



COALEX STATE INQUIRY REPORT - 115
June 2, 1989

Iris Skidmore, Esquire
Natural Resources and Environmental Protection Cabinet
Department of Law - 5th Floor
Capitol Plaza Tower
Frankfort, Kentucky 40601

TOPIC: EXEMPTION FOR GOVERNMENT-FINANCED CONSTRUCTION

INQUIRY:

Locate Interior's Office of Hearings and Appeals decisions which discuss the exemption from obtaining a mining permit when the extraction of coal is an incidental part of government-financed construction. SMCRA Sec. 528 (2) (formerly numbered Sec. 528 (3)). 30 CFR Part 707. 30 CFR Sec. 700.11.

SEARCH RESULTS:

Using the COALEX Library on LEXIS, a number of relevant Administrative Law Judge (ALJ) and appeals decisions from the Interior Board of Land Appeals (IBLA) and the Interior Board of Surface Mining Appeals (IBSMA) were identified. A list of the opinions and the topics they address follows. One relevant Federal Register entry was also identified. Copies of all materials are enclosed.

Sec. 528 (2) states:

"The provisions of this Act [SMCRA] shall not apply to any of the following activities:...(2) the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority."

30 CFR Sec. 707.5 provides definitions, quoted here in part, which form the criteria for determining the validity of exemptions from obtaining mining permits:

"Extraction of coal as an incidental part means the extraction of coal which is necessary to enable the construction to be accomplished."

"Government-financed construction means construction funded 50 percent from a government financing agency's budget or obtained from general revenue bonds, but shall not mean...in-kind payments."



The OHA decisions discussed below rule on the validity of Notice of Violations (NOVs) and Cessation Orders (COs) issued to mine operators for mining without a permit, failing to construct sedimentation ponds and other violations of surface mining regulations. The mine operators claimed exemptions under Sec. 528 of the Act and 30 CFR 700.11. With two exceptions, discussed at the end, all of the enclosed OHA decisions determined that the mine operators failed to meet one or more of the criteria listed above and, therefore, were not exempt from provisions of surface mining regulations. (For rulings on the specific NOVs and COs, see the enclosed decisions.)

The decisions are grouped according to the type of construction involved in each case.

AIRPORT CONSTRUCTION

WILDER COAL CO. v OSM, Docket No. NX 5-86-R (1987) [Virginia].

The ALJ determined that "the extraction of coal by the use of auger mining" was not necessary in order for the airport expansion project to be accomplished. "Necessary" was defined as "an engineering necessity, not an economic necessity." This distinction was made because, as one witness testified, the airport commission had "...encouraged [the] surface mining activity in order to produce revenues which were used to defray the costs of the airport improvements." Since Wilder Coal failed the first criterion (mining is "incidental"), the ALJ did not rule on the percentage of government financing of the construction.

CONCORD COAL CORP. v OSM, 3 IBSMA 92 (1981); CONCORD COAL CORP. v OSM, Docket Nos. CH 0-314-R, CH 0-335-R, CH 0-249-R (1980) [West Virginia].

The Board affirmed the ALJ's finding that the funds used to construct the airport "cannot be characterized as government funds". The Board determined that the Airport Authority was a "third party" to the coal lease, therefore, it did not "own the coal being mined by Concord" or the revenue being generated by the sale of the coal which was to "ultimately constitute the predominate source of compensation for the airport construction." The Board elaborated on the meaning of the phrase "the extraction of coal which is necessary to enable construction" by defining "necessity" as "a function of engineering--not cost--constraints."

ROAD CONSTRUCTION

LEROY SEXTON v OSMRE, Docket No. NX 7-89-R (1987) [Tennessee].

Here, the ALJ determined that the coal operator failed to meet the required criteria for an exemption: The use of contour surface mining was not required in rebuilding of the road. The ALJ felt that the rebuilding effort was a stratagem to engage in mining "without having to observe... reclamation responsibilities." Nor was the 50% government-financing criterion met: Neither the coal operator nor his contractor "received any monetary compensation". Recovery of operational expenses and any profit was to be derived from the "sale of the coal which they removed in the course of performing" the road construction.

LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-R (1985); LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-P (1982) [Kentucky].



In both hearings, the ALJs found that the county failed to "provide the required financing" for the construction of a county road. In the earlier hearing, the ALJ found that the building of the road was "incidental to the extraction of coal" -- the Little Goose company had built a road with a bench width of 100 feet, while a width of "only 40 feet was necessary to build a county road...." In addition, there was a "likelihood of significant imminent environmental harm to land, air or water resources" due to the lack of sediment control.

WEST VIRGINIA ENERGY, INC., 3 IBSMA 301 (1981); OSM v WEST VIRGINIA ENERGY, INC., 4 IBSMA 120 (1982); WEST VIRGINIA ENERGY, INC. v OSM, Docket Nos. CH 0-5-R, CH 0-11-R, CH 0-72-R, CH 0-63-P, CH 0-94-P (1980) [West Virginia].

