

**Editor's note: Reconsideration denied by Order dated July 31, 1990.**

HARMAN MINING CORP.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-525

Decided May 10, 1990

Appeal from an Administrative Law Judge decision denying Harman Mining Corporation's application for review of Cessation Orders No. 85-13-289-2 and 85-13-289-3. NX 5-103-R.

Affirmed in part, reversed in part, set aside in part, and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The record on appeal establishes that the mineral and surface owner was cited and served with notices of violation. Therefore, subsequent cessation orders issued for failure to abate the NOV's were not invalid for failure to cite and serve the underlying NOV's on said mineral and surface owner.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

A surface coal mining operation which commences prior to the formulation of a state permanent program must comply with the Federal interim regulatory program after the state permanent program is effective if the mine operator has not sought and received a permit to operate under the applicable state permanent program. 30 CFR 710.11(a)(3)(iii).

3. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

OSMRE is not divested of its authority to carry out the statutory mandate to issue failure to abate cessation orders because it fails to immediately issue such orders.

4. Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

The procedural rule found at 43 CFR 4.1166(c) does not require a litigant to plead all affirmative defenses when responding to a preceding pleading.

5. Administrative Procedure: Adjudication--Res Judicata--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

A litigant's failure to timely seek review of a notice of violation does not bar it from challenging OSMRE's jurisdictional authority to issue the underlying notice of violation in an application for review of a cessation order subsequently issued for failure to abate the violations set out in the NOV.

6. Administrative Procedure: Adjudication--Evidence: Generally--Res Judicata--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Stipulations in a proceeding in which a second party did not appear should not serve as the basis for concluding there was privity between the second party and a party to the previous action (a prerequisite for applying collateral estoppel) because the second party was not a party to the proceeding in which the stipulations were entered.

P&K Coal Co. v. OSMRE, 98 IBLA 26 (1987), overruled in part.

APPEARANCES: John A. Macleod, Esq., Thomas C. Means, Esq., and R. Timothy McCrum, Esq., Washington, D.C., for Harman Mining Corporation; Paul A. Molinar, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

Harman Mining Corporation (Harman) appeals from an April 30, 1987, decision by Administrative Law Judge (Judge) Joseph E. McGuire denying its application for review of Cessation Order (CO) Nos. 85-13-289-2 and 85-13-289-3. In his decision Judge McGuire also held that Harman was barred from challenging the Notices of Violation (NOV's) by the doctrine of administrative finality, because of Harman's failure to seek review of the underlying NOV's when they were issued. 1/

The facts are essentially undisputed. These facts fall into one of three time categories and it is important to keep in mind the three phases of the action leading to this decision to understand the basis for this decision. The first phase was the initial inspection phase.

#### Initial action

Inspector Bill Arnett (Arnett) conducted several inspections of Mud Fork Coal Corporation (Mud Fork) surface coal mining operations in Buchanan County, Virginia. These operations were not permitted and no permit had ever been issued for either the mining or reclamation activities described in this decision. During the course of a December 12, 1980, inspection, Arnett issued NOV No. 80-1-73-30 for failure to eliminate a highwall on one of five sites, in violation of 30 CFR 715.14, which was promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). Mud Fork was the only party named in NOV No. 80-1-73-30 which was personally served on Theodore Looney (Looney), owner of Mud Fork. Mud Fork filed a timely application for review of the NOV.

On December 17, 1980, OSMRE modified NOV No. 80-1-73-30 to include Harman, the owner of the land being mined. Harman was served by certified mail on December 22, 1980. Harman did not seek review of the NOV. The modified NOV called for abatement of the violation by January 26, 1981. Mud Fork and Harman failed to abate the violation within the prescribed period, but no CO was issued, and no civil penalties were assessed.

