

**Editor's note: Appealed, Civ.No. 88-C-281-E; aff'd, (ND Okla. Sept. 29, 1989); (settled Oct. 22, 1990) stipulated dismissal No. 89-5187 (10th Cir. Nov. 23, 1990)**

McNABB COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-1559      Decided March 15, 1988

Appeal from a decision of Administrative Law Judge Michael L. Morehouse vacating Cessation Order No. 85-03-257-1. TU 6-34-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Generally--  
Surface Mining Control and Reclamation Act of 1977: Variances and  
Exemptions: Generally

In order to qualify for an exemption under the terms of sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1291(28)(A) (1982), the extraction of coal must be both incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale.

2. Surface Mining Control and Reclamation Act of 1977: Generally--  
Surface Mining Control and Reclamation Act of 1977: Variances and  
Exemptions: Generally--Surface Mining Control and Reclamation Act  
of 1977: Words and Phrases

"Incidental." The extraction of coal is not incidental to the extraction of other minerals where the mining of coal is essential to the economic viability of the mine; the coal is the deepest strata mined for commercial use or sale; the acreage of the shallower deposits extracted for commercial use or sale is less than 50 percent of the acreage of the coal deposit extracted; the acreage of the mineral deposit immediately above the coal seam extracted is less than 5 percent of the acreage of coal extracted; and the decision to mine the deposit immediately above the coal is based on the decision to mine the coal.

APPEARANCES: Ken Ray Underwood, Esq., Tulsa, Oklahoma, for McNabb Coal Company; Dianne M. Shawley, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Thomas J. McGeady, Esq., Vinita, Oklahoma, for intervenors, Oklahoma Wildlife Federation, Anchor Industries, Inc., Tulsa Rock Company and Sweetwater Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Office of Surface Mining Reclamation and Enforcement (OSMRE) appeals from a July 23, 1986, decision of Administrative Law Judge Michael L. Morehouse. In the decision, rendered subsequent to a hearing held April 2 and 3, 1986, Judge Morehouse vacated Cessation Order (CO) No. 85-03-257-1, issued by OSMRE to McNabb Coal Company (McNabb) on December 17, 1985, for conducting surface coal mining operations without a valid permit in violation of §§ 771.11 and 771.19 of the Oklahoma Permanent Regulatory Program Regulations. <sup>1/</sup> In vacating the CO, Judge Morehouse found that McNabb was exempt under section 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1291(28)(A) (1982), from the permitting requirements of SMCRA.

The basis for Judge Morehouse's decision was twofold. First, he found that limestone was the primary mineral sought by McNabb in the cited mining operation and, hence, that the production of coal was incidental to the operation. Secondly, he recognized, as stipulated by the parties, that the coal extracted constituted less than 16-2/3 percent of the tonnage of minerals extracted for purposes of commercial use or sale.

In the statement of reasons for appeal, OSMRE asserts the Administrative Law Judge committed prejudicial error when he excluded the testimony of appellant's expert regarding the acreage of the different mineral deposits extracted in the mining operation. Further, appellant contends Judge Morehouse improperly construed the term "incidental" when considering whether the extraction of coal was incidental to the mining of other minerals in the operation. OSMRE contends the record shows that mining of the coal was an essential part of the operation and, hence, was not incidental. McNabb argues in its answer that the testimony of OSMRE's expert witness was properly excluded as irrelevant and the decision of the Administrative Law Judge is supported by the record.

A petition to intervene as appellants in this case, challenging the finding of the Administrative Law Judge that the production of coal was incidental to this mining operation, was filed on behalf of the Oklahoma

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<sup>1/</sup> At the time of issuance of the CO, OSMRE had the responsibility for enforcing the Oklahoma Permanent Regulatory Program pursuant to a finding by the Secretary of the Interior after a hearing under the terms of sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), that the State was unable to adequately enforce the State program. 49 FR 14674-688 (Apr. 12, 1984); see 30 CFR 936.17 (1984).

Wildlife Federation, Anchor Industries, Inc., Tulsa Rock Company, and Sweet-water Coal Company. <sup>2/</sup> Petitioners assert that they are, respectively, a nonprofit corporation seeking to protect the quality of the environment; two local corporations engaged in the production and sale of limestone products; and an Oklahoma corporation engaged in the production and sale of coal. In support of intervention, petitioners assert that McNabb's selling price for limestone produced from the mine is substantially below the cost of production since it does not need to derive a profit from the limestone operations because they are incidental to the coal mining operations.

