

RITH ENERGY, INC.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-27

Decided April 9, 1991

Appeal from that part of a decision of Administrative Law Judge David Torbett vacating violation No. 2 of Notice of Violation No. 86-92-179-21. Hearings Division Docket No. NX 7-33-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

In a proceeding involving an application for review of a notice of violation, OSM has the burden of going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated the Surface Mining Control and Reclamation Act of 1977, the regulations, or a permit condition. The ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

Where OSM presents evidence that an applicant for review was engaged in surface coal mining operations under a permit; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit, a prima facie case in support of a violation of 30 CFR 773.17(a) is established. However, where the applicant shows by a preponderance of the evidence that its activity outside the permit boundaries does not constitute surface coal mining operations, the violation is properly vacated.

APPEARANCES: J. David Clayton, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Michael Boehm, Esq., Chattanooga, Tennessee, for Rith Energy, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from that part of a decision of Administrative Law Judge David Torbett, dated August 31, 1988, vacating violation No. 2 of Notice of Violation (NOV) No. 86-92-171-21, issued by OSM to Rith Energy, Inc. (Rith), on October 16, 1986, pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1988).

On October 16, 1986, OSM Inspector Edzel R. Pugh inspected Rith's surface mining and reclamation operation at its Eagle Ferguson Mine No. 1, located in Bledsoe County, Tennessee, which was operating under Permit No. 2583 issued by OSM's Division of Tennessee Permitting. As a result of his inspection in the area of Cut No. 8, south of the Vander-Ferguson County Road, Pugh issued NOV No. 86-92-179-21, citing two violations, only the second of which is at issue in this appeal. 1/ Violation No. 2 charged that Rith had violated 30 CFR 773.17(a) 2/ by disturbing "lands outside of lands designated as the approved permit area." 3/ The lands in question lie just outside the eastern permit boundary in an area where Rith was working to realign the Vander-Ferguson County Road. On January 6, 1987, OSM terminated violation No. 2.

Rith filed a timely application for review of the NOV, and following a hearing, Judge Torbett issued his decision. He found that violation No. 2 was "not properly issued," explaining:

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1/ The first violation cited Rith for a failure to backfill and rough grade the disturbed area south of the proposed location of the Vander- Ferguson County Road. In his decision, Judge Torbett sustained that violation and Rith has not appealed that ruling.

2/ 30 CFR 773.17(a) provides that:

"The permittee shall conduct surface coal mining and reclamation operations only on those lands that are specifically designated as the permit area on the maps authorized for the term of the permit and that are subject to the performance bond or other equivalent guarantee in effect pursuant to Subchapter J of this chapter."

3/ The NOV described the portion of the operation to which the notice applied as the "area between the Vander-Ferguson [sic] road and the eastern edge of the permit where the proposed relocation of the Vander-Ferguson [sic] Road will inter [sic] the permit" (Exh. R-1 at 3). As remedial action, OSM required Rith to secure OSM approval of a revision to the permit to include the off-site relocation of the county road and reclamation associated therewith. Abatement was to be completed on Dec. 16, 1986, or 2 days after denial of the permit revision.

OSM itself by letter of October 7, 1986, granted Rith an extension of time ". . . for the area to be disturbed for the proposed construction of the new county road." (R-7) <sup>4/</sup> Rith had a right to rely on this extension. Further, it is questionable whether OSM would have jurisdiction over the road construction which was off the permit site. The road here was clearly off the permit site and was not used to facilitate mining. Thus, the undersigned finds that Respondent has not met its burden of establishing a prima facie case on count No. 2 of the NOV, and it is consequently vacated.

(Decision at 5).

On appeal, counsel for OSM argues that Judge Torbett erred by ruling that OSM has no jurisdiction over Rith's road construction adjacent to the permit site and by holding that representations in its October 7 letter estopped OSM's issuance of an NOV to Rith for its actions with respect to the adjacent unpermitted area.