OSMRE conducted another inspection and issued NOV No. 80-1-73-32 on December 18, 1980, citing both Mud Fork and Harman for: (1) failure to install sedimentation ponds on sites 3, 4, and 5, in violation of section 715.17(a) of the regulations; (2) failure to eliminate high-walls on sites 2, 3, 4, and 5 in violation of section 715.14; and (3) failure to adequately maintain access and haul roads between the sites, in violation of section 715.17. The required action necessary to abate NOV No. 80-1-73-32 included: (a) installation of sedimentation ponds,

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1/ At the commencement of the hearing the Office of Surface Mining Reclamation and Enforcement (OSMRE) entered a motion in limine seeking to exclude any evidence regarding the underlying NOV's on grounds of collateral estoppel. On Feb. 18, 1989, Judge McGuire granted OSMRE's motion. "In limine. On or at the threshold; at the very beginning; preliminary." Black's Law Dictionary 896 (Rev'd 4th ed. 1968).

diversion channels, and/or other siltation structures so that all surface drainage from the disturbed area would pass through a sedimentation pond before leaving the disturbed area; (b) elimination of highwalls; and (c) maintenance of access and haul roads by constructing a ditchline, and crowning the road surface to assure adequate drainage. Abatement was to be completed by 8:00 a.m., February 12, 1981. NOV No. 80-1-73-32 was personally served on Looney on December 18, 1980, and Harman was served by certified mail on December 22, 1980. Again, Mud Fork filed a timely application for review. Harmon did not seek review.

#### Mud Fork hearing

OSMRE determined that the violations had not been abated within the prescribed period, and issued a \$600 civil penalty, but no CO was issued at that time. The notice of assessment of the civil penalty named only Mud Fork, no civil penalty was assessed against Harman, and Harman was not served with the notice of assessment.

Mud Fork then filed a petition for review of the civil penalty. Harman did not join and was not named as a party to the proceedings initiated by Mud Fork's petition for review. As its primary defense in the consolidated proceedings reviewing Mud Fork's applications for review and the civil penalty assessed against it, Mud Fork challenged OSMRE'S jurisdiction to issue the underlying NOV's contending that the operations it had conducted were exempted from the operation of SMCRA by the 2-acre rule. Preliminary to a hearing held on August 20, 1981, the parties stipulated to a number of facts thus narrowing the issues of fact and law before the Judge. In his October 20, 1981, decision, the Judge sustained the NOV's but reduced and suspended the civil penalty.

Mud Fork then filed an appeal with the Interior Board of Surface Mining and Reclamation Appeals (IBSMA) <sup>2/</sup> contending that each site named in the NOV's contained less than 2 acres, and hence Mud Fork was exempt from the operation of SMCRA, even though the total acreage disturbed by Mud Fork exceeded 2 acres. In an April 28, 1983, decision, IBSMA relied on the facts as stipulated, addressed the issues presented to the Judge at the hearing, affirmed the Judge's decision upholding NOV Nos. 80-1-73-30 and 80-1-73-32, vacated the reduction and suspension of the civil penalty, and remanded the case for a new civil penalty hearing. Mud Fork Coal Corp., 5 IBSMA 44, 59, 90 I.D. 181, 189 (1983).

#### Action leading to the present appeal

OSMRE conducted followup inspections on January 7, and May 7, 1985. After finding the two NOV's unabated, OSMRE issued CO Nos. 85-13-289-2 and 85-13-289-3, naming both Mud Fork and Harman. The CO's were served by certified mail on May 7, 1985.

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<sup>2/</sup> The functions of IBSMA were subsequently assumed by this Board. See 48 FR 22370 (May 18, 1983).

On June 10, 1985, Harman filed an application for review of the CO's. The matter, originally scheduled for hearing on August 29, 1985, was rescheduled for September 26, 1985. At the outset of the September 26 hearing OSMRE filed and served a motion in limine seeking to exclude any evidence Harman might offer contesting the violations alleged in NOV Nos. 80-1-73-30 and 80-1-73-32. The hearing was adjourned to permit Harman an opportunity to respond. Harman subsequently filed a memorandum in opposition to OSMRE's motion and OSMRE filed a reply brief. On February 18, 1986, the Judge granted OSMRE's motion, thus precluding Harman from challenging the fact of violation or OSMRE's jurisdictional authority to issue NOV Nos. 80-1-73-30 and 80-1-73-32.

