



## COALEX STATE INQUIRY REPORT - 287

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**TOPIC:** EXEMPTION FOR GOVERNMENT-FINANCED CONSTRUCTION (Updates COALEX REPORTS 115, 133 & 262)

**INQUIRY:** A city proposes to use a site which had previously been CO'd (for mining without a permit) as a public park and gym. The original operator will be the contractor. Is this site eligible for the government-financed construction exemption? Please locate federal, state and administrative decisions on operations exempted from SMCRA by meeting the government-financed construction criteria.

**SEARCH RESULTS:** The existing COALEX State Inquiry Reports on the exemption for government-financed construction were updated using the COALEX Library and LEXIS.

Two additional decisions were identified; these are listed below. The first decision, from the state court of Alabama is particularly relevant.

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### I. RESULTS OF ADDITIONAL RESEARCH

#### **DARTY DEVELOPMENT CO., INC. v OSMRE, 632 F Supp 627 (N D AL 1986).**

Darty leased land to the City of Carbon Hill for the purpose of constructing a recreational facility. The city contracted with Darty to undertake and complete the construction work, with the contracted price to be paid upon the completion of the construction. The court upheld OSM's issuance of a CO for mining without a permit, stating that the "exemption granted to Darty, by its terms, became null and void when the City of Carbon Hill failed to appropriate, from its budget, fifty-percent or more of the construction costs."

#### **KIMBLE v DIERINGER, 1991 Ohio App LEXIS 2229 (Ohio Ct App 1991).**



The state court affirmed the Reclamation Board of Review's finding that "Kimble's extraction of coal was incidental to a permitted highway project, and was therefore not a coal mining operations". Kimble cut the property down to grade so that electric, gas and water lines could be moved onto his property for the highway widening. The coal encountered had to be removed because it was above grade for drainage for the highway.

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## II. COALEX STATE INQUIRY REPORT - 262, "Non-commercial use of 'other minerals'" (1993).

Two decisions from this report relating to exemption for government-financed construction are listed below. Only these two decisions are attached.

### **VICTOR CONTRACTING CORP. v OSM; DICKENSON COUNTY, VA. v OSM, Docket Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, NX 91-26-R (1992).**

The ALJ upheld the Virginia Division of Mined Lands Reclamation determination that the Honeycamp Landfill project qualified for the government-financed construction exemption. The primary purpose of the project was to bring the landfill into compliance with new waste management regulations and to expand the landfill to increase its use for an additional 10 plus years. Removal of the previously mined coal beneath the ridge created greater stability and lessened possible leachate problems.

### **WILDER COAL CO. v OSM, 112 IBLA 107, IBLA 87-576 (1989).**

The Board affirmed the ALJ decision, finding that the augering of coal was performed in order to finance the grading the airport commission wished done and not because it was necessary to the construction of the airport. "Although the excavation down to the level of that seam may have been advisable as a means of assuring the stability of the surface, the extraction of the coal was not necessary to enable the construction of the airport facilities."

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## III. COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989).

The following are the descriptions of the materials included as part of the Report:

### **LEGISLATIVE HISTORY**

**119 CONG REC S1357 (daily ed. Jan. 18, 1973) (statement of Sen. Jackson).**



"This section [Surface mining operations not subject to the Act] provides specific exemptions for certain types of activities which might otherwise be construed to fall within the definition of 'surface mining operations' and thus be subject to the Act. Activities specifically excluded are (1) those which should not be included because the scope of their impact is so minor; (2) those which have a few characteristics in common to surface mining but which are primarily for other useful and, in some cases, public purposes; and (3) those which do not present the environmental or social costs which regulation under the Act would internalize. Neither the House-passed measure nor the committee-reported bill in the 92nd Congress provided this exemption. However, it is apparent that Federal legislation should not, because of ambiguity, address local conditions and the actions of individuals which have no national, State, or regional significance or which present no important questions of Federal or State policy."

