

PAUL F. KUHN

IBLA 89-539

Decided July 3, 1991

Appeal from the decision of the Director, Office of Surface Mining Reclamation and Reinforcement, declining to conduct a Federal inspection pertaining to 10-day Notice No. 89-07-117-003 in response to appellant's citizen complaint.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program:
10-Day Notice to State

If a citizen files a complaint with the Office of Surface Mining Reclamation and Enforcement alleging that a permittee has no right to enter and mine upon his land and that state program action has not been appropriate, pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, the Office of Surface Mining Reclamation and Enforcement has authority to issue a 10-day notice to the state, and to review resulting state program action to determine whether the state has taken "appropriate action to cause said violation to be corrected or has shown good cause for such failure" under 30 U.S.C. § 1271(a)(1) (1988).

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

A permit is a written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority. Under the Surface Mining Control and Reclamation Act of 1977, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated area under the conditions specified in the permit, without which permit such mining would not be allowable.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

Pursuant to the Surface Mining Control and Reclamation Act of 1977, this Board has no authority to award damages for trespass. While sec. 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter," the Act provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988).

4. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Under the Surface Mining Control and Reclamation Act of 1977, a permit applicant is required to file legal documentation of a right to mine an area under consideration, and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (1988)), providing that, "[w]henever, on the basis of any information available to him, including receipt of information from

any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority," and the state authority shall take "appropriate action."

5. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

If a citizen alleges and provides evidence that a state program has granted a permit to enter and mine where the permittee has not obtained a legal right to enter and mine, a state is required by sec. 521(a)(1) (30 U.S.C. § 1271(a)(1) (1988)) and sec. 507(b)(9) (30 U.S.C. § 1257(b)(9) (1988)) of the Surface Mining Control and Reclamation Act of 1977 to take any "appropriate action" short of adjudication of property title disputes.

6. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

Where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the operator has the right to enter and mine before the area is mined, and state action which fails to do so will be deemed inappropriate action pursuant to sec. 521(a)(1) of the Act. 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988). So long as the operator retains full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act as stated in sec. 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" is jeopardized.

7. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

The Office of Surface Mining Reclamation and Enforcement is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of the Surface Mining Control and Reclamation Act of 1977. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity, and thus finds a permit is not required, but the interpretation of the statute advanced by the state is contrary to both the intent of the Act and a reasonable interpretation of state law, it is proper for the Office of Surface Mining Reclamation and Enforcement to order a Federal inspection. If, after Federal inspection, the Office of Surface Mining Reclamation and Enforcement determines that the activity is in violation of any requirement of the Act, the Office of Surface Mining Reclamation and Enforcement may issue a notice of violation to the operator or cessation order, fixing a reasonable time for abatement.

8. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

Under sec. 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1988), a permittee of a minesite was properly cited for a violation of the Act notwithstanding the fact that the surface mining or related activity was performed by a third party.

APPEARANCES: Paul F. Kuhn, Harrison, Ohio, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Paul F. Kuhn appeals a letter decision dated June 21, 1989, issued by the Director, Office of Surface Mining Reclamation and Enforcement (OSM).

The decision notified Kuhn that OSM would not take enforcement action on his appeal, dated May 17, 1989, from a decision by the Columbus Field Office (CFO), OSM. CFO's decision declined to conduct a Federal inspection of a mining site under permit D-217-2 to Empire Coal Company (Empire), located adjacent to Kuhn's property in Clay and Salem Townships, Tuscarawas County, Ohio.

On March 23, 1989, Kuhn filed a citizen's complaint with CFO, pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1988), 1/ alleging that Empire had committed four infractions against him. Kuhn alleged that in June 1988, Empire had committed a surface disturbance on his property when it bulldozed across a property line onto a strip of his property; that it had committed a mining encroachment and removed coal by auger from his property; that a gas pipeline had been laid across his property in furtherance of Empire's mining operations without his permission; and that trees

1/ 30 U.S.C. § 1271(a)(1) (1988) provides, in pertinent part:

"Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action."

were cut and his property damaged as a result. 2/ He also alleged that the Ohio Department of Natural Resources, Division of Reclamation (DOR) had improperly approved permit D-217-2 to include part of his land within the permit boundaries.