The hearing was reset for September 17, 1986. However, the parties stipulated that a hearing was no longer necessary and that the matter would be submitted on stipulations and briefs. Harman then filed a Motion for Summary Judgment which was denied by order issued April 27, 1987. Having precluded Harman's attacking the NOV's, the only remaining issue was whether Harman failed to abate the violations set out in the NOV's.

The April 30, 1987, Judge's decision affirmed the CO's and denied Harman's application for review (Apr. 30, 1987, decision). Harman then filed an appeal with this Board.

[1] On appeal, Harman contends that the CO's are invalid because the underlying NOV's were issued only to Mud Fork. As indicated above, the record reflects that Harman was cited in and served with both NOV's. Therefore, Harman's first argument is rejected.

[2] Harman maintains that OSMRE had no authority to issue the CO's in 1985, because its enforcement authority under the interim program expired on the effective date of Virginia's permanent program, and con-tends that the language in 30 U.S.C. § 1252(c) (1982), and 30 CFR Part 710 supports its position. Harman avers that the chief objective of the interim program is to protect public health, safety, and the environment "from surface coal mining operations during the interval between enactment of the Act and adoption of a permanent State or Federal regulatory program" (Statement of Reasons (SOR) at 9) (emphasis supplied). According to Harman, the permanent program does not authorize the issuance of a CO for failure to abate an NOV issued for an interim program violation.

Harman asserts that the sole purpose of 30 CFR 710.11(a)(3) is to ensure that the operators requiring a permanent program permit would comply with the initial permit during the brief period between the State's assumption of enforcement responsibilities and issuance of the permanent program permit. Harman contends that it was never intended to subject those operators who ceased mining before the interim program ended (and hence never applied for or received a permanent program permit) to perpetual interim program regulation.

In response, OSMRE avers that 30 CFR 710.11(a) contradicts Harman's argument. This section provides that the interim program remains effective until an operator secures a permit under the state's permanent regulatory program. On this basis OSMRE states that the interim regulations

remain applicable to the Mud Creek-Harman operation because these companies failed to secure a permit under the permanent program (OSMRE's Brief at 5-7). Alternatively, OSMRE contends that if the mine were under the permanent program after December 15, 1981, OSMRE remained obligated to issue the failure-to-abate CO's because of its affirmative obligation to followup abatement and issue a CO if abatement fails (OSMRE's Brief at 7, 8).

Harman's argument cannot be sustained in light of the express language of 30 CFR 710.11(a)(3)(iii), which provides: "(iii) A person shall comply with the obligations of this section [interim program] until he has received a permit to operate under a permanent State or Federal regulatory program." Harman has neither applied for nor received a permit to operate on the sites in question under Virginia's permanent program. Consequently, the interim program regulations continue to apply. The reason for Harman's failure to secure a permit to operate under the permanent program is immaterial.

This Board has no authority to disregard or declare invalid duly promulgated regulations of the department. 30 CFR 710.11(a)(3)(iii) has the force and effect of law and is binding on the Department. See Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987); Robert R. Perry, 87 IBLA 380, 388 (1985); Ahtna, Inc., 87 IBLA 283, 291 (1985); Wisnak, Inc., 87 IBLA 67, 70 (1985); Kuugpik Corp., 85 IBLA 366, 370 (1985).

