



COALEX STATE INQUIRY REPORT - 164

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TOPIC: RIGHT OF ENTRY INFORMATION IN PERMIT APPLICATIONS

INQUIRY: In the application for a mining permit, an operator listed a pending lease as the document substantiating his right to enter and begin mining operations. The pending lease is now in dispute. What legal documents do other states require to prove right of entry? Do other states require proof of the right of entry for the entire permitted area or for each increment as it is mined?

SEARCH RESULTS: Research was conducted using the COALEX Library in LEXIS. Most state statute sections identified generally follow the language found in SMCRA Section 507(b)(9) and 510(b)(6); state regulations follow the language found in 30 CFR Section 778.15. The states require a description of the type of document on which the legal right to enter is based to be included along with the date of execution and "the land to which [the documents] pertain"; however, none of the state statutory and regulatory materials found in COALEX listed specific types of documents accepted as proof of the right of entry.

Some states refer to providing documentation for "tracts" or "lands within the permit area" where the private mineral estate to be mined is severed from the private surface estate; however, no materials were found which differentiate documentation requirements for the entire permitted area versus portions or increments to be mined. One statute section (from Louisiana) was identified which states that, with certain provisos, a permit may not be denied because right of entry consent for a portion of the permitted area has not been finalized at the time the application is filed.

The research findings are discussed below. Copies of relevant sections are attached, as indicated.

Included with this report are these additional materials:

Three cases: An Interior Board of Land Appeals (IBLA) decision, the Administrative Law Judge (ALJ) opinion from which it was appealed, and a Montana State Supreme Court case which rule on right of entry questions.

Three IMCC Reports: These reports on subsidence issues include discussions of state right to mine and right of entry regulations.



Legislative History materials: Excerpts from two congressional hearings and a report are included for general background information.

Federal Register notices: Excerpts from preambles for amendments to Illinois and Pennsylvania permanent programs which discuss the states' right of entry regulations.

[NOTE: State program materials in COALEX are current through mid-1989. ALSO NOTE: An asterisk following the state name indicates that a copy of the statute or regulation section for that state is attached.]

STATE STATUTES

Statute sections for these states are identical or substantially similar to permit application language found in SMCRA Section 507(b)(9), requiring "the source", "the description", or "a statement of the legal right to enter":

1. Alabama
2. Colorado
3. Indiana
4. Louisiana
5. Missouri
6. New Mexico
7. Texas*
8. Utah
9. Virginia*
10. West Virginia

North Dakota* and Ohio* statutes require that "copies of documents upon which the permit applicant bases his legal right to enter and commence coal mining operations" must be included with the permit application.

The Louisiana* statute section corresponding to SMCRA Section 510 (b)(6) [the severance of the private mineral estate from the private surface estate] requires the applicant to provide documentation stating legal right to enter for the "tracts within the permit area". The same section states that a permit may not be denied if the applicant does not have the legal right to enter "all tracts of land within the permit area" at the time the application is filed, provided (1) that the permit area can be mined "without mining of the tracts on which the applicant does not have the legal right to enter"; and (2) the permittee notifies the commissioner when the legal right to enter has been obtained.

[NOTE: State sections corresponding to SMCRA Sec. 510(b)(6) are included only when they specifically address "right to enter" or "right of entry".]



STATE REGULATIONS

30 CFR 778.15 Right of Entry Information applies to applications for both surface and underground operations. Section 782.15, which applied solely to underground operations, was removed September 28, 1983 (48 FR 44344) [Excerpt attached].

Regulations of the following states are identical or substantially similar to the right of entry information requirements found in Section 778.15:

1. Alaska*
2. Kansas
3. Virginia

Regulations of these states are substantially similar to the federal section except that they state that, for severed mineral estates, the application must include the required documentation "for lands to be affected by those operations within the permit area":

1. Alabama
2. Arkansas
3. Colorado*
4. Illinois*
5. Indiana*
6. Iowa
7. Kentucky
8. Louisiana
9. Maryland*
10. Mississippi
11. Missouri
12. Montana
13. New Mexico
14. Ohio
15. Oklahoma
16. Pennsylvania*
17. Texas
18. Utah

Illinois and Indiana applicants may substitute a notarized statement in place of copies of certain documents.

North Dakota* requires the permit application to "contain a narrative and supporting certified copies of the appropriate documents".

ALJ AND IBLA DECISIONS

TURNER BROTHERS, INC. v OSM, Docket No. TU 4-40-R (1985).



Turner Brothers was cited for permitting an area it did not have the right to mine: it did not list a particular landowner in the permit package nor did it reference the fact that the right to enter and mine that landowner's property was under negotiation. In affirming the validity of the notice of violation (NOV), the ALJ agreed with OSM that the violation first existed when Turner Brothers submitted its permit application and would continue until a permit revision was processed.

TURNER BROTHERS v OSM, 92 IBLA 381, IBLA 85-529 (1986).

The Board affirmed the ALJ's decision, stating that the "appellant was correctly cited for failure to document changes in its permit." OSM admitted it "did not consider it necessary to have a lease to all lands in a permit application," so long as OSM was aware of the status of the lands included in the application. Turner Brothers failed "to indicate anywhere in its permit application it was negotiating for the right to mine part of the permit property" and then failed to delete the property from its permit when lease negotiations failed.

STATE CASE

WESTERN ENERGY CO. v GENIE LAND CO. AND MONTANA DEPT. OF STATE LANDS, 227 Mont 74, 737 P2d 478 (Mont 1987).