"The exempted activities include:...Highway and railroad cuts and other excavations for public projects where the Federal, State or local government requires reclamation of the affected areas".

"The Secretary may identify other activities not subject to the Act and issue regulations further defining the exempted activities taking into consideration their magnitude (in tons and acres), their potential environmental impact, and whether the class, type, or types of activity are already subject to existing Federal, State, or local regulatory systems. In identifying and defining other exempted activities, the Secretary is expected to follow a rule of common sense. The purpose of the Act is to insure that social and environmental costs of surface mining are internalized by reclamation. Any activity which inflicts significant costs and which should be accompanied by reclamation should, of course, not be exempted. On the other hand, individual, non-commercial, extremely localized, activities which do not cause environmental damage should be exempted not only to insure fairness but also to relieve the administrative burden of the regulatory authorities so that the authorities can concentrate on those activities which truly require careful regulation."

**Regulation of Surface Mining, HEARINGS on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess (April, 1973).**

1. Statement of Dr. Darnell Whitt, Deputy Administrator for Field Services, Soil Conservation Service, from page 852. Included among the activities which "may be exempted" under these versions of the Act are: "Excavations by a governmental agency or its authorized contractors for highway and railroad cuts and fills."
2. Statement of Frank C. Wachter, National Industrial Sand Association, from page 1189. "[T]he wording of the subparagraph...[regarding exempt excavations] appears to create a competitive inequity in the construction aggregates industries by creating an exempt category of aggregate producers...who apparently can avoid the cost of



reworking the excavated land. We suggest the following for clarification of what appears to us to be ambiguous wording: '(2) excavations by an agency of Federal, State or Local government or its authorized contractors for highway and railroad cuts if the Federal, State or Local government requires reclamation of the area affected.'

**Surface Mining Control and Reclamation Act of 1977, S REP No 95-128, 95th Cong, 1st Sess 98 (May 10, 1977).**

"This section [Surface mining operations not subject to this Act] provides specific exemptions for three types of coal surface mining which would otherwise be subject to the Act.

"These are (1) the extraction of coal by a landowner for his own noncommercial use from land owned or leased by him, (2) the extraction of coal where surface mining affects 2 acres or less, and (3) extraction of coal in the process of highway or other construction.

"The Committee felt that these three classes of surface mining cause very little environmental damage and that regulation of them would place a heavy burden on both the miner and the regulatory authority."

**Surface Mining Control and Reclamation Act of 1977, HR REP No 95-493, 95th Cong, 1st Sess 112 (July 12, 1977).**

"The Senate amendment...included an exemption for all construction. The conferees agreed to a modified version of the Senate amendment which limits the exemption to extraction of coal as an incidental part of government-funded construction only, rather than all construction as originally provided in the Senate language."

**IBSMA DECISIONS**

**HARDLY ABLE COAL CO., 2 IBSMA 270, IBSMA 80-31 (1980).**

Hardly Able received a Notice of Violation (NOV) for mining within 100 feet of a county road. (They subsequently applied for and received a waiver of the 100-foot rule.) In the validity of the NOV, the Board concluded: "The Act contemplates that a miner obtain permission from the regulatory authority to mine within 100 feet of a public road before the mining takes place. The ex post facto approval by the regulatory authority of mining within 100 feet of a county road generally defeats the purpose of the Act, that is, giving interested parties notice allowing them to protest before the actual mining takes place."

**ALABAMA BY-PRODUCTS CORP. V OSM, 1 IBSMA 239, 86 I.D. 446 (1979).**



The Board ruled that the regulatory authority's approval of an exemption under the Act or regulations (the use of alternative materials in place of topsoil) must be obtained prior to the start of any action to which the exemption applies.

## **FEDERAL DECISIONS**

### **MONONGAHELA POWER CO. v MARSH, 809 F2d 41 (D D C 1982).**

The Appeals Court reversed the District Court ruling and determined that the Monongahela Power was required to obtain a permit from the Army Corps of Engineers in order to "discharge fill material into navigable waters during construction of a hydroelectric facility previously licensed by the Federal Power Commission."