In Peabody Coal Co. v. OSMRE, 101 IBLA 167 (1988), Peabody held an interim program permit and had applied for, but not yet received, a State permanent program permit when the NOV was issued. We held that:

Under the Act, surface mining operations were required to comply with the Federal interim regulatory program until a permanent State or Federal program was in place. 30 U.S.C. § 1252(e) (1982); 30 CFR 710.11(a)(3). \* \* \* [U]ntil an operator received a permit to operate under a permanent state or Federal regulatory program, it was required to comply with the terms of the interim program permit. 30 CFR 710.11(a)(3)(iii). Therefore, although the Indiana State permanent program was in place in March and April 1984, Peabody was required to comply with the terms of its interim program permit and the interim regulatory program.

Id. at 169. In Peabody Coal we also rejected the operator's argument that OSMRE could not enforce the interim program after the effective date of Indiana's permanent program because the statutory authority to enforce the interim program had expired.

In addition, the legislative history of SMCRA does not support Harman's assertion that Congress intended a hiatus in enforcement of the interim program. Specifically, the House Report contains the following statement:

Operators are required to obtain permits 8 months after approval of a State program of implementation of [sic] a Federal program.

Section 506(a). Mines operating under existing permits may continue to mine without a new permit, however, if an administrative decision has not been rendered during that period.

Prior to issuance of such a permit, as discussed in another portion of this report, permits must be in compliance with the interim performance standards. [Citation omitted.]

H.R. Rep. No. 218, 95th Cong., 1st Sess. 86, reprinted in 1977 U.S. Code Cong. & Admin. News 593, 623. The House Conference Report No. 95-493 did not alter this interpretation. H.R. Conf. Rep. No. 493, 95th Cong., 1st Sess. 102, reprinted in 1977 U.S. Code Cong & Admin. News 734.

Finally, to the extent that Harman's challenge can be construed as a challenge to the validity of the interim program regulations, under 30 U.S.C. § 1276(a) (1982), the United States District Court for the District of Columbia is the forum available for judicial review of regulations promulgated under SMCRA. Hence, this Board has no authority to consider a claim that a regulation promulgated under that Act is invalid. Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 116 (1988).

[3] Harman also maintains that a failure-to-abate CO must be issued immediately if the violation has not been abated within the prescribed abatement period. 30 U.S.C. § 1271(a)(3) (1982). It contends that OSMRE's 4-year delay was so prejudicial that the CO's must be vacated, and cites several cases under Federal Rule of Civil Procedure (FRCP) Rule 41(b) in support of this proposition.

Harman also notes the authority of a "court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). Accordingly, it urges this Board to exercise its quasi-judicial capacity and vacate the CO's.

We find merit in the idea that, under 30 U.S.C. § 1271(a)(3) (1982), OSMRE should immediately follow up an unabated NOV with a CO. 30 U.S.C. § 1271(a)(3) (1982) explicitly incorporates interim program enforcement, and legislative history reveals Congress's conviction regarding the importance of the statute's enforcement provisions. <sup>3/</sup> Congress concluded: "Experience with State surface mining reclamation laws has amply demonstrated that the most effective reclamation occurs when sound performance

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<sup>3/</sup> We note a further aspect of this case which makes the delay between the date of inspection and the date of issuance of the CO even more disturbing. Under 30 CFR 843.11(a)(2), the conduct of surface mining operations without a valid permit constitutes a condition or practice which, pursuant to 30 CFR 843.11(a)(1), requires the immediate issuance of a CO. See Firchau Mining, Inc. v. OSMRE, 101 IBLA 144 (1988). There was no valid surface mining permit for the site in 1980 and there is no evidence that one was ever obtained.

standards go hand in hand with strong, equitable enforcement mechanisms." H.R. Rep. No. 218, 95th Cong., 1st Sess. 128, reprinted in 1977 U.S. Code Cong. & Admin. News 660.

Congress endowed the field inspectors with the strong flexible enforcement mechanisms necessary for response to minor and serious violations. OSMRE did not immediately issue the CO's and its failure to do so is regrettable at best. However, we find no support in the statute, legislative history, or regulations for the proposition that OSMRE's failure to issue a CO in a timely manner somehow divests it of the authority to carry out the statutory mandate. Nor can we say that such finding would further the Act's salutary purpose -- reclamation. Accordingly, we decline to vacate the CO's.