On March 27, 1989, OSM issued a 10-day notice to DOR, informing DOR that citizen's complaint had been received alleging removal of overburden and coal by auguring beyond permit limits onto Kuhn's property. On March 29, 1989, DOR conducted an on-site investigation of the portion of Empire's permit D-217-2 abutting appellant's property. At that time DOR issued two notices of violation (NOV's) to Empire. Both NOV's alleged violations by Empire of Ohio Revised Code (ORC) 1513.16(a)(20) and 1513.17(a). NOV 18414 alleged that Empire had "removed vegetation beyond the western limits of the permit during construction of pond number 013, on the property of Franklin Horsfall and Wilma Kuhn"; NOV 18415 alleged that "the permittee has augered coal beyond the western limits of the permit on the Franklin Horsfall property and the Wilma Kuhn property." Both NOV's required Empire to "immediately cease all mining beyond the permit limits," and to reclaim the areas pursuant to standards in section 1513, ORC. DOR did not require Empire to suspend mining on the disputed

2/ The record establishes that "the stakes placed by [Empire's surveyor] * * * delineating the mining permit area in Salem Township were incorrect, encroaching onto Mr. Kuhn's property approximately 80 feet at the north-easterly corner and approximately 30 feet at the southeasterly corner of Mr. Kuhn's 36.25 acre tract in Salem Township" (Letter of David A. Miskimen, P.E., P.S., dated Mar. 27, 1989). Although somewhat ambiguous as to location, the record also establishes an encroachment upon Kuhn's property in an area not affected by the disputed survey.

land within the permit area, nor was relocation of the gas line across Kuhn's property determined to be violative of any Ohio statutory or regulatory provisions.

DOR reinspected the site on March 30, the day following the initial inspection. Finding the land to have been satisfactorily reclaimed, DOR terminated both NOV's owing to Empire's prompt reclamation efforts. While minor assessments were calculated for the two NOV's, they were deleted pursuant to provisions within the Ohio State plan which permit discretionary deletion of penalty assessments less than \$ 500 per violation. On April 4, 1989, Kuhn visited CFO and objected to DOR's determination that assessments should not be levied and the NOV's terminated.

On April 5, CFO issued a notification of inappropriate response to DOR. CFO found that the issuance of NOV's 18414 and 18415 did not comply with the program requirements of Ohio Administrative Code (OAC) 1501:13-14-02(A)(2), which requires issuance of a cessation order (CO) where mining off the permit has occurred, as follows:

Coal mining and reclamation operations conducted by any person without a valid permit issued pursuant to these rules constitute a condition or practice which causes or can reasonably be expected to cause significant environmental harm to land, air or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations.

(Letter Decision (Apr. 5, 1989) at 1).

With respect to the permit boundary dispute, CFO stated that, while the information available to DOR at the time the permit was issued supported the initial decision, Kuhn's documentation provided DOR with reason to believe that the permit may have been issued in error. CFO found DOR's refusal to suspend mining in the disputed permit area pending resolution of the dispute to be arbitrary and capricious action, and therefore found DOR's failure to suspend mining on the disputed area within the permit boundaries to be inappropriate action.

CFO found DOR's resolution of the gas pipeline issue in favor of Empire to be appropriate, stating:

[DOR's] * * * response to this allegation is considered appropriate since no surface area was affected, ie. [no] disturbance to the actual ground surface has occurred. It is our understanding that the gas line is a plastic line laid across the surface of the ground and could not be construed as a surface coal mining operation activity.

Id. at 2.

Pursuant to 30 CFR 842.11(b)(1)(iii), on April 10, 1989, DOR requested the Assistant Director, OSM, to conduct an informal review of CFO's determination. DOR alleged that it was reasonable to issue an NOV for "incidental off-permit affectment" and that its decision not to suspend mining within the disputed area of the permit was not arbitrary.

