COALEX STATE INQUIRY REPORT – 155
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TOPICS: LANDS UNSUITABLE FOR MINING AND VALID EXISTING RIGHTS IN A SEVERED MINERAL SITUATION

INQUIRY: An operator, in possession of a deed dating back to 1924, is conducting underground coal mining within 300 feet of an occupied dwelling without permission of the surface owner. What are the options for enforcement? Please locate administrative decisions and federal or state cases which address this issue.

SEARCH RESULTS: Using the COALEX Library and the other materials available in LEXIS, a number of relevant decisions were identified. These are discussed below. Copies are attached.

INTERIOR ADMINISTRATIVE DECISIONS

RONALD JOHNSON, 5 IBSMA 19, IBSMA 80-86-1 (1983).

The Board affirmed OSM's decision that Peabody Coal Company had valid existing rights (VER) to conduct surface coal mining operations within 300 feet of two occupied dwellings owned by Johnson. On August 3, 1977, Peabody had a "legally binding conveyance" and all required permits to conduct surface coal mining operations on lands "immediately adjacent to an ongoing surface coal mining operation". Although the conveyed deed did not specify Peabody's right to surface mine, the Board "assume[d] the requisite authorization to surface mine coal, in the absence of language to the contrary". In addition, the landowner knew he was selling both surface and mineral estates to a coal company.

GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, Docket No. CH 2-50-R (1988 [Amends 1984 and 1986 Orders]).

Gateway constructed a portal within 300 of an occupied dwelling and within 100 feet of a state road. The Administrative Law Judge ruled that Gateway did not have VER to construct the portal: (1) As of August 3, 1977, Gateway was in the process of negotiating a lease ("Mere expectancies of a right to conduct surface coal mining operations do not equate to those property rights which must be vested, or existing, in character."); and (2) as of August 3, 1977, Gateway did not have all of the permits it needed to begin construction of the portal.

STATE DECISIONS

WILLOWBROOK MINING CO. v COMMONWEALTH OF PENN., DEPT OF ENVIRONMENTAL RESOURCES, 92 Pa Commw 163, 499 A 2d 2 (Pa Commw Ct 1985)

The court affirmed the Pennsylvania EHB's decision upholding DER's denial of Willowbrook's request for a variance in order to surface mine within 300 feet of an occupied dwelling. Willowbrook did not meet the 1979 "all permits" test - the controlling definition of VER. In addition, the court ruled that although the Pennsylvania Surface Mining Act was "an exercise of state police power", Willowbrook failed "to carry its burden of proving the statute unduly oppressive....[T]he statute did not result in an unconstitutional taking of Willowbrook's property".

COGAR et al. v FAERBER AND SPRING RIDGE COAL CO., 371 SE 2d 321 (W Va 1988).

The appellate court reversed the lower court and Reclamation Board of Review decisions in ruling that Sandy Spring did not have VER, which, according to the West Virginia Code, required an operator to have "completed its portion of the application process for all the necessary state and federal permits" by August 3, 1977. Spring Ridge had requested a modification to its permit to allow new openings to the underground mine which were within 100 feet of a public road and 300 feet of occupied dwellings. The court found that "[s]imply obtaining a lease of mineral rights to an area does not confer [VER] upon an operator....We require more than simply obtaining a mineral lease to constitute 'substantial legal and financial commitments' as contemplated by the [state] statute."

COGAR et al. v SOMMERVILLE, SPRING RIDGE COAL CO., INC., AND PARDEE & CURTIN LUMBER CO., 379 SE 2d 764 (W Va March, 1989).

This case involves some of the same parties as that immediately above. Here, Spring Ridge contended that the broad form waivers contained in 1907 and 1914 severance deeds were valid under SMCRA and would allow Spring Ridge to obtain a permit to mine less than 300 feet from an occupied building. The court determined that "the old severance deed waived only surface damages and did not authorize mining operations within three hundred feet of an occupied dwelling." The waiver contemplated in federal law and regulations is one which is "knowingly made by the owner and which specifies the distance from the occupied dwelling where mining operations may take place."

EVANGELINOS v DIV. OF RECLAMATION, Case No. 88-B-12, 1989 Ohio App LEXIS 3618 (Ohio Ct App September, 1989).

The court affirmed prior rulings in finding that the deed signed in 1965 "constituted a waiver of the restriction against mining within three hundred feet of an occupied dwelling." The deed provided a "legal description" of the property and "included provisions for the removal of structures" in order to permit mining.

RUSSELL v ISLAND CREEK COAL CO. AND FAERBER, No. 19104, 1989 W Va LEXIS 986 (W Va December, 1989); rehearing refused February, 1990.

In a 1972 deed, Russell conveyed the right to surface mine an adjacent tract to Island Creek. The conveyance contained a waiver of liability for damages to the spring located on Russell's tract. The court ruled that the West Virginia Code which "specifically permits owners of an interest in real property to waive their private water rights" is "consistent with the parallel federal provision". An owner who "knowingly waived the requirement that the water supply be replaced" may not maintain "a private cause of action seeking money damages and equitable relief because of a violation" of the West Virginia Code which regulates private water rights.

ATTACHMENTS

A. RONALD JOHNSON, 5 IBSMA 19, IBSMA 80-86-1 (1983).
B. GATEWAY COAL CO. v OSM, STOUT, INTERVENOR, Docket No. CH 2-50-R (1988 [Amends 1984 and 1986 Orders]).
C. WILLOWBROOK MINING CO. v COMMONWEALTH OF PENN., DEPT OF ENVIRONMENTAL RESOURCES, 92 Pa Commw 163, 499 A 2d 2 (Pa Commw Ct 1985)
D. COGAR et al. v FAERBER AND SPRING RIDGE COAL CO., 371 SE 2d 321 (W Va 1988).
E. COGAR et al. v SOMMERVILLE, SPRING RIDGE COAL CO., INC., AND PARDEE & CURTIN LUMBER CO., 379 SE 2d 764 (W Va March, 1989).
F. EVANGELINOS v DIV. OF RECLAMATION, Case No. 88-B-12, 1989 Ohio App LEXIS 3618 (Ohio Ct App September, 1989).
G. RUSSELL v ISLAND CREEK COAL CO. AND FAERBER, No. 19104, 1989 W Va LEXIS 986 (W Va December, 1989); rehearing refused February, 1990.