McNabb objected to the petition, contending it would be prejudiced by allowing intervention after the hearing in this case in that it would be deprived of the opportunity to cross-examine witnesses and to rebut evidence. OSMRE did not object to the petition, but asserted that review should be limited to the facts presented at the hearing. By order dated January 6, 1987, the Board granted the petition for intervention, noting, with respect to the question of new evidence on appeal, that allegations of a factual or evidentiary nature made after a hearing are ordinarily not considered except for the limited purpose of determining whether a further hearing is required to resolve the case on appeal.

It appears from the record established in this case <sup>3/</sup> that McNabb has been mining coal in Oklahoma since early in this century (Exh. G-47 (McNabb Deposition) at 115-116; II Tr. 216, 270-271). Virgil Tipton, who came to work for McNabb in 1978, testified that coal operations at the subject site began in 1978 or 1979 (II Tr. 217). Operations at the mine at issue here were initially conducted under a permit issued pursuant to SMCRA by the Oklahoma Department of Mines (ODOM) which had the authority to issue permits under the Act (Exh. G-47 at 116; II Tr. 217).

<sup>2/</sup> Petitioners were not participants in the proceedings before Judge Morehouse. After filing a citizen's complaint (Exh. G-25, attachment 2) they did seek relief as plaintiffs in a lawsuit filed pursuant to sec. 520 of SMCRA, 30 U.S.C. | 1270 (1982), against OSMRE and McNabb in U.S. District Court, Northern District of Oklahoma. By orders dated July 14, 1986, and Aug. 6, 1986, respectively, the District Court dismissed the suit against OSMRE on the ground it had taken action to enforce SMCRA in issuing a CO on Dec. 17, 1985, and judicial review was premature in the absence of a final administrative decision; and, further, rendered judgment for McNabb on the ground of failure to show a violation of any regulation or permit (Exhs. D and E to Intervenors' Brief). Oklahoma Wildlife Federation v. Hodel, 85-C-964-C (N.D. Okla. Jul. 14, 1986). Intervenors indicate that they have appealed these rulings to the 10th Circuit.

<sup>3/</sup> The record in this case includes two hearings: the Dec. 30, 1985, hearing on McNabb's application for temporary relief from the CO pending a full hearing on the merits (which relief was granted by Judge Morehouse) and the April 1986 hearing on the merits. References to the hearing transcripts are prefaced by a I and II for the respective hearings. The record also includes responses to interrogatories and requests for admissions as well as several depositions.

Tipton testified that shortly after he came to work for McNabb in 1978 he "was instructed to conduct a feasibility study for the implementation of quarrying operations" (II Tr. 199). In early 1980, McNabb began obtaining the equipment required to produce the noncoal minerals, including crushers, screens, conveyors, dozers, scrapers, loaders, and trucks (II Tr. 202-203, 206). Commercial operations commenced in the summer of 1981 with the first sales in September (II Tr. 206). Since 1980, deposits at the mine site extracted for commercial use or sale have included limestone and shale, as well as coal (Exh. G-47 at 12-13). In November 1981 McNabb obtained from ODOM permits to mine noncoal minerals (rock, slate, and shale) from the coal mine site (II Tr. 205, Exhs. R-5 and 6). For a period of time McNabb operated the mine under both coal and noncoal permits for the same land (II Tr. 214). Subsequently, after the tonnage of coal produced dropped below 16-2/3 percent of the total production, McNabb requested that the coal permits be cancelled, which ODOM did on June 7, 1983 (II Tr. 215-216, Exhs. G-7 and 8).

Steve Martin, an OSMRE reclamation specialist who was conducting a routine oversight inspection at the mine site on June 1, 1983, testified at his deposition that he first learned of the claimed exemption from talking with Frank McNabb and Tipton on the occasion of that inspection (Exh. G-41 at 8). Thereafter, on June 13, 1983, OSMRE issued a 10-day notice to ODOM raising the issue of whether McNabb was improperly mining coal without a valid coal mining permit. ODOM responded to the notice in late June 1983, stating:

Section 742.2.49a of the Oklahoma Coal Reclamation Act states that the definition of "surface mining activities" does not include "the extraction of other minerals where coal does not exceed sixteen and two-thirds percent (16 2/3%) of the tonnage of materials removed for the purposes of commercial use or sale". The definition of "other minerals", as found in Section 742.2.27, means "clay, stone, sand, gravel, metalliferous and nonmetal-iferous ores, and any other solid material or substances of commercial value excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form".

McNabb Coal Company has had a limestone mining permit from the Department of Mines for the past two years, and has purchased sophisticated equipment to process this material for commercial sale. This company will be removing limestone from both above and beneath the seam of coal for commercial sale; in this manner fulfilling the requirement that the coal removed be incidental to other mineral mining activities.

During the month of May 1983, the tonnage of coal removed by this company was under the 16 2/3% ratio; the Department will closely monitor the production of limestone and coal through the monthly production reports submitted the Department. Should any trend develop in which the 16 2/3% ratio of coal tonnage is exceeded, the Department will take necessary steps to reevaluate

whether a coal permit will again be required. OSM is invited to examine all production reports relating to this company to assure itself that the requirements of the law are being fulfilled.

(Exh. G-2).

Upon receipt of the ODOM reply, OSMRE initiated an audit of the McNabb operations which showed that McNabb's coal production had in fact dropped to less than 16-2/3 percent of the tonnage of all minerals McNabb was producing (II Tr. 294-95). In a letter dated December 14, 1983, the OSMRE Tulsa Field Office Director told ODOM that "OSM's audit conclusions favor the McNabb exemption as it presently exists" (Exh. G-13).

By letter dated August 20, 1984, intervenors herein filed a citizen's complaint with OSMRE regarding the McNabb operation and requested an inspection of the operation (Exh. G-25, attachment 2). Intervenors alleged in essence that the coal mining operation at McNabb's mine was not "incidental" to limestone quarrying activities in view of several factors, including the fact that the coal seam lay as much as 40 feet below the limestone deposit and that the gross revenues from coal sales were projected to be three to four times gross revenues from limestone sales. In response to the complaint, an inspection of the mine site was made (Exh. G-9).

Thereafter, by letter dated December 3, 1984, the Assistant Director of OSMRE required ODOM to immediately review the McNabb exemption. The letter stated in part:

The Oklahoma Department of Mines (ODOM) has apparently taken action with respect to the McNabb permits in violation of Section 700.11(c) of the ODOM regulations. ODOM released coal permits on portions of McNabb's operation in June 1983, without sufficient documentation of evidence to support McNabb's claim that coal was being mined incidental to the mining of limestone. Based upon the available information, OSM has reason to believe that McNabb's coal extraction is not an "incidental" part of its limestone operation.

The incidental mining exemption, found in ODOM regulations at Section 700.11(c), exempts operations from the requirement of the Oklahoma statute if the operations extract coal "incidental to the extraction of other minerals, where the extraction of coal does not exceed 16 2/3 percent of the tonnage of minerals removed for purposes of commercial use or sale \* \* \*." The operator has the burden of meeting both parts of this two-part test to qualify for the exception. See also, 49 Fed. Reg. 19336, May 7, 1984. [4/]

(Exh. G-12).

4/ OSMRE published on May 7, 1984, an Advance Notice of Proposed Rulemaking concerning its intention to revise 30 CFR 700.11 (a)(4). 49 FR 19336. This publication included "Guidelines" for the implementation of the exemption

The letter further explained the basis for OSMRE's concern that McNabb's coal operations were not incidental:

The McNabb operation consists of two active mining areas known as the middle and south pits. The available evidence indicates that McNabb's coal production, although apparently less than 16 2/3 percent of the total tonnage of minerals produced at the two pits combined, is not incidental to its production of limestone. At the time of OSM's August 1984 inspection, McNabb was mining coal located approximately 30 to 50 feet below the limestone strata in both the middle and south pits. No limestone was being segregated nor was any limestone being stockpiled in the vicinity of McNabb's south pit. McNabb was treating any limestone encountered in the south pit as overburden. The middle and south pits are separated by a highway, and McNabb has no method for moving limestone from the south pit to the crushing apparatus near the middle pit. Under these facts, in neither pit is McNabb's coal extraction an "incidental" part of its limestone operations.

(Exh. G-12).

OSMRE received responses to the above notice from both McNabb, who had been sent a copy, and ODOM. McNabb, while acknowledging that coal was being extracted as far as 20 feet below the limestone, responded that the coal was immediately below a 12-foot layer of shale "of very high quality" that was "being used in an ongoing brick making process" (Exh. G-14). ODOM explained that the exemption had been initially granted based on the 16-2/3 percent test and that incidental was "an undefined term" until the assumption of responsibility for enforcement of Oklahoma's program by OSMRE on April 30, 1984 (Exh. G-15). ODOM declined to take any further action in response to the OSMRE notice.

Further exchange of correspondence between OSMRE, McNabb, and ODOM during 1985 was inconclusive in that it failed to produce evidence satisfactory to OSMRE that the production of coal is incidental to McNabb's mining operations. Hence, on December 17, 1985, OSMRE issued the CO which is the subject of this appeal.

At the hearings on the merits of the CO in this case, both McNabb and OSMRE stipulated that the tonnage of coal production has been less than 16-2/3 percent of total mineral production since June 1983 (I Tr. 25-26; II Tr. 4, 87). Further, OSMRE did not argue the relative costs of and income generated by coal as opposed to noncoal mineral production

fn. 4 (continued)

pending final rulemaking. 49 FR 19338 (May 7, 1984). The document stated OSMRE's position that the current regulation requires two conditions be met to qualify for the exemption: "First, the extraction of coal must be incidental to the mining of other materials, and, second, the percentage of coal removed must be less than 16-2/3 percent of all minerals removed for commercial use or sale." Id. at 19336.

(II Tr. 4-5). The issue raised is whether the production of coal was incidental to the production of other minerals for commercial use and profit at the McNabb mine, notwithstanding the fact the tonnage of coal produced was less than 16-2/3 percent. No regulations defining the incidental exemption were promulgated by OSMRE prior to issuance of the CO in this case. <sup>5/</sup> We note the guidelines referred to in note 4, supra, stated that whether a recovery operation was incidental would be a question of fact. 49 FR at 19338 (May 7, 1984).

[1] Section 506(a) of SMCRA, 30 U.S.C. | 1256(a) (1982), provides that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program \* \* \*." The statutory definition of surface coal mining operations excludes "the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16-2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale." 30 U.S.C. | 1291(28)(A) (1982) (emphasis added). <sup>6/</sup>

<sup>5/</sup> On June 1, 1987, OSMRE published proposed rules amending its regulations concerning the incidental mining exemption. 52 FR 20546 (June 1, 1987). Under the proposed rules, OSMRE would establish three tests or requirements to be satisfied in order for an operation to be exempt from SMCRA. As explained in the preamble:

"The 16 2/3 percentage test applies to the total coal and other mineral production achieved over the life of mining at each individual excavation.

\* \* \*

"The second test, found at proposed [30 CFR] | 702.14(b), requires coal to be produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use. Although other tests for determining whether the coal is incidental were considered, the proposed provision achieves a balance between environmental concerns and concerns for the full utilization and conservation of the coal. This will minimize the potential for future disturbance of the land to recover coal.

"The third test to be satisfied, proposed [30 CFR] | 702.14(c), requires that each of the other minerals upon which an exemption under this part is claimed is a commercially valuable mineral. This means that either a market presently exists or the mineral is mined in bona fide anticipation that a market will exist in the reasonably foreseeable future, but not to exceed twelve months."

OSMRE has recently reopened the comment period on these proposed regulations until Mar. 25, 1988. 53 FR 5430 (Feb. 24, 1988).

<sup>6/</sup> An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation operations where he finds on the basis of any Federal inspection any condition, practice, or violation of the Act which creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 U.S.C. | 1271(a)(2) (1982); 30 CFR 843.11(a)(1). Surface coal mining and reclamation operations conducted without a valid surface coal mining permit constitute

Contrary to McNabb's contention, interpreting the term "incidental" in the proviso to section 1291(28)(A) as being defined solely by the less than 16-2/3 percent of the tonnage of minerals removed language is contrary to widely accepted rules of statutory construction. A statute should be construed so as to give effect to all of its provisions, so that no part will be inoperative or superfluous. 2A Sutherland Stat Const | 46.06 (4th ed. 1984). Here the statute clearly provides the extraction of coal must be incidental to the mining operation, as well as constituting less than 16-2/3 percent of the tonnage produced. Hence, it must be determined whether the production of coal in this case was incidental to the mining operation.