With respect to the disputed boundary, DOR stated:

What is characterized in the field office's inappropriate determination as an "improper location of a permit boundary" based on a "property line error" essentially mischaracterizes what is clearly a property dispute. The Division has, in its investigation, ascertained that the basis of the Kuhn/Empire dispute is not simply due to a surveyor's measuring error, but is due to a disagreement on appropriate surveying reference points. The Division has requested that Empire review its original survey, and in that way may attempt to facilitate a voluntary resolution of this property dispute. However, unless one party or the other recognizes or agrees to an error, the Division is powerless to resolve this dispute. See attached Ohio Revised Code 1513.07(B)(2)(i) which clearly states that the Chief has no authority to adjudicate property title disputes.

Id. at 3. DOR disputed CFO's determination that mining operations should have been suspended, stating: "After careful review, it is the Division's opinion that it has no authority to [order the permittee to] cease operations in the disputed and unaffected area; further, the authority cited in the April 5, 1989 letter * * * does not support the contention that the Division does have such authority." Id. at 3-4. According to DOR, at the time of its inspection, "Empire * * * [was] not affecting any of the disputed area 80 feet east from its permit boundary running along the Paul and Jean Kuhn property; * * * [nor did] Empire * * * propose to affect such disputed area." Id. at 4.

On April 28, 1989, Brent Walquist, OSM Assistant Director for Program Policy, issued a decision upholding CFO's determination that DOR's response concerning the failure to issue imminent harm cessation orders for mining outside permit limits was inappropriate, and reversing CFO's determination

that DOR should have taken action to prohibit mining within areas of the permit allegedly encroaching upon appellant's property. Concerning DOR's responsibility to issue a CO for mining off the permit site, the Assistant Director stated pertinently:

[ORC 1501.13-14-02(A)] clearly requires a cessation order for surface coal mining and reclamation operations conducted without a valid permit regardless of the extent of the disturbance unless such operations are an integral, uninterrupted extension of previously permitted operations and the person conducting such operations has filed a timely and complete application for a permit for such operations. * * * In this case, there is no practical difference between issuing a notice of violation and issuing a cessation order, except that a cessation order requires a mandatory assessment. [Emphasis in original.]

(Letter Decision (Apr. 28, 1989) at 2). As a result of this letter decision, and prior to any entry on the site by OSM, DOR issued CO's Nos. I-098 and I-099 on May 2, 1989. 3/

Concerning the disputed permit boundary, the Assistant Director stated:

3/ Despite the Assistant Director's finding in his Apr. 28 decision that, "a cessation order requires a mandatory assessment," DOR waived the assessments for CO I-098 and I-099 on May 9, 1989, because they were calculated at less than \$ 500. Twenty days subsequent to DOR's issuance of the CO's, on May 22, 1989, CFO again informed DOR that the Ohio code does not permit waiver of assessments in the case of cessation orders. DOR agreed to revise the initial assessment and to reissue assessments on both CO's. On June 9, 1990, Kuhn called CFO to discuss his concerns about when civil penalty assessments would be issued (Telephone Record of Bob Mooney, June 9, 1989). CFO contacted DOR, and DOR issued assessments to Empire on June 12, 1989, 43 days after issuance of the imminent harm CO.

Under the Ohio plan, DOR was required to issue assessments within 30 days of issuance of the CO's. Our review of the record leads us to conclude that CFO had jurisdiction to issue a 10-day notice to DOR on June 2, 1989, and should have done so without prodding from Kuhn; indeed, CFO could have made DOR aware of the ramifications of dragging its feet in the matter. DOR was placed on notice twice of the assessment issue; certainly CFO had

While I agree that * * * [DOR] does not adjudicate property disputes, it is appropriate for your agency under program provisions such as ORC 1513.09(B)(1)(e) to notify the permittee that his right to enter is subject to dispute and to require reasonable and necessary information to ensure that the permittees' basis for right of entry remains consistent with program requirements. In this regard, the record indicates that your agency has taken such action. Although the Ohio program may authorize a range of actions short of adjudicating a property dispute which could serve as a basis to restrict mining operations on the disputed area until there is a resolution, such actions are not mandatory.

(Letter Decision (Apr. 28, 1989) at 1). The Assistant Director therefore reversed the determination that DOR's failure to suspend mining was inappropriate action.