Western Energy's coal lease provided it with the right to enter and use the surface to operate its coal mine. Genie, citing to Montana's Owner Consent Statute which requires a waiver by the surface owner to enter and begin mining, refused to give its consent. The court found the Owner Consent Statute unconstitutional, concluding that "the denial of just compensation place[d] an unreasonable burden on the mineral owners, in violation of due process."

LEGISLATIVE HISTORY

Surface Mining Control and Reclamation Act of 1997, Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong, 1st Sess 193 (1977) (statement of Steven L. Friedman, Counsel, Pennsylvania Coal Mining Association).

The suggested amendment to what became SMCRA 507(b)(9) would have changed the highlighted phrase: "Evidence of the applicant's right to enter and commence surface mining operations on the area affected" to "area to be bonded only".

Surface Mining Control and Reclamation Act of 1977, Hearings on HR 2 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong, 1st Sess 310 (1977) (statement by John C. Doyle, Jr., Environmental Policy Institute).

In reporting on its review of 28 state strip mining statutes, the Environmental Policy Institute stressed the importance of written findings in the permit review process after "careful scrutiny" of such factors as right of entry, plan of reclamation, etc.



"The reviewing authority should also make a written finding from the permit application that the operator has the clear legal right to mine through a surface estate to extract near-surface coal resources, and that all legal surface-owner rights will be upheld and honored, or in the alternative, that such rights have been clearly adjudicated by the courts before strip mining is permitted."

Surface Mining Control and Reclamation Act of 1976, HR Rep No 95-218, 95th Cong, 1st Sess 156 (1977).

The House Committee on Interior and Insular Affairs recommended that "in all cases a permit applicant should demonstrate the legal right to enter and mine all portions of the area covered by the application."

ATTACHMENTS

- A. TEXAS: Sec. 14. Contents of Permit Application. Surface Coal Mining and Reclamation Act, Texas Legislative Service, H B 1424 (1979).
- B. VIRGINIA: Sec. 45.1-181. Chap. 16. Permits for Certain Mining Operations. Va. Code Ann. (1980) and Cumulative Supplement (1979).
- C. NORTH DAKOTA: Sec. 38-14.1-14. Permit Applications. N.D. Cent. Code (1985).
- D. OHIO: Sec. 1513.07. Permits. Coal Mining and Reclamation Law [as amended by the 115th General Assemble of the State of Ohio, Sec. 1] (1985).
- E. LOUISIANA: Sec. 910 Permit Approval or Denial. La. Surface Mining and Reclamation Act, tit. 30 (1980).
- F. Excerpts from 48 FR 44344 (SEPTEMBER 28, 1983). Final Rule.
- G. ALASKA: 11 AAC 90.025 (1982). General Permit Application Information Requirements. Authority to Enter. [AAC = Alaska Administrative Code]
- H. COLORADO: Sec. 2.03.6. Application for Permit; Right of Entry and Operation Information. Rules and Regulations of the Colorado Mined Land Reclamation Board Pursuant to the Colorado Surface Coal Mining Reclamation Act (1982).
- I. ILLINOIS: Sec. 1778.15. Permit Applications. Right of Entry Information. Ill. Admin. Code tit. 62 (1986).
- J. INDIANA: Sec. 310 IAC 12-3-21 (1982). Permitting Procedures. Right of Entry and Operation Information. [IAC = Indiana Administrative Code]
- K. MARYLAND: Sec. 08.13.09.02. Permit Applications. General Requirements. Code of Md. Regs. (1985).
- L. PENNSYLVANIA: Sec. 86.64. Permits. Right of Entry. Pa. Dept. of Environmental Resources Coal Mining Regs. (1982).
- M. NORTH DAKOTA: Sec. 69-05.2-06-03. Permit Applications. Right of Entry and Operation Information. N. D. Rules Governing the Reclamation of Surface-Mined Land, as revised June, 1983.
- N. TURNER BORTHERS, INC. v OSM, Docket No. TU 4-40-R (1985).
- O. TURNER BROTHERS v OSM, 92 IBLA 381, IBLA 85-529 (1986).
- P. WESTERN ENERGY CO. v GENIE LAND CO. AND MONTANA DEPT. OF STATE LANDS, 227 Mont 74, 737 P2d 478 (Mont 1987). Q. Excerpts from Surface Mining



Control and Reclamation Act of 1997, Hearings on S. 7 before the Subcommittee on Public Lands and Resources of the Senate Committee on Energy and Natural Resources, 95th Cong, 1st Sess 193 (1977) (statement of Steven L. Friedman, Counsel, Pennsylvania Coal Mining Association).

- Q. Excerpts from Surface Mining Control and Reclamation Act of 1977, Hearings on HR 2 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 95th Cong, 1st Sess 310 (1977) (statement by John C. Doyle, Jr., Environmental Policy Institute).
- R. Excerpts from Surface Mining Control and Reclamation Act of 1976, HR Rep No 95-218, 95th Cong, 1st Sess 156 (1977).
- S. COALEX STATE INQUIRY REPORT - 101, "Permit Information re. the Right to Subside" (1988).
- T. COALEX SIGNIFICANT ISSUE REPORT - 116, "Subsidence: An Oversight of Significant Issues" (1989).
- U. COALEX SIGNIFICANT ISSUE REPORT - 151, "Subsidence: An Oversight of Significant Issues" (1990).
- V. 55 FR 6647 (FEBRUARY 26, 1990). Pa. Program Proposed Rule.
- W. 52 FR 26300 (JULY 14, 1987). Pa. Program Final Rule.
- X. 53 FR 43112 (OCTOBER 25, 1988). Ill. Program Final Rule.