[4] Harman challenges the Judge's granting OSMRE's motion in limine and his finding that it was precluded from challenging the NOV's because it had failed to challenge those NOV's within the 30-day period set out in 43 CFR 4.1162. Harman maintains that OSMRE failed to timely raise the affirmative defenses of collateral estoppel and statute of limitations in its answer to Harman's application. According to Harman, when OSMRE failed to timely raise these defenses, they were waived (Appellant's Brief at 14-16).

Harman contends that FRCP Rule 8(c) was derived from common law and made a part of the rules because it was considered only fair that certain types of things which in common law pleading were matters in confession and avoidance must be specifically pleaded in the answer, and cites 18 Wright, Miller, and Cooper (Wright), Federal Practice & Procedure, 1270 at 1292 (1982 ed.) in support of this contention. Harman maintains that, while Rule 8(c) is not directly applicable, the fairness rationale underlying Rule 8(c) is fully applicable. Hence, Harman urges the Board to hold that OSMRE waived its affirmative defenses when it failed to raise them in its answer to Harman's application for review (Appellant's Brief at 14-16). Harman stresses its belief that this rule of fairness is particularly important in this case because OSMRE asserted its defense with a motion to exclude evidence after Harman had exerted substantial effort and expense in preparing for the hearing (Harman's SOR at 16).

OSMRE counters that the rules governing pleading and practice before the United States Department of the Interior, Office of Hearings and Appeals, set forth in the Code of Federal Regulations at Subpart L-Special Rules applicable to Surface Coal Mining Hearings and Appeals, 43 CFR 4.1100 have not been replaced or superceded by the FRCP. Specifically 43 CFR 4.1166, pertaining to the required contents of an answer to an application for review, does not require OSMRE to affirmatively plead collateral estoppel (OSMRE's Brief at 9-10). Consequently, OSMRE concludes that it did not waive the defense of collateral estoppel.

While we agree that OSMRE visited Harman with a tactical surprise, we are not convinced that the rules governing SMCRA hearings (or FRCP 4/)

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4/ See, however, Rule 15(a). A party may amend a complaint or an answer at any time with leave of the Court.

impose an absolute requirement that a litigant must raise all affirmative defenses in the answer. The applicable rule, 43 CFR 4.1166, neither has a requirement regarding when affirmative defenses must be pled nor gives any notice of such a requirement. <sup>5/</sup> Absent specific language requiring a litigant to plead all affirmative defenses, equity alone will not justify imposition of such a requirement. Accordingly, we hold OSMRE timely raised the affirmative defenses.

[5] Harman argues that the Judge erred when precluding it from contesting the facts underlying the NOV's in the proceeding to review the failure-to-abate CO's. It notes that the Act and the regulations (30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(a)(1)) provide that the fact of the violation may be contested in a proceeding to review the proposed imposition of a civil penalty based on a NOV or CO.

OSMRE responds that it has not proposed assessment of civil penalties against Harman for the violations described in the 1980 NOV's, Harman did not file applications to review those NOV's, and therefore the only issue in the proceeding to review the issuance of the CO's is whether Harman failed to abate the violations.

In his February 18, 1986, order granting OSMRE's motion in limine, the Judge stated:

It is instantly apparent that an operator's failure to timely file an application for review challenging the fact(s) of violation alleged in an NOV, in reliance upon asserting that challenge in a subsequent civil penalty proceeding, is not without attendant risks. In the event that no civil penalty is subsequently assessed, as was the case in NOV No. 80-1-73-30 under these facts, that strategy results in \* \* \* operator having effectively waived its right to contest the fact(s) of violation alleged in the NOV. Similarly, where two or more NOV's are issued as a result of a single OSM[RE] inspection, as here, that tactic carries with it the further risk that civil penalties will not be assessed on all violations in the NOV's, thereby depriving the person and/or firm named in the NOV, and upon whom and/or which the citation was served, of later challenging the alleged fact(s) of violation set forth in those NOV's upon which no civil penalties were issued.