On May 9, 1989, CFO notified Kuhn of the Assistant Director's decision of April 28, 1989, and of the finding that the gas pipeline relocation onto Kuhn's property was not within the purview of SMCRA. Pursuant to 30 CFR 842.15, Kuhn then appealed OSM's decision not to take Federal action by letter dated May 17, 1989. On June 21, 1989, the Director issued a letter

fn. 3 (continued)

continuing jurisdiction to see that appropriate action was taken on Kuhn's complaint, which encompassed the breadth of appropriate enforcement, including assessments. Be that as it may, DOR did eventually take appropriate action by issuing assessments, and the issue is not now before this Board.

OSM's file does not contain documentation of the assessments issued to or paid by Empire for CO I-098 and I-099. In his Nov. 26, 1990, response to Empire's answer, Kuhn has provided the Board with copies of DOR's assessment worksheets for CO I-098 (removing vegetation without a permit) and I-099 (auguring without a permit). These worksheets indicate that on June 12, 1989, Empire was assessed \$ 620 for CO I-098, and was granted a 25-percent reduction in penalty for the good faith demonstrated by its prompt abatement, which reduced the assessment for Co. No. I-098 to \$ 465. An assessment of \$ 1,020 was issued on June 12, 1989, for CO I-099; no good faith reductions were granted.

decision in response to Kuhn's appeal, upholding OSM's decision not to inspect or enforce. Kuhn's appeal of the Director's June 21, 1989, decision was filed with this Board on July 13, 1989.

In his statement of reasons on appeal (SOR), ^{4/} Kuhn alleges that two issues concerning the response of DOR to 10-day notice No. 89-07-117-003 remain unresolved to his satisfaction. With regard to Walquist's findings concerning the disputed permit boundary, Kuhn alleges that DOR should have investigated and confirmed that the "right of entry" information submitted by Empire was correct, and that DOR's failure to verify Empire's documentation of permit boundaries "improperly shifts the burden of demonstrating right-of-entry from the permit applicant to the public" (SOR at 2). Kuhn further contends that, once DOR was aware of his complaint, the appropriate procedure for the State regulatory agency to follow was to suspend mining in the disputed area until the matter was resolved. *Id.* According to Kuhn, "[i]n this case, the coal company obtained a 'negative' incidental boundary revision to delete the acreage that my land surveyor had shown to be within the boundaries of my property, indicating that there was no 'dispute' but rather a trespass on my lands." ^{5/} Kuhn states that "[t]he damage done to my land and removal of coal from beneath my land has not been fully remediated," and demands that this Board "reverse the Ohio Field Office and require appropriate action by the state of Ohio" (SOR at 2-3).

^{4/} Kuhn filed his SOR by letter dated Sept. 26, 1989.

^{5/} On Apr. 17, 1989, Empire filed an application with DOR for a Negative Incidental Boundary Revision, which conceded the boundary error alleged by Kuhn. On Apr. 19, DOR approved the boundary revision (see letter, May 1, 1989, from Robert Mooney to Sally Rickert).

Second, Kuhn alleges that Empire relocated a gas line onto his land, and that such activity was a "surface coal mining activity" within the meaning of section 701(28) of the Act, and should have initially been found to be so by the DOR, and by OSM (SOR at 3). Kuhn requested a hearing and expedited consideration of his appeal. These requests were denied by order dated January 24, reaffirmed on March 14, 1990.

On September 26, 1990, appellant filed additional evidence supporting his appeal in the form of a supplemental SOR. Kuhn alleged that Empire's permit map D-0398, submitted to DOR on September 6, 1989, indicated that the plan for the natural gas line to be removed from the mining pit onto Kuhn's property was submitted by Empire to DOR and approved without Kuhn's notice or approval. Kuhn alleged that "[t]he same map by Empire and approved by the State of Ohio indicated my boundary therefore it was the full intention of Empire Coal Company to steal my land, my coal and my forest." On October 5, 1990, this Board issued an order giving notice to Empire of the new evidence submitted by Kuhn, and granting Empire opportunity to respond. Empire filed a response on November 15, 1990; Kuhn responded to Empire on November 26, 1990. 6/

6/ In his Nov. 26, 1990, response, Kuhn reiterated his plea to this Board to require OSM and DOR "to issue cessation orders to Empire Coal Co. and assess penalties in the amount of \$ 750. per day per cessation order from the date of Empire action to the present" for (1) "[t]respassing on my land with a bulldozer destroying my forest"; (2) "[l]aying of gas line through my forest destroying my trees"; (3) "[f]or the auguring of my coal and require Empire to uncover the auger holes on vein number five"; (4) "[f]or trespassing on my property to set stakes with full intention of stealing my land and coal"; and (5) "[r]eclaim all mined areas by Empire Coal Co. in Tuscarawas County State of Ohio."