"Section 404 [of the Clean Water Act] transmits a crisp and unwavering message: all significant discharges, whether or not exempt from the permit requirement, must be subjected to Section 404(b)(1) scrutiny or its equivalent."

## **FEDERAL REGISTER ENTRIES**

### **53 FR 5430 (FEBRUARY 24, 1988).**

This is a notice of reopening of the comment period on proposed regulations pertaining to the "exemption for coal extraction incidental to the extraction of other minerals", SMCRA Sec. 701(28), 30 CFR Part 702.

"Under Sec. 702.11(a), new operations would be required to file a complete application for exemption which would require an administrative decision by the regulatory authority before the operator would be allowed to commence coal extraction based upon the exemption. Requiring operators to apply for and receive exemptions is a procedure OSMRE successfully used earlier with regard to the special small operator exemption in 30 CFR 710.12."

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IV. COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).

The following are the descriptions of the materials included as part of the Report:

## **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.

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### **ATTACHMENTS**

1. DARTY DEVELOPMENT CO., INC. v OSMRE, 632 F Supp 627 (N D AL 1986).
2. KIMBLE v DIERINGER, 1991 Ohio App LEXIS 2229 (Ohio Ct App 1991).
3. COALEX STATE INQUIRY REPORT - 262, "Non-commercial use of 'other minerals'" (1993).
  - A. VICTOR CONTRACTING CORP. v OSM; Dickenson County, VA. v OSM, Docket Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, NX 91-26-R (1992).
  - B. WILDER COAL CO. v OSM, 112 IBLA 107, IBLA 87-576 (1989).
  
4. COALEX STATE INQUIRY REPORT - 133, "Exemption for government-financed construction" (1989). [with attachments]
  - A. Excerpts from 119 CONG REC S1357 (daily ed. Jan. 18, 1973)(statement of Sen. Jackson).



- B. Excerpts from Regulation of Surface Mining, HEARINGS on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 852 (April, 1973)(statement of Dr. Darnell Whitt, Deputy Administrator for Field Services, Soil Conservation Service).
- C. Excerpts from Regulation of Surface Mining, HEARINGS on HR 3 (and related bills) before the Subcommittee on the Environment and the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, 93rd Cong, 1st Sess 1189 (April, 1973)(statement of Frank C. Wachter, National Industrial Sand Association).
- D. Excerpts from Surface Mining Control and Reclamation Act of 1977, S REP No 95-128, 95th Cong, 1st Sess 98 (May 10, 1977).
- E. Excerpts from Surface Mining Control and Reclamation Act of 1977, HR REP No 95-493, 95th Cong, 1st Sess 112 (July 12, 1977).
- F. HARDLY ABLE COAL CO., 2 IBSMA 270, IBSMA 80-31 (1980).
- G. ALABAMA BY-PRODUCTS CORP. v OSM, 1 IBSMA 239, 86 I.D. 446 (1979).
- H. Excerpts from MONONGAHELA POWER CO. v MARSH, 809 F2d 41 (D D C 1982).
- I. 53 FR 5430 (FEBRUARY 24, 1988). Notice of reopening of public comment period on all issues of "Exemptions for Coal Extraction Incidental to the Extraction of Other Mineral", 30 CFR 702.
- J. COALEX STATE INQUIRY REPORT - 115, "Exemption for government-financed construction" (1989).
  - 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. CLAYPOOL CONSTRUCTION CO. v OSM, Docket Nos. CH 9-9-R, CH 9-22-R (1979) ,/
  - L. DENNIS R. PATRICK, 1 IBSMA 158 (1979)
  - M. SQUIRE BAKER v OSM, Docket No. NX 9-25-R (1979)
  - N. 53 FR 13896 (APRIL 25, 1988)