[2] Merline Van Dyke, a civil engineer employed by OSMRE who had experience in calculating volumes of materials (II Tr. 105), testified that during a visit to the mine on March 7, 1986, he measured the thickness of the strata and obtained samples of the limestone material being quarried, as well as the shale and coal being extracted. He then had the samples analyzed by a scientific laboratory to determine, among other things, the specific gravity of the mineral deposits (II Tr. 113-116; Exh. G-33).

Van Dyke testified at the hearing that the mineral profile at the McNabb minesite embraced, in descending order, a sandstone deposit of varying thickness, a 50-foot deposit of shale overburden, the 10-foot deposit of Verdigris limestone which is being mined, a 3-foot layer of black shale, 29 feet of shale "interburden" (part of which is being mined) <sup>7/</sup> and, finally, the 18-inch Croweburg coal seam (II Tr. 108-109). The thickness of the limestone deposit which was being mined was placed at 10 feet by McNabb in his deposition (Exh. G-47 at 20-21). This 10-foot thickness was also acknowledged by McNabb in admission number 5 (first round). This evidence was basically consistent with the cross-section of the deposit shown in Exh. R-4 which was accepted by the parties as a fair representation of the strata (II Tr. 8-9).

McNabb acknowledged in response to interrogatories that a total of 209.54 acres at the mine site were excavated to the level of the Croweburg coal seam between June 1, 1983, and February 28, 1986 (Answer to Interrogatory No. 7). There is no doubt this coal was removed for sale (Exh. G-47 (McNabb deposition) at 56, 130). In order to place the tonnage of coal produced from the mine in perspective when compared to the tonnage of limestone and shale extracted for commercial use or sale, Van Dyke analyzed the tonnage production figures for coal, rock, and shale set forth in Exh. G-23

fn. 6 (continued)

a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. 30 CFR 843.11(a)(2). Hence, the question of whether the extraction of coal in McNabb's operation is incidental to the production of other minerals is dispositive of the propriety of the CO in this case.

<sup>7/</sup> McNabb estimated the depth of the grey shale deposit immediately above the coal as 20 feet, of which the bottom half is marketable (Exh. G-47 (McNabb deposition) at 22-23).

which McNabb's employee, Tipton, acknowledged to represent an accurate summary of coal and rock production from June 1983 through December 1985 (II Tr. 246-247). Van Dyke computed the number of cubic feet of each mineral deposit extracted for commercial use or sale (coal, limestone, and shale) by dividing the number of pounds of the mineral extracted by the product of the weight of a cubic foot of water (in pounds) multiplied by the specific gravity  $\frac{8}{8}$  of that particular mineral deposit as disclosed by the laboratory analysis (Exh. G-33). Having computed the number of cubic feet of the deposit extracted, Van Dyke divided that figure by the depth (in feet) of the mineral strata extracted to derive the surface area of the deposit extracted in square feet. Dividing that figure by the number of square feet in an acre, Van Dyke computed the acreage of the deposit extracted. His calculations are set forth in Exh. G-37. In this manner Van Dyke computed that 211.4 acres of the coal deposit, 93.2 acres of the limestone deposit, and 7.3 acres of the shale deposit were extracted (Exh. G-37). His figure for the acreage of coal extracted compares closely with the acreage of coal mined as disclosed in McNabb's answer to interrogatory number 7.

The Administrative Law Judge sustained the objection by McNabb on the ground of relevance to Exh. G-37 containing the computation of the acreage of the respective mineral deposits extracted (II Tr. 137-138). The basis for the ruling by the Administrative Law Judge was his recognition that all of the mineral strata over the 209 acres of coal would have to be mined in this open pit mine operation in order to extract and market the coal from the Crowburg seam which was on the bottom of all the strata. Thus, the Administrative Law Judge inquired of OSMRE's witness Van Dyke: "[H]ow can you mine 209 acres of coal and not also mine 209 acres of the other material?" (II Tr. 119). The answer is found in the response of Van Dyke: "They probably, in my opinion, this was mined but a lot of it was not sold, it was put back in the pit." *Id.* In other words, a substantial part of the acreage of these other mineral deposits was disturbed but was not extracted for commercial use or sale. This Board is persuaded that the acreage of the limestone and shale deposits mined and extracted for commercial use or sale is relevant to the question of whether the mining of coal was incidental to McNabb's operation where the coal is the deepest strata mined lying below both the shale and limestone mined. Thus, it was error to fail to consider this evidence.

Regarding the shale produced in the McNabb mine from the interburden between the limestone and the coal which was used for road construction purposes, Tipton acknowledged that the reason for using the shale in the interburden as opposed to the shale in the overburden related to the manner of mining rather than the character of the deposit (II Tr. 258). The overburden is removed with scrapers which are not practical for stockpiling materials whereas the interburden is removed with trucks and loaders which facilitate stockpiling the material in selected locations (II Tr. 258).

$\frac{8}{8}$  Specific gravity is defined as: "The weight of a substance compared with the weight of an equal volume of pure water at 4~ C." Bureau of Mines, U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms 1050 (1968).

Indeed, Tipton acknowledged that if McNabb were not going after the coal they would not be mining the interburden shale and using that mining technique (II Tr. 283-284). This is consistent with the testimony of Van Dyke to the effect there is very little difference between the overburden shale and the interburden shale which McNabb produced commercially (II Tr. 146, 149-150).

There was evidence that the shale in the overburden above the limestone was less desirable for use in making bricks and aggregate blocks (Exh. G-47 at 24-25) and that McNabb considered marketing the 12-foot shale deposit immediately above the coal seam for brickmaking (Exh. G-14). However, although the shale was apparently tested for this prospective market, no shale was sold for this purpose (Admission No. 16 (first round); II Tr. 269-270, 283). Further, contrary to the assertion in the June 1983 ODOM response to the 10-day notice (Exh. G-2), there is no evidence in the record that McNabb extracted any deposit below the level of the Croweburg coal seam for commercial use or sale from June 1983 to December 17, 1985 (II Tr. 284; Admission No. 3 (first round); Exh. G-47 (McNabb deposition) at 26).

In response to an inquiry from the Administrative Law Judge as to his opinion of the primary mineral which McNabb was seeking, Van Dyke replied "limestone and coal" (II Tr. 173). In response to a similar question, Tipton replied "rock," predominately limestone (II Tr. 262). It is clear from the record, however, that the extraction and sale of coal is essential to the profitability of the mining operation (Exh. G-47 (McNabb deposition) at 77).

Reviewing the evidence in this case, we find that mining the Croweburg coal seam, which was the deepest strata mined for commercial use or sale, was essential <sup>9/</sup> to the viability of this mining operation. Although mining operations had to proceed through all of the overlying strata to reach the 211.4 acres of the coal seam mined, only 93.2 acres of the overlying limestone deposit and 7.3 acres of the overlying shale deposit were extracted for commercial use or sale. The enormous balance of these deposits, like the rest of the overburden, was spoiled or left in the pit. While it is true the small acreage of the shale deposit extracted was removed from the strata immediately above the coal seam, the testimony established that this result was dictated by the mining technique utilized and this technique would not have been used if they had not been mining the coal. The party claiming an exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. S & S Coal Co. v. OSMRE, 87 IBLA 350, 354 (1985). In the context of the record established in this case, we must conclude McNabb has failed to sustain the burden of establishing an exemption from SMCRA. <sup>10/</sup>

<sup>9/</sup> "Essential" is recognized as an antonym for the term incidental. Webster's New Collegiate Dictionary 575 (1979) (definition of "incidental").

<sup>10/</sup> In view of the fact we find the evidence introduced at the hearing to be dispositive on the question of McNabb's eligibility for an exemption, we do not reach the allegations raised by intervenors with respect to the prices of the products produced.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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C. Randall Grant, Jr.  
Administrative Judge

We concur:

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Will A. Irwin  
Administrative Judge

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John H. Kelly  
Administrative Judge