Empire has admitted that "[i]n June of 1988 Empire's contractor's dozer * * * [trespassed] onto the Kuhn property and disturbed 0.03 acres of brush on the Kuhn side of the Horsfall/Kuhn Property line." According to Empire, "[t]he area was repaired by seeding and mulching the next day." Empire has averred that "[a]n automatic Civil Penalty Assessment of \$ 750.00 was paid to the state as a result of the CESSATION ORDER." Empire has admitted that a second trespass occurred between February 18 and February 23, 1989, and that "[b]etween the dates of Feb. 18 to Feb. 23, 1989 Empire augered the #6 seam along the Kuhn property line." Empire explained that:

[D]ue to a lack of detail on an engineering sketch showing the toe of the #6 highwall in relation to the Kuhn property line our auger penetrated a maximum of 8 feet into Kuhn's coal. The sketch showed the highwall as a straight line when in fact the wall bowed toward the Kuhn line.

Empire has conceded that it augered 46.6 tons of appellant's coal and that a second NOV and CO were issued against it by DOR. For the second infringement, Empire states that it paid \$ 750.

Concerning relocation of the Horsfall gas pipeline on Kuhn's property, Empire explained:

On August 28, 1988 Empire Coal Company provided David Horsfall a map showing the needed relocation of a gas line on his mother's property * * *. The purpose of the line was to supply gas for heating from a gas well on the Horsfall property to the new location of the Horsfall house. The Horsfall house was moved from its original location inside the mining area to a new location outside the mining area. The map showed a location for the line to remove it from the area to be affected by mining. The actual relocation

of the gas line was the responsibility of the Horsfalls and the work was performed by the Horsfalls. When the auger mining encroachment was determined it was discovered that the gas line cut across the corner of the Kuhn property.

(Empire Response at 1).

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), provides that the Secretary of the Interior shall order a Federal inspection of a surface coal mining operation where the Secretary has reason to believe a violation of any requirement of SMCRA or any permit condition has occurred and the State, acting as the regulatory authority, "fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure." OSM is required to conduct the inspection and "if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate." 30 CFR 843.12(a)(2).

When a state program is approved, the state concerned assumes responsibility for issuing mining permits and enforcing its regulatory program. In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). A state's jurisdiction for enforcement of an approved program is primary, but not exclusive. Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 320 (1986), appeal denied, Turner Brothers, Inc. v. Office of Surface Mining Reclamation & Enforcement, No. 86-380-C (E.D. Okla. Oct. 5, 1987); Shamrock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 81 IBLA 374, 376 (1984), appeal

dismissed, Civ. No. 84-238 (E.D. Ky. May 13, 1987). Effective August 16, 1982, the Ohio State program was conditionally approved by the Secretary of the Interior. See 30 CFR 935.10. On that date, DOR became the regulatory authority in Ohio for all surface coal mining and reclamation operations. Id. Thus, at the time OSM issued the 10-day notice, the State of Ohio was operating under an approved State program, and the question presented by this appeal is, therefore, whether DOR's response was "appropriate action" within the meaning of section 521(a)(1).

While no definition of the phrase "appropriate action" has been provided by OSM, the preamble to 30 CFR 843.12 states: "The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation" (47 FR 35627-28 (Aug. 16, 1982)). Later rulemaking has delineated a "standard of review" for "appropriate action" as a "response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion." 30 CFR 842.11(b)(1)(ii)(B)(2). 53 FR 26730 (July 14, 1988). As a practical matter, this standard has been implicit in Board rulings under section 521(a)(1). See W. E. Carter, 116 IBLA 262, 267 n.3 (1990).

