



## COALEX STATE INQUIRY REPORT - 327

June 1995

Deanna Smith  
Department of Environmental Resources  
Office of Chief Council  
400 market Street - 9th floor  
Harrisburg, Pennsylvania 17105

**TOPIC:** OWNERSHIP & CONTROL: DEFINITION OF "CONTROLLED" (Update of COALEX Report No. 231, which includes Reports 148 & 131)

**INQUIRY:** An operator permitted to conduct coal mining operations received money for its operations from another company. What liability does the company providing the financial backing have for violations? Does the company providing the financial backing "control" the operator according to the O&C/AVS regulations? Please provide and additional information not already described in Report 231.

**SEARCH RESULTS:** Research was conducted to further update three existing COALEX Reports: Nos. 131, 148 and 231. No additional materials were identified that specifically address the issue of this Report. The additional decisions retrieved discuss related O&C/AVS topics that may be of some value.

Copies of the items listed below are attached. Copies of earlier COALEX Reports are included without attachments. Contact the IMCC office for copies of those items.

---

### COALEX REPORTS

**COALEX STATE INQUIRY REPORT - 131, "Individual liability of corporate officer, director or agent" (1989).**

Interior and Pennsylvania administrative decisions as well as state and federal cases listed in this Report address a regulatory agency's attempt to "pierce the corporate veil" or use the "participation theory" in attempting to hold a corporate officer, director or agent individually or personally liable for reclaiming a mine site or assessed civil penalties.

**COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control" (1990).**



This Report includes Interior and Pennsylvania administrative decisions plus state and federal cases interpreting the phrase "own and control".

**COALEX STATE INQUIRY REPORT - 231, "Ownership and control: 'related parties'" (1992).**

Included here are materials that update the two previous Reports. The research was broadened somewhat to include items on related issues, e.g., who is the party responsible for the condition cited in an NOV and CO; reliance on inspection reports and service to indicate who was in control of the daily operations at the time a violation occurred.

**ADDITIONAL MATERIAL**

**COTEAU PROPERTIES CO. v DOI, 1995 U.S. App. LEXIS 10156 (8th Cir 1995).**

In reversing the district court's decision, the circuit court ruled that OSM did not follow its "regulatory mandates" when it overruled the North Dakota Public Service Commission's (PSC) finding that Coteau was not "owned or controlled" by Basin Electric Power Cooperative.

Approximately 6% of Coteau's mined coal came from land leased from Basin or its subsidiaries. Under separate contract, Coteau sold coal to Dakota Coal Company, a Basin subsidiary. The PSC found "that the contractual agreements between Coteau and Basin were traditional 'arms length' business contracts." According to the provisions in the contract, Basin did not control Coteau's mining operations, "because such provisions protecting Basin's interests, providing for dispute resolution and independent audits, and allocating various risks between Basin and Coteau would be unnecessary if Basin controlled Coteau." The court concurred with PSC's analysis of Coteau's agreement with Dakota.

**U.S. STEEL MINING CO., INC. v OSM, 132 IBLA 216, IBLA 95-235 (1995).**

"OSM argues that Judge Torbett 'seriously misinterpret[ed] the ownership or control rule' by assuming that the ability to control a mining operation is insufficient to establish an ownership or control link.... OSM contends that Judge Torbett improperly required 'evidence of actual exercise of the power to establish control'....

...

"Based on our preliminary review of the record, Judge Torbett's decision, and the briefs of the parties submitted on appeal, we agree with USM that Judge Torbett's ruling constituted a finding that the record on temporary relief showed that USM had a substantial likelihood of prevailing on the merits because it did not either exercise actual control or have the authority to control the mining operations."

**JAMES SPUR, INC. v OSM, 133 IBLA 123, IBLA 93-633 (1995).**



HEADNOTES: "Under 30 CFR 773.5(b) (1994), one entity may 'control' another where it has 'authority' to determine the manner in which mining operations are conducted. It is not required that such authority actually have been exercised."

**FINCASTLE MINING, INC. v BABBITT, 842 F Supp 204 (W.D. Va 1993).**

Hobbs Brothers Coal, a Virginia permit holder, entered into an agreement with Fincastle, lessee of an adjacent tract who did not have a permit to mine, "by which Hobbs would use its existing portals to access and mine Fincastle's coal." Hobbs was unable to pay its bond when Virginia law increased substantially the required bond amount. The state regulatory authority forfeited Hobbs' bond and revoked its permit. Fincastle was permit blocked by the OSM Applicant/Violator System which listed Fincastle as an "owner or controller" of Hobbs.

The court concluded "that OSM exceeded its statutory and regulatory authority when it used the AVS to link Fincastle to Hobbs based upon a state violation which did not implicate federal law."

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

"In order to find that Leroy Lackey was an operator under the Act it would be necessary to find that an agency relationship existed between Lackey and Elwood Gibson, or that they had a partnership or joint venture." The ALJ cited to U.S. v RAPOCA found in Report - 148 in analyzing the relatedness question. The ALJ determined the Applicant was not an "operator" according to the Act: "The relationship between the Applicant and the permittee was no more than that of creditor/debtor."

**AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1982). Amended by: AUBREY WATKINS v OSM, Docket No. NX 0-225-R (1983).**

The ALJ found that Watkins was liable as a "joint venturer" for violations of SMCRA committed by Black and White Land Developers.

**ATTACHMENTS**

1. COALEX STATE INQUIRY REPORT - 231, "Ownership and control: 'related parties'" (1992).
  - A. 25 PA CODE Sec. 86.37 (1991). Criteria for permit approval or denial.
  - B. METZLER COAL CO. v OSM; DEAN CHAMBERS, D/B/A DEAN CHAMBERS COAL CO. v OSM, Docket Nos. NX 7-107-R, NX 7-168-R (1988).
  - C. CHRISTING COAL CO. v OSM; MORAN LEWIS v OSM; HERSHELL PENNINGTON v OSM, Docket Nos. NX 90-23-R, NX 90-41-R, NX 90-47-R (1991).
  - D. W.P. (WP) CORP. v OSM, 119 IBLA 130, IBLA 89-648 (1991).



- E. COALEX STATE INQUIRY REPORT - 148, "Contractor liability for violations; ownership and control" (1990).
1. WILLIAM J. MCINTIRE COAL CO. v COMMONWEALTH OF PA., DEPT. OF NATURAL RESOURCES (DER), Docket No. 83-180-M, slip op (July 7, 1986).
  2. CONCERNED CITIZENS OF JEFFERSON TOWNSHIP v COMMONWEALTH OF PE., DEPT. OF ENVIRONMENTAL RESOURCES AND GRINDSTONE COAL CO., Docket No 83-269-G, slip op (March 5, 1986).
  3. KEYSTONE MINING COMPANY, INC. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 542, Docket No. 83-241-G (June 19, 1985).
  4. PARKER SAND AND GRAVEL v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1893 EHB 557, Docket No. 83-134-G (September 9, 1983).
  5. JANE BURNS, ET AT. v GEORGE DIALS, COMMISSIONER, 378 SE 2d 665 (W Va 1989).
  6. CLARK COAL CO. v OSM, 102 IBLA 93, IBLA 86-627, 87-348 (1988).
  7.
    - a. SHELBIANA CONSTRUCTION CO. v OSM, SAMMY GOFF v OSM, 102 IBLA 19, IBLA 85-88, IBLA 87-307 (1988).
    - b. SAMMY GOFF v OSM, Docket Nos. NX 5-49-R, NX 5-102-R (1987).
  8.
    - a. TENNESSEE CONSOLIDATE COAL CO. v OSM, 99 IBLA 274, IBLA 85-351 (1987).
    - b. TENNESSEE CONSOLIDATED COAL CO. AND WALNUT COAL COMPANY, INC. v OSM, Docket Nos. NX 1-87-R, NX 1-147-P (1985).
  9. MCWANE COAL CO., INC., 95 IBLA 1, IBLA 85-621 (1986).
  10. S & M COAL CO. & JEWELL SMOKELESS COAL CO. v OSM, 79 IBLA 350, IBLA 83-620, 82-20 (1984).
  11. KIMBERLY SUE COAL CO., INC., 74 IBLA 170, IBLA 83-619, 82-19 (1983).
  12.
    - a. VIRGINIA FUELS, INC., 4 IBSMA 185, IBSMA 82-18 (1982).
    - b. MOLE COAL CO., INC. AND VIRGINIA FUELS, INC. v OSM, Docket Nos. CH 2-21-R, CH 2-33-R (1982).
  13. PIERCE COAL AND CONSTRUCTION, INC., 3 IBSMA 350, IBSMA 81-33 (1981).
  14.
    - a. WILSON FARMS COAL CO., 2 IBSMA 118, IBSMA 80-33 (1980).



- b. WILSON FARMS COAL CO. v OSM, Docket No. NX 9-88-R (1980).
- 15. H.C. BOSTIC COAL CO., INC. AND WAYNE BOSTIC v OSM, Docket Nos. NX 88-8-R, NX 88-33-R, NX 88-34-R, NX 88-38-R, NX 88-46-R (1988).
- 16. ROY E. MEHAFFEY v OSM, Docket No. NX 7-35-R (1987).
- 17. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v OSM, Docket Nos. NX 1-118-R, NX 3-10-P (1985).
- 18. GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v OSM, Docket No. NX 1-146-P (1985).
- 19. Q & G COAL CO., INC. v OSM, Docket No. CH 1-200-P (1982).
- 20. L & R MINING CO., INC. v OSM, Docket No. CH 1-222-P (1982).
- 21. BLACK FOX MINING AND DEVELOPMENT CORP. v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 1985 EHB 172, Docket No. 84-114-G (April 29, 1985).
- 22. DRESSLER COAL CORP. v DIVISION OF RECLAMATION, slip op (Ohio Ct App 1984).
- 23. US v RAPOCA ENERGY CO., 613 F Supp 1161 (D C VA 1985).
- 24. US v DIX FORK COAL CO., 692 F2d 436, 13 ELR 20244 (6th Cir 1982).
- 25. INTERNATIONAL UNION v FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, 840 F2d 77 (D C Cir 1988).
- 26. ANNOTATION. "Who is 'operator' of coal mine within the meaning of the Federal Coal Mine Safety and Health Act (30 USCS Sec. 802(d))", 54 ALR Fed 792 (1989).
- 27. BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v OSM, 97 IBLA 285, IBLA 85-845 (1987).
- 28. BERNOS COAL CO. AND EXCELLO LAND AND MINERAL CORP. v LUJAN, 739 F Supp 1133 (ED Tenn 1990).
- F. ROY E. MEHAFFEY v OSM, 117 IBLA 350, IBLA 87-664 (1991).
- G. COALEX STATE INQUIRY REPORT - 131, "Individual liability of corporate officer, director or agent" (1989).
  - A. KY. REV. STAT. ANN. Sec. 350.990(9) (Michie/Bobbs-Merrill 1988).
  - B. 25 PA CODE Sec. 86.1 (1982). Protection of Natural Resources. Definitions.
  - C. POLICY STATEMENT OF THE DEPT. OF ENVIRONMENTAL RESOURCES: Civil Penalty Program (1985). Introduction.
  - D. RUDOLPH WILLIAMS (LAKE COAL CO., INC.) v. OSM, Docket No. NX 5-12-P (Sept. 23, 1986).
  - E. BERT BANKS (LAKE COAL CO.) v. OSM, Docket No. NX 5-14-P (Oct. 31, 1986).
  - F. GRUNDY MINING CO. AND TENNESSEE CONSOLIDATED COAL CO. v. OSM, Docket No. NX 1-146-P (June 14, 1985).



- G. BERNOS COAL CO. AND EXCELLO LAND MINERAL CORP. v. OSM, Docket Nos. NX 1-118-R and NX 3-10-P (July 26, 1985).
- H. U.S. v DIX FORK COAL CO., 692 F.2d 436 (6th Cir., 1982).
- I. WILFORD NIECE v OSM, Docket No. NX 5-2-P (Oct. 27, 1986).
- J. COLLEGE WATERCOLOR GROUP. INC. v WILLIAM H. NEWBAUER, INC, AND WILLIAM H. NEWBAUER, 468 Pa. 103, 360 A.2d 200 (Pa., 1976).
- K. ZUBIC v ZUBIK, 384 F.2d 267 (3rd Cir., 1967), cert. denied, 390 U.S. 988 (1968)./
- L. CHESTER-CAMBRIDGE BANK AND TRUST CO. v RHODES, 346 Pa. 427, 31 A.2d 128 (Pa., 1943).
- M. DONSCO, INC. v CASPER CORP., 587 F.2d 602 (3rd Cir., 1978).
- N. WICKS v MILZOCO BUILDERS, INC., 503 Pa 614, 470 A.2d 86 (Pa., 1983).
- O. U.S. v PARK, 421 U.S. 658 (1975).
- P. LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI v COMMONWEALTH OF PA., DEPT. OF ENVIRONMENTAL RESOURCES, 119 Pa. Commw. 440, 547 A.2d 447 (Pa. Commw. Ct., 1988).
- Q. DER v LUCKY STRIKE COAL CO. AND LOUIS J. BELTRAMI, EHB Docket No. 80-211-CP-W, slip op. (Pa. EHB, 1987).
- R. JOHN E. KAITES AND JOHNSTOWN COAL AND COKE, INC. v DER, 108 Pa. Commw. 269, 529 A.2d 1148 (Pa. Commw. Ct., 1987).
- S. JOHN E. KAITES, ET AL. v DER, Docket No. 84-104-G, slip op. (Pa. EHB, 1986).
- T. JOHN E. KAITES, ET AL. v DER, Docket No. 84-104-G, 1985 E.H.B. 625 (1985).

53 FR 38868 (OCTOBER 3, 1988). Final rule. Requirements for permit approval; ownership and control.

54 FR 8982 (MARCH 2, 1989). Final rule. Requirements for permit approval; ownership and control information; reporting of violations.

56 FR 45780 (SEPTEMBER 6, 1991). Proposed rules. Use of AVS; standards and procedures for ownership and control determinations.

COTEAU PROPERTIES CO. v DOI, 1995 U.S. App. LEXIS 10156 (8th Cir 1995).

U.S. STEEL MINING CO., INC. v OSM, 132 IBLA 216, IBLA 95-235 (1995).

JAMES SPUR, INC. v OSM, 133 IBLA 123, IBLA 93-633 (1995).

FINCASTLE MINING, INC. v Babbitt, 842 F Supp 204 (W.D. Va 1993).

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

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

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