Counsel for OSM states that section 701(28)(A) of the Act, 30 U.S.C. § 1291(28)(A) (1988), provides a comprehensive definition of "surface coal mining operations" and that section 701(28)(B) of the Act further expands the definition to include "adjacent land the use of which is incidental to any such activities." <sup>5/</sup> Counsel asserts that the unpermitted lands disturbed by Rith fall within this definition because they are adjacent to Rith's permitted lands and Rith's disturbance was incidental to its surface mining activities. With respect to the representations made in OSM's October 7 letter, counsel concedes that the letter was intended to grant a time extension for reclamation of some of the lands within the permitted

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<sup>4/</sup> On Aug. 18, 1986, OSM added a special condition to Permit No. 2583, requiring Rith to complete reclamation on the exposed portion of Cut No. 8 on the south side of the existing Vander-Ferguson County Road by backfilling and grading that area by Oct. 15, 1986. By letter dated Sept. 30, 1986, Rith sought an extension of that time. On Oct. 7, 1986, OSM granted Rith a limited extension for only that area "to be disturbed for the proposed construction of the new county road" (Exh. R-7). It specifically required, however, that "[a]ll of the area south and east of proposed new road \* \* \* must be completely reclaimed according to the approved reclamation plan by October 15, 1986." *Id.* Pugh's Oct. 16, 1986, inspection was for the purpose of determining compliance with the reclamation deadline.

<sup>5/</sup> Section 701(28)(A) of the Act defines "surface coal mining operations" as "activities conducted on the surface of lands in connection with a surface coal mine," including "excavation for the purpose of obtaining coal, the use of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical process, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the minesite." 30 U.S.C. § 1291(28)(A) (1988); *see* 30 CFR 700.5.

area, but argues that the Judge misinterpreted the letter to include the area cited in violation No. 2, which was outside the permit boundaries.

Although Rith did not file a substantive response to OSM's brief, it claimed, at page 2 of its application for review, that "the disturbance outside of the permit area was unrelated to its mining operations but rather was the result of the relocation of the Vander-Ferguson Road over which OSM has no jurisdiction."

For the reasons set forth below, we find that, although Judge Torbett erred in finding that OSM had failed to meet its burden of establishing a prima facie case regarding violation No. 2, he, nevertheless, properly vacated that violation.

[1] In a proceeding involving an application for review of an NOV, OSM's initial burden is limited to going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated the Act, the regulations, or a permit condition. Harry Smith Construction Co. v. OSM, 78 IBLA 27, 29-30 (1983); Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982); 43 CFR 4.1171(a). <sup>6/</sup> If OSM meets its burden of establishing a prima facie case, the ultimate burden of persuasion rests with the applicant for review, and if OSM's evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed. See Coal Energy, Inc. v. OSM, 105 IBLA 385, 387-88 (1988); 43 CFR 4.1171(b). As discussed below, OSM presented sufficient evidence to establish a prima facie case for the existence of the violation.

In this case, Pugh testified that on the day of his inspection he observed an area outside Rith's permit boundaries that had been disturbed (Tr. 17-18). He depicted the extent of the disturbance on Exhibit R-4, a permit map (Tr. 18). Photographs introduced as evidence show that the area in question had been bulldozed (Exhs. R-8, R-9, and R-10; Tr. 19-21). Pugh stated that the purpose of the disturbance was "to disturb that area to move the road over so that they can mine the existing road, under the existing road" (Tr. 32).

[2] Thus, the evidence submitted by OSM showed that Rith was engaged in surface coal mining operations under Permit No. 2583; that it had disturbed "adjacent land"; and that the disturbance was incidental to its coal extraction activities on the permit. Such evidence established a prima facie case in support of the violation charged by OSM.

The question presented is whether Rith satisfied its burden of persuasion to establish by a preponderance of the evidence that no violation occurred. We believe that it did.

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<sup>6/</sup> A prima facie case is made where sufficient evidence is presented to establish the essential facts and which will justify, but not compel, a finding in favor of the one presenting it. S & M Coal Co. v. OSM, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984).

