on which the trailer sits but the ownership of the trailer itself is in dispute?

**SEARCH RESULTS:** Using COALEX, LEXIS and existing COALEX Reports a number of relevant items were identified. These include a regulatory history of the definition of "occupied dwelling", a number of Interior administrative decisions ruling on whether or not certain structures were "occupied dwellings" and administrative decisions from prior COALEX Reports discussing the issue of property rights. However, none of materials identified has a fact situation close to the subject of this Report. Items listed below are attached.

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### I. DEFINITION OF "OCCUPIED DWELLING"

#### REGULATORY HISTORY

##### COALEX STATE INQUIRY REPORT - 72, "Occupied dwellings" (1986).

Included in this Report are the regulatory history of the definition of "occupied dwelling" from Federal Register preambles to federal regulations and definitions of the phrase from several state programs. The Report is supplemented by additional federal state regulatory items.

In the March 13, 1979 permanent program regulations, "occupied dwelling" was defined as "any building that is currently being used on a regular or temporary basis for human



habitation", including conventionally built homes and mobile homes with full-time and part-time occupancy.

The June 10, 1982 proposed revisions would have defined "temporary" to mean use "for not less than three consecutive months each year." However, in the September 14, 1983 final rules, the original definition was retained since OSM believed it provided enough flexibility to deal with the issue of what constitutes an occupied dwelling on a case-by-case basis.

[See the Report and attachments for further detail.]

## **INTERIOR ADMINISTRATIVE DECISIONS**

### **RONALD W. JOHNSON, 5 IBSMA 19, IBSMA 80-86-1 (1983). RONALD W. JOHNSON, 5 IBSMA 19, IBSMA 80-86 (1981).**

The Board affirmed that Peabody had VER to conduct surface mining within 300 feet of two occupied dwellings (mobile homes) owned by Johnson.

### **GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, 118 IBLA 129, IBLA 89-158 (1991).**

The Board found that Stout's home, from which she operated a full-time antiques business, fell "within the scope of the regulatory definition" of "occupied dwelling".

### **A.L. PHIPPS v OSM AND AM-LE-CO, Inc. AND NEW BIG CREEK MINING CO., Docket No. NX 4-39-R (1986).**

Included as an exhibit to this ruling on an award of costs and expenses is the ALJ's ruling that OSM failed to include a second house in its NOV issued for mining within 300 feet of an occupied dwelling and ordered the NOV modified. The ALJ concluded that the second house was an occupied dwelling even though no one was living in the house at the time the active mining took place.

### **BROOKS RUN COAL CO. v OSM, JUNE MACKEY, INTERVENOR, Docket Nos. CH 0-244-R & CH 1-21-P (1981). BROOKS RUN COAL CO. v OSM, JUNE MACKEY, INTERVENOR, Docket Nos. CH 0-244-R (1980).**

A hunting cabin used occasionally during the hunting season and on occasional weekends, which was not the "usual and ordinary place of abode" of the Intervenor or her father, was not ruled to be an occupied dwelling.

### **GREEN COAL CO. v OSM, Docket No. NX 9-112-R (1980).**



A home located within 1000 feet of a blast site, which had been unoccupied at the time a pre-blast survey was conducted but occupied at the time of the blast, was ruled to be an occupied dwelling.

## II. ADJUDICATION OF PROPERTY RIGHTS

### **COALEX STATE INQUIRY REPORT - 288, "Right of entry on navigable waterway" (1994).**

Adjudication of property rights and right of entry were issues researched as part of this Report. Relevant Interior and Pennsylvania administrative decisions and Federal Register preambles from Report - 288 are attached.

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

Included as part of Report - 288, Report - 164 is also enclosed, without attachments.

## ATTACHMENTS

1. COALEX STATE INQUIRY REPORT - 72, "Occupied dwellings" (1986).
2. 44 FR 14902 (MARCH 13, 1979). Final rules.
  - a. 30 CFR Section 761.5 Definitions. Occupied dwelling.
  - b. 30 CFR Section 817.123. Deleted section re: premining survey.
3. 47 FR 25278 (JUNE 10, 1982). Proposed rules. Lands unsuitable. Definition of occupied dwelling.
4. 47 FR 16152 (APRIL 14, 1982). Proposed rule. Postmining land uses and variances from AOC.
5. 48 FR 41312 (SEPTEMBER 14, 1983). Final rules. Lands unsuitable. Definition of occupied dwelling.
6. Excerpts from comments on state program definitions of "occupied dwelling":
  - a. Georgia (1980)
  - b. Kentucky (1980)
  - c. West Virginia (1981)
  - d. Illinois (1982)
  - e. Multi-state (1982)
7. RONALD W. JOHNSON, 5 IBSMA 19, IBSMA 80-86-1 (1983).
8. RONALD W. JOHNSON, 5 IBSMA 19, IBSMA 80-86 (1981).
9. GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, 118 IBLA 129, IBLA 89-158 (1991).
10. A.L. PHIPPS v OSM AND AM-LE-CO, INC. AND NEW BIG CREEK MINING CO., Docket No. NX 4-39-R (1986).
11. BROOKS RUN COAL CO. v OSM, JUNE MACKEY, INTERVENOR, Docket Nos. CH 0-244-R & CH 1-21-P (1981).



12. BROOKS RUN COAL CO. v OSM, JUNE MACKEY, INTERVENOR, Docket Nos. CH 0-244-R (1980).
13. GREEN COAL CO. v OSM, Docket No. NX 9-112-R (1980).
14. COALEX STATE INQUIRY REPORT - 288, "Right of entry on navigable waterway" (1994).
  - 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 POPOVICK 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. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. Permitting - Related information requirements of applications. [NOTE: Listed as Attachment GG in Report - 288.]
  - K. 44 FR 14902 (MARCH 13, 1979). Permanent program final preamble - Final rule. Part 778 Permitting - Related information requirements of applications. [NOTE: Listed as Attachment HH in Report - 288.]
  - L. COALEX STATE COMPARISON REPORT - 164, "Right of entry information in permit applications" (1990). [Enclosed without attachments.] [NOTE: Listed as Attachment II in Report - 288.]