(Order dated Feb. 18, 1986, at 7-8). He then held the failure to file applications for review of the NOV's barred challenging the facts of violation in the proceeding to review the CO's, because 43 CFR 4.1162 requires an application for review of an NOV be filed within 30 days. Similarly, in P&K Coal Co. v. OSMRE, 98 IBLA 26 (1987), we held that the appellant had waived its right to contest OSMRE's jurisdiction to modify an NOV when it did not file an application for review of the

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<sup>5/</sup> When the drafters of the regulation intended to adopt the FRCP rule they expressly did so by copying in extenso the language of the applicable Federal rule, i.e., 43 CFR 4.1130 (discovery).

modification and sought to raise the issue in a proceeding to review a CO that had been issued for failure to comply with the modified NOV.

Recently we observed that a failure-to-abate CO flows from an underlying NOV and there are good and understandable reasons why an operator might forego contesting an NOV. Gabriel Energy Corp., 105 IBLA 53, 59 n.3 (1988). Such a decision could be based on the belief that there was no violation, that it was not serious, or that it would be a relatively simple task to abate it. However, the period for abatement (90 days) exceeds the time for filing an application for review of an NOV (30 days), and it is quite possible that a permittee or operator would perform what it considered to be the required remedial action, receive a failure-to-abate CO from an OSMRE inspector who disagreed, and find its opportunity to contest the fact of the violation foreclosed if it could not do so in a proceeding to review the CO. As a result, the prudent permittee or operator would file an application for review of every NOV to avoid the risk the Judge described. We think neither the risk nor the precaution is required by the Act or the regulations. We therefore hold that the fact of a violation set out in an NOV may be contested in a proceeding to review a CO issued for failure to abate the NOV, as well as in civil penalty proceedings. To the extent P&K is inconsistent, it is overruled.

[6] Finally, Harman argues the Judge erred in concluding "that applicant is collaterally estopped from presenting evidence in this proceeding which challenges the facts of violation contained in the underlying NOV's" (Feb. 18, 1986, Order at 8). Harman argues that the stipulations between Mud Fork and OSMRE (see 5 IBSMA at 47, 90 I.D. at 182) cannot be the basis for concluding there is privity between Mud Fork and Harman. Harman also argues that it did not have a sufficient incentive to join the proceeding between OSMRE and Mud Fork, so the doctrine of collateral estoppel may not be applied.

We agree that the stipulations in the Mud Fork-OSMRE proceeding should not serve as the basis for concluding there was privity between Harman and Mud Fork, a prerequisite for applying collateral estoppel against Harman, because Harman was not a party to the proceeding in which the stipulations were entered.

Since Judge McGuire's ruling on collateral estoppel was based on his finding that Harman and Mud Fork were in privity, we set aside his February 18, 1986, order as to collateral estoppel and his April 30, 1987, decision based on that order, and remand this matter to the Hearings Division for a hearing on whether there was privity between Harman and Mud Fork at all critical times. If he finds collateral estoppel is not appropriate because the requisite privity did not exist, or for any other reason (see, e.g., United States v. International Building Co., 345 U.S. 502 (1953); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330-31 (1979)), the Judge should determine whether the evidence supports the issuance of the NOV's. The ultimate burden of persuasion as to the collateral estoppel issues shall be on OSMRE. If the facts of violation of the underlying NOV's become an issue, Harman shall have the ultimate burden of persuasion in accordance with 43 CFR 4.1171.

The Judge shall issue a decision on these issues which shall be final for the Department absent a timely appeal to this Board.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, reversed in part, set aside in part, and remanded for a hearing consistent with this decision.

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R. W. Mullen  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge