

EASTERN MINERALS INTERNATIONAL, INC.

IBLA 88-256

Decided December 21, 1990

Appeal from a decision of the Assistant Director, Eastern Field Operations, Office of Surface Mining Reclamation and Enforcement, find-ing that appellant had not shown valid existing rights to engage in sur-face coal mining operations on land in Bledsoe and Van Buren Counties, Tennessee. OSM Permit No. 2416.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

An applicant for valid existing rights bears the burden of proving entitlement.

2. Surface Mining Control and Reclamation Act of 1977: Valid Existing Rights: Generally

A decision rejecting an application for valid existing rights to mine coal on lands not subject to surface coal mining after Aug. 3, 1977, pursuant to sec. 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(e)(3) (1988), will be affirmed where the applicant fails to show, and the record fails to demonstrate, that the necessary permits to mine the coal were applied for as of the Aug. 3, 1977, enactment of the Act.

3. Estoppel--Surface Mining Control and Reclamation Act of 1977: Generally

A party claiming estoppel must demonstrate that it relied on its adversary's conduct in such a manner as to change its position for the worse.

APPEARANCES: Thomas O. Helton, Esq., Virginia C. Love, Esq., and Louann Prater Smith, Esq., Chattanooga, Tennessee, for Eastern Minerals International, Inc.; J. David Clayton, Esq., George E. Penn, Esq., and Judith M. Stolfo, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Recla-mation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Eastern Minerals International, Inc. (Eastern), 1/ has appealed from a January 20, 1988, decision by the Assistant Director, Eastern Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), rejecting Eastern's request for a determination that it holds "valid existing rights" (VER), under section 522(e)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) (30 U.S.C. § 1272(e)(3) (1988)) to mine coal on certain property in Bledsoe and Van Buren Counties, Tennessee.

Factual and Procedural Background

By Purchase Agreement dated December 12, 1975, Wilson W. and Ann Wyatt, Sr., transferred to Milton J. Bernos, Jr., certain property for a proposed mining site (Exh. A, Bernos Affidavit). These lands lie immediately adjacent to Falls Creek Falls State Park, Tennessee. Bernos, the President and 100-percent shareholder of Eastern, had begun coal exploration work on the property prior to entering the purchase agreement. 2/ Over 850 holes were drilled on the proposed deep mining site between January 1976 and December 1978 (Bernos Affidavit at 2).

In 1976, Bernos applied to the Division of Surface Mining (DSM), Tennessee Department of Conservation, for a surface mining permit "on another site of the property." He later withdrew that application and in 1977-78 attempted to obtain financing for a deep mine. By a 1979 financing transaction structured as a sale-leaseback, Cane Company Limited bought the property and immediately leased the mineral rights to Eastern for deep mining (Bernos Affidavit at 2-3).

On February 4, 1980, the Tennessee DSM issued Eastern a 1-year permit to deep mine "area 1" (33 acres) in Bledsoe County, Tennessee. DSM issued a second such permit on September 14, 1981 (Bernos Affidavit, Exhs. 3 and 4; Exh. C). On October 10, 1982, Eastern applied to DSM to re-permit area 1. On November 29, 1982, DSM issued Eastern a notice of violation (NOV), for failure to conduct reclamation operations in area 1. Subsequently, DSM issued a notice of proposed assessment and a cessation order (CO) for failure to abate the NOV. However, Eastern continued to pursue its application for the permit, contending that it would be foolish to reclaim an area which, upon issuance of a permit, would be used for mining. On November 9, 1983, Eastern again submitted an application to re-permit area 1, based on DSM's representatives that such an application was necessary to comply with "new mining regulations which had been recently enacted by the State of

1/ By charter amendment, Eastern Minerals Corporation changed its name to Eastern Minerals International, Inc., on Nov. 2, 1987 (Supplemental Statement of Reasons (SSOR) at 1).

2/ Both Eastern's SSOR and the Bernos affidavit mention a report of exploration work, dated Sept. 22, 1975, submitted to Bernos by American Mining Services, Inc., of Birmingham, Alabama. Bernos states in the affidavit that "[o]n the basis of this report" he decided to enter into the purchase agreement with the Wyatts (Bernos Affidavit at 2). The report has not been submitted as a part of the record in this appeal.

Tennessee (Bernos Affidavit at 4). DSM denied that application on May 8, 1984.

In an "Agreed Order" entered August 16, 1984 (Exh. C), the Tennessee Board of Reclamation Review (TBRR) recognized "that the area does not presently constitute a threat to the environment or hazard to the public and that the operator has assured this Board that he will maintain environmental controls on the site in accordance with all State and Federal requirements." Id. at 4. TBRR ordered Eastern to withdraw its application for a permit but noted that denial of the application was not based on a determination that the area in question was unsuitable for coal mining, and that TBRR's action was without prejudice to Eastern's right to file a new permit application as provided for in the order. TBRR ordered Eastern to pay the penalties assessed under the NOV and CO and stipulated that the NOV and CO would be terminated upon the earlier of either (1) issuance of a permit and posting of an appropriate bond or (2) completion of phase 1 reclamation at the site. TBRR directed Eastern to "submit an administratively complete permit application covering the area in question * * * within (6) weeks of the entry of this Agreed Order." Id. at 4-5.

On April 5, 1984, the Department assumed direct Federal enforcement of the inspection and enforcement portions of Tennessee's permanent regulatory surface mining program pursuant to 30 CFR 733.12. 49 FR 15496 (Apr. 18, 1984). The Department withdrew approval of the State's permanent regulatory program in full, effective October 1, 1984. As of that date, OSM began enforcing the provisions of the permanent program performance standards set forth in 30 CFR Part 816 that replaced the State regulations repealed effective the same date. 30 CFR 942.816(a) (49 FR 38874, 38895 (Oct. 1, 1984)). Because of these changes, Eastern filed with OSM, rather than DSM, the permit application required by TBRR's Agreed Order (Bernos Affidavit at 5).

According to Eastern's SSOR, 3/ OSM denied Eastern's permit application on July 2, 1986, based on a finding that the mine would be on property unsuitable for mining and would cause an adverse impact on Falls Creek Falls State Park, adjacent to the mining site. 4/ Eastern sought review of the denial

3/ Initially, Eastern filed a statement of reasons containing only summary allegations and no arguments. OSM filed a brief answer admitting or denying each of Eastern's allegations. Finding that neither party had presented a statement of facts or cogent arguments on the basis of which the case could be adjudicated, the Board, by order dated Aug. 9, 1988, established a briefing schedule. In response to that order Eastern filed its SSOR, with legal argument. OSM filed a response disputing Eastern's arguments. The previously referenced Bernos Affidavit and Exhibits 1-4 and A-C all accompanied the SSOR.

4/ Neither the case file nor the briefing materials of the parties contain a copy of the July 2, 1986, decision rejecting the permit. However, in its response to Eastern's SSOR, OSM "acknowledges that the factual and procedural background as found in [Eastern's SSOR] is basically correct" (Response at 1).

by filing an application (NX 6-2-PR) with the Hearings Division, Office of Hearings and Appeals, and subsequently, the parties held a number of record conferences with Administrative Law Judge David Torbett. Judge Torbett, with the agreement of OSM, directed OSM to withdraw its denial of the permit application and to reconsider that application with attention to the issues of Eastern's VER and whether or not the proposed operation would adversely affect the Falls Creek Falls State Park. However, because a decision on VER favorable to Eastern would negate the necessity for a determination on the second issue, Judge Torbett ordered OSM to deliver a "final" determination on the question of Eastern's VER. 5/ That determination is OSM's January 20, 1988, decision, now before us on appeal.

Discussion

In the decision appealed herein, OSM reviewed its attempts to define VER by regulation since 1979. Various definitions were promulgated (30 CFR 761.5(a)), published in the Federal Register, judicially reviewed, and remanded to OSM for further rulemaking (Decision at 2-5). 6/ To comply with the court's order in In re: Permanent Surface Mining Regulation Litigation, 22 E.R.C. 1557 (D.D.C. 1985), OSM suspended the definition of VER in 30 CFR 761.5(a), pending further rulemaking to define VER. 7/ See 51 FR 41954, 41961 (Nov. 20, 1986). The decision explained that suspension of the rule had the effect of undoing improper promulgation and leaving in place the 1979-1980 VER test. BLM explained the application of that test, as follows:

OSMRE will make VER determinations on a case-by-case basis after examining the particular facts of each case and will consider property rights in existence on August 3, 1977, the owner of which, by that date, had made a good faith effort to obtain all permits, as one class of circumstances that would invariably entitle the property owner to VER. VER would also exist when there are property rights in existence on August 3, 1977, the owner of which can demonstrate that the coal is both needed for

5/ 30 CFR 942.761.11(c) essentially restates section 522(e)(3) of SMCRA, 30 U.S.C. § 1272(e)(3) (1988), which provides:

"After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977 shall be permitted--
* * * * *

"(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site; * * *."

See 30 CFR 942.761.11(c). The Act does not define VER.

6/ Two recent cases, The Stearns Co., 110 IBLA 345 (1989), and Blackmore Co., 108 IBLA 1 (1989), contain detailed discussions of the Department's efforts at rulemaking to implement section 522(e) of SMCRA.

7/ To date, no new regulatory definition of VER has been promulgated. See 54 FR 30557 (July 21, 1989), withdrawing proposed definitions, published on Dec. 27, 1988 (53 FR 52374), for further study.

and immediately adjacent to a mining operation in existence prior to August 3, 1977.

(Decision at 4). OSM then held that Eastern did not have VER:

Although Milton Bernos, Eastern's predecessor-in-interest, entered into an agreement (the "Purchase Agreement") with Wilson and Ann Wyatt on December 12, 1975, that conveyed the proposed mining site in Bledsoe County, as well as other properties to Bernos, no demonstration has been made that meets the additional criteria of the "1980 test" used by OSMRE in Federal program states to make VER determinations.

There is no evidence that all of the necessary permits had been issued or applied for, and no representations have been made concerning the need for the coal in order to continue mining operations in existence prior to August 3, 1977.

(Decision at 4-5).

Eastern does not challenge the VER test utilized by OSM to make its determination. It does contend that it meets the elements of that test. Thus, Eastern points out that it had property rights in the proposed mining site on August 3, 1977, by virtue of the 1975 Purchase Agreement between Bernos and the Wyatts. Since OSM concedes Eastern's property rights in the site (Answer at 1), this element of the VER test is not at issue.

Eastern also does not contend that it had sought or obtained the requisite permits prior to August 3, 1977. Eastern asserts that obtaining a permit prior to exploring and obtaining financing for a mine would have been "premature" because "[i]f the reserves are not of sufficient quantity or quality and if the financing cannot be obtained, the funds used to do the engineering work to obtain the permit will be wasted" (SSOR at 18). Eastern also maintains, citing the Bernos affidavit, that "[n]o other use of the property except mining would have justified the price which Bernos agreed to pay for it" (SSOR at 20). Eastern argues that its activities prior to August 3, 1977, must be construed as a "good faith effort" to obtain the necessary permits to avoid an unconstitutional taking of its property.

Eastern also argues that because it has expended substantial sums of money in developing a mine, OSM should be estopped from denying that Eastern has VER.

[1, 2] Eastern, which bears the burden of proving entitlement to VER, Blackmore Co., 108 IBLA 1, 8 (1989), has failed to meet that burden. The record, and Eastern's own pleadings, demonstrate that OSM properly rejected Eastern's VER application. While Eastern is possessed of a property interest in the site proposed for mining, that interest alone is insufficient to clothe it with VER. Only one surface mining permit application was filed by

Bernos in 1976 and later withdrawn, because he chose to focus on deep mining exploration. The statements in the Bernos affidavit, as well as those in the SSOR, clearly indicate that the acquisition of permits was not a priority for Eastern in the period 1976 through 1978 when exploration holes were drilled and Bernos attempted to obtain financing. These activities cannot be construed as viable substitutes for good faith attempts to obtain the necessary permits.

Eastern's arguments concerning an unconstitutional taking and estoppel are not viable. In The Stearns Co., 110 IBLA 345, 350 (1989), the Board affirmed an OSM determination that the appellant had not shown VER to surface mine coal which it owned in Kentucky. We found that ownership of the coal, standing alone, did not compel a blanket determination of VER to mine the coal.

[3] Eastern's estoppel argument is unfounded. Eastern has alleged, but not demonstrated, that the traditional elements of estoppel are present in this case. "A party claiming estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" Heckler v. Community Health Services of Crawford, 467 U.S. 51, 59 (1984); Slone v. OSM, 114 IBLA 353 (1990). The averments in the Bernos affidavit and the documents submitted in support of the appeal demonstrate a course of autonomous conduct. Eastern's exploration work and its attempts to obtain financing were the results of its own business decisions and were in no way influenced by OSM.

Eastern has requested a hearing on "mining industry practices" and to demonstrate facts requiring the application of estoppel. This case presents no issue of fact which would have to be proved before an adjudication could be rendered. Therefore the request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Assistant Director, Eastern Field Operations, OSM, is affirmed.

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING:

In essence, the facts as recounted in the lead opinion are not in dispute. The Minerals International, Inc. (Eastern), dispute arises over whether those facts support a finding that Eastern has valid existing rights (VER) to mine the land in question. The Office of Surface Mining Reclamation and Enforcement (OSM) has concluded that it does not; Eastern disagrees.

The lands in question are in the State of Tennessee. In 1984, the Federal Government withdrew approval of the Tennessee State program and took over implementation and enforcement of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1988), in that State. 49 FR 15496 (Apr. 18, 1984). Therefore, OSM was the regulatory authority when it issued the VER determination in 1988. 1/

The test applied by OSM in its 1988 determination was the "1980 test" or "good faith/all permits test." In its decision, OSM explained the application of that test, as follows:

OSM will make VER determinations on a case-by-case basis after examining the particular facts of each case and will consider property rights in existence on August 3, 1977, the owner of which, by that date, had made a good faith effort to obtain all permits, as one class of circumstances that would invariably entitle the property owner to VER. VER would also exist when there are property rights in existence on August 3, 1977, the owner of which can demonstrate that the coal is both needed for and immediately adjacent to a mining operation in existence prior to August 3, 1977.

(Decision at 4). 2/

On appeal, Eastern does not challenge the utilization of the "1980 test"; it asserts that its actions taken prior to August 3, 1977, "constitute either 'a good faith effort to obtain all permits' or 'another class

1/ In its notice suspending the definition of VER in 30 CFR 761.5(a), pending further rulemaking to define VER, OSM explained:

"The suspension of the VER definition has a particular impact in Federal program States (where OSM is the regulatory authority), because the suspension, without substitution of some test, would leave such pro-grams without regulatory criteria. This is especially important in Tennessee where a number of permit applications are pending and OSM will be called upon to make VER determinations before permits may be issued."

51 FR 41954 (Nov. 20, 1986).

2/ But for some changes in punctuation, this is the exact language utilized by OSM in its notice of suspension of the VER definition. See 51 FR 41955 (Nov. 20, 1986).

of circumstances' which will satisfy the second prong of the VER test" 3/ (Supplemental Statement of Reasons (SSOR) at 16). It is Eastern's contention that a good faith effort to obtain all permits prior to August 3, 1977, is only one class of circumstances that result in VER. Eastern asserts that "[i]n order to effectuate the legislative intent behind VER, these other circumstances must at least include those which would result in an unconstitutional taking if VER are not found to exist" (SSOR at 17).

Thus, Eastern is, in essence, seeking to incorporate, as part of the VER test, the "takings standard," which was the basis for the 1983 VER definition which was suspended, effective December 22, 1986 (51 FR 41952 (Nov. 20, 1986)), as another class of circumstances which would entitle it to VER. Eastern's argument is founded on the language of OSM's decision quoted above.

That language, however, is not properly interpreted in such a fashion. While the Department has indicated that a good faith effort to obtain all permits is one class of circumstances that will entitle a property owner to VER, it has also defined the other class of circumstances in which VER would exist--when the owner of property rights in existence on August 3, 1977, can show that the coal is needed for and immediately adjacent to a mining operation in existence prior to August 3, 1977. I cannot find that the language relied upon by Eastern establishes that other undefined classes of circumstances exist, which would also justify VER.

Since there was no pre-August 3, 1977, mining operation adjacent to the land in question, Eastern may establish VER only by showing that it made a good faith effort to obtain all permits by August 3, 1977. The record contains no such showing. Eastern asserts that if a hearing were ordered in this case it would present testimony that the actions taken in "preparation for mining were done in the order and with the speed dictated by prudent mining industry practices" and that applying for a permit "at any earlier time than it did would be ill-advised and contrary to mining industry practices" (SSOR at 25-26). Accepting that Eastern could establish those facts, a favorable VER determination would still not be possible under the good faith/all permits test, because that test clearly contemplates that, at a minimum, application for necessary permits be made by August 3, 1977. The Stearns Co., 110 IBLA 345 (1989). Eastern does not even allege that it applied for necessary permits for its proposed underground mine by August 3, 1977.

Eastern's charge that OSM should be estopped to deny VER must be rejected for the reason that Eastern is attempting to assert estoppel against OSM, based on the conduct of the State of Tennessee in issuing it two 1-year permits to mine the land in question. Estoppel cannot lie

3/ It is uncontested that the 1975 Purchase Agreement between Bernos and the Wyatts served to satisfy the first prong of the VER test by establishing that Eastern had property rights in the proposed mining site on Aug. 3, 1977. In addition, Eastern admits that it did not have a permit for the proposed deep mine operation on Aug. 3, 1977.

in such a situation. In Patrick Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 661 F. Supp. 380, 385 (W.D. Va. 1987), the court noted that there are two threshold requirements that a private party must demonstrate when asserting an estoppel defense against the United States: "that it relied on the United States' advice and that it changed its position." The court found that the company had relied on "DMLR's [Virginia Division of Mined Land Reclamation] decision, not on the United States' advice" in rejecting the estoppel defense. Id. ^{4/} The same is true in this case; Eastern relied on the conduct of the Tennessee Department of Conservation, Division of Surface Mining and Reclamation, not on the conduct or advice of OSM.

OSM properly determined that under the good faith/all permits test Eastern did not have VER to mine the land in question. I concur with the lead opinion's disposition of Eastern's appeal.

Bruce R. Harris
Administrative Judge

^{4/} It also found that the company had not changed its position in reliance on the decision of the DMLR.