At the hearing, William H. Ring, President of Rith, testified with regard to the off-permit disturbance that the company had applied to the Knoxville OSM office for permission to relocate the Vander-Ferguson County Road, which divided Rith's permit area (Tr. 46; Exh. R-4). Ring indicated that the purpose of moving the road was two-fold: to correct a very bad curve in the road which had been the scene of several accidents and to allow removal of the coal under the portion of the old road right-of-way located on the permit area (Tr. 54). He stated that relocation of the road was to take place under the direction and supervision of the Bledsoe County Road Supervisor (Tr. 47). Ring testified that the Road Supervisor came to the minesite and instructed Rith personnel to "take the bulldozer and cut that roadway through there so he could make sure that we had the proper alignment for the center lines of the road" (Tr. 47). <sup>7/</sup>

On cross-examination, Pugh was asked whether the area in question was ever "included in the mining of coal or in any permit" (Tr. 27). Pugh responded that "it had to be in order to revise the road." *Id.* However, he admitted that he had terminated the notice of violation without knowing whether the permit boundaries had been changed (Tr. 29). <sup>8/</sup> Upon examining Exhibit R-12, which was a copy of the January 6, 1987, notice of termination of the violation, he stated: "The reason given here is that the road relocation portion of the permit revision was separate from the original revision application and was approved as a separate revision" (Tr. 29). To the best of Pugh's knowledge, in order to relocate the road, Rith was required first to get the approval of the county and then take the county's approval to OSM (Tr. 30). <sup>9/</sup>

Rith established by a preponderance of the evidence that it was not conducting surface coal mining operations on the area cited in the NOV. Although such lands were, in fact, "adjacent land" within the meaning of 30 U.S.C. § 1291(28)(B) (1988), the use of those lands was not incidental to any activities listed in 30 U.S.C. § 1291(28)(A) (1988). Rith has shown

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<sup>7/</sup> Ring's testimony is consistent with Exhibit A-3 which is a copy of a Feb. 4, 1987, letter from the Road Supervisor to an OSM Assessment Conference Officer, concerning "Rith Energy, Inc.- Vander-Ferguson Road Relocation," stating:

"The purpose of this letter is to advise your office that the clearing work that was done by the mining company along the new right-a-way was done at my request so that the alignment could be seen. The clearing work allowed us to check the planned road width and see that the center line was located to solve the problem of the section of road that it was replacing."

<sup>8/</sup> Ring testified that the permit boundaries were not changed to include the area in question and that Rith never intended to mine any coal under that area and, in fact, did not mine that area (Tr. 49).

<sup>9/</sup> Pugh's understanding is consistent with a representation made by an engineering firm representing Rith in a letter to OSM dated Sept. 23, 1986, in which he stated that "[t]he county has approved the relocation and an application for permit revision is now in the public notice and permit review process" (Exh. R-5).

that it bulldozed those lands at the direction of the Bledsoe County Road Supervisor to secure the county's approval to relocate the Vander-Ferguson County Road, and that county approval was a condition precedent to OSM action on a permit revision for the road relocation. 10/ Under the circumstances, Rith's action was clearly incidental to the relocation of the Vander-Ferguson County Road, not to its surface coal mining activities. As Judge Torbett found: "The road here [at least the area in question] was clearly off the permit site and was not used to facilitate mining" (Decision at 5). We conclude that OSM had no jurisdiction over the disturbed area outside Rith's permit boundaries because Rith was not conducting surface coal mining operations in that area at the time of the disturbance or at the time of the inspection. 11/

Accordingly, pursuant to the authority delegated to the Board of Lands Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris  
Administrative Judge

I concur:  
R. W. Mullen  
Administrative Judge

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10/ The remedial action required by OSM in the NOV was to obtain OSM approval of a permit revision for the road relocation. The record shows, however, that the off-permit disturbance was necessary to acquire county approval, which was a prerequisite of OSM approval.

11/ We agree with OSM that its Oct. 7, 1986, letter to Rith did not relate to areas outside the permit area, and, therefore, Judge Torbett erred in concluding that Rith had a right to rely on that extension regarding the area in question. However, given our conclusion that Rith was not conducting surface coal mining operations on the lands outside the permit boundaries, that error is harmless.