The Board reversed the ALJ decision in finding that West Virginia Energy (Energy)'s road improvement project did not "fall within the definition of 'government-financed' construction." It determined that: "[a]lthough the State did provide some material to Energy and although it expended a considerable amount of effort on its part of the project, no State funds were used to complete Energy's part of the project."

In anticipation that it would be removing coal in the conduct of the road rehabilitation project, Energy had inquired whether a permit was necessary. The State replied: "...no permit was necessary insofar as there was an agreement covering the project and that there was a performance bond (which Energy had posted for completion)."

MOUNTAIN ENTERPRISES COAL CO. v OSM, Docket Nos. CH 1-88-R, CH 1-109-R (1981) [Virginia].

Under contract to the county, Mountain Enterprises relocated a road which OSM agreed improved "the quality of life in the area". The ALJ stated that: "the removal of the coal, under the circumstances, was necessary in order to obtain the quantity of material necessary to construct the relocated road."

However, the ALJ ruled that the county had "contributed no financing to the operation" and therefore, "the activities of [Mountain Enterprises] are subject to the Act...."

MISCELLANEOUS CONSTRUCTION

H.C. BOSTIC COAL CO. v OSM, Docket Nos. NX 4-78-R, NX 5-26-P (1986) [Virginia].

Bostic was given the right to "haul coal across school property" in return for "work in building [an elementary school] playground." The ALJ determined that the arrangement constituted an "in-kind payment" and "[t]hus, this project cannot be considered 'government-financed construction'...."

CLAYPOOL CONSTRUCTION CO. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979) [West Virginia].

Claypool Construction extracted coal in the process of transforming a previously mined area, which had become a dump site, into a trailer park. The ALJ found that: "[t]he mere fact that [Claypool] was improving the property while at the same time removing over 10,000 tons of coal



and selling it into commerce does not alter the requirement of the Act since the Act does not consider the beautification of real estate as an exemption."

CASES WITH CONTRARY FINDINGS

DENNIS R. PATRICK, 1 IBSMA 158 (1979) [Kentucky].

The Board held that Patrick, in a privately financed operation, did not require a strip mining permit to excavate coal in the process of creating a "level bench for a housing development", stating: "...under the initial regulatory program, OSM has no jurisdiction over a surface coal mining operation which occurs on state land and which is not subject to existing state regulation within the scope of any of the initial federal performance standards."

SQUIRE BAKER v OSM, Docket No. NX 9-25-R (1979) [Kentucky].

In the process of excavating basements of new homes in the area of previous deep mining, a coal seam was exposed. All work ceased while Squire Baker applied to Kentucky for a permit to remove and sell the coal. No coal was mined and there was no intention to mine without a permit, therefore, the ALJ ruled that Squire Baker had "done no act which is presently subject to the Surface Mining Control and Reclamation Act of 1977."

FEDERAL REGISTER ENTRY

On the April 25, 1988, Interior published its "Semiannual agenda of rules scheduled for review or development" (53 FR 13896). Interior announced that action to revise the "government-financed construction" exemption regulations relating to Abandoned Mine Lands programs was withdrawn.

ATTACHMENTS

- A. WILDER COAL CO. v OSM, Docket No. NX 5-86-R (1987).
- B. CONCORD COAL CORP. v OSM, 3 IBSMA 92 (1981).
- C. Concord coal corp. v OSM, Docket Nos. CH 0-314-R, CH 0-335-R, CH 0-249-R (1980).
- D. LEROY SEXTON v OSMRE, Docket No. NX 7-89-R (1987).
- E. LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-R (1985).
- F. LITTLE GOOSE COAL CO. v OSM, Docket No. NX 2-23-P (1982).
- G. WEST VIRGINIA ENERGY, INC., 3 IBSMA 301 (1981).
- H. OSM v WEST VIRGINIA ENERGY, INC., 4 IBSMA 120 (1982).
- I. WEST VIRGINIA ENERGY, INC. v OSM, Docket Nos. CH 0-5-R, CH 0-11-R, CH 0-72-R, CH 0-63-P, CH 0-94-P (1980).
- J. MOUNTAIN ENTERPRISES COAL CO. v OSM, Docket Nos. CH 1-88-R, CH 1-109-R (1981).
- K. H.C. BOSTIC COAL CO. v OSM, Docket Nos. NX 4-78-R, NX 5-26-P (1986).
- L. CLAYPOOL CONSTRUCTION CO. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979).
- M. DENNIS R. PATRICK, 1 IBSMA 158 (1979).
- N. SQUIRE BAKER v OSM, Docket No. NX 9-25-R (1979).



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

O. 53 FR 13896 (APRIL 25, 1988).