A state's failure to affirmatively enforce statutory and regulatory requirements under SMCRA by issuance of an NOV or CO subsequent to receipt of a 10-day notice is "inappropriate." Dora Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 100 IBLA 300 (1987); Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., 95 IBLA 182

(1987); Bannock Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 93 IBLA 225 (1986). If a state issues an NOV or a CO, but does not enforce abatement or reclamation requirements, OSM may, without notice to the state, reinspect and issue Federal enforcement sanctions. Turner Brothers, Inc., 92 IBLA at 320. Further, a primacy state may not extend an abatement time beyond that allowed by law or regulation, nor may it vacate NOV's or CO's, thus circumventing abatement. Peabody Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 95 IBLA 204, 94 I.D. 12 (1987).

Often, however, scrutiny of state actions leads to the conclusion that the state has acted appropriately, and that, therefore, OSM has no jurisdiction to assume enforcement authority. When evidence in a record shows an "ongoing effort" on the part of the state agency to rectify a violation, and that enforcement activities are proceeding "apace," Federal enforcement efforts will be deemed to be unjustified. Turner Brothers v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 87, 93 (1987). Where the record does not bear out allegations by a citizen that his land has not been restored to its approximate original contour, and that reclamation efforts left "excessive gullying and inadequate revegetation," a decision by Federal officials not to take enforcement action will be upheld. Kenneth Marsh, 82 IBLA 3 (1984).

Kuhn has not challenged the reclamation efforts of Empire insofar as Empire's encroachment upon his property is concerned, although he continues to challenge Empire's failure to reclaim his land in connection with placement of the Horsfall gas pipeline across his property. Kuhn's quarrel with

DOR is not that DOR failed to enforce reclamation requirements, but that it did not diligently investigate Empire's permit application, thereby leaving his property at risk from encroachment by permit D-217-2. Kuhn further alleges that even when DOR was put on notice of possible infractions on his property by permit D-217-2, DOR refused to take appropriate action.

Kuhn alleges that DOR should have investigated and confirmed that the "right of entry" information submitted by Empire was correct, and that DOR's failure to verify Empire's documentation of permit boundaries "improperly shifts the burden of demonstrating right-of-entry from the permit applicant to the public" (SOR at 2). Kuhn further contends that, once DOR was aware of his complaint, the appropriate procedure for the state regulatory agency to follow was to suspend mining in the disputed area until the matter was resolved. Id. Last, Kuhn requests that this Board order DOR to "remediate" the damage done to his land and his coal by Empire's trespass. Thus, Kuhn alleges that SMCRA imposes the following duties upon DOR: (1) the duty to ensure accurate permit boundaries prior to permit issuance and to prevent trespass; and (2) the duty to suspend permission to mine where permit boundaries are called into question.

[1, 2] Generally, a permit is "[a] written license or warrant, issued by a person in authority, empowering the grantee to do some act not forbidden by law, but not allowable without such authority." Black's Law Dictionary 1298 (4th ed. 1968). Particularizing this general definition to permits issued under SMCRA, the issuance of a surface mining permit by a regulatory authority empowers the permittee to surface mine a designated

area under the conditions specified in the permit, without which permit such mining would not be allowable. While many decisions of this Board have addressed allegations that the permittee has expanded surface mining operations beyond permit limits, few cases have addressed allegations that the regulatory authority has issued a permit which erroneously expands upon the legal right to mine; that is, that the boundaries described in the permit encompass more land than the operator has legal authority to mine. While the distinction may seem minute, it is significant. In the first instance, an operator may have obtained legal right to conduct surface coal mining operations from adjacent landowners, but the activity is not allowed because he has not obtained regulatory permission. In the second instance, the regulatory agency has bestowed authority to mine upon the operator, but it allegedly lacks the legal right to do so. Compare Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, 108 IBLA 303 (1989), and Firchau Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 144 (1988), and Thomas J. Fitzgerald, 88 IBLA 24 (1985), with Samuel M. Mullinax, 96 IBLA 52 (1987), and W. E. Carter, *supra*.

In Samuel M. Mullinax, this Board upheld a decision by OSM finding state action to be appropriate where irregularities with respect to the issuance of surface mining permits were alleged, but it was established that the operator and state had complied with relevant provisions of the state's surface mining statute. Of particular relevance to this appeal is the Board's analysis distinguishing permitting issues from reclamation issues under section 521(a)(1):

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It is clear that section 521(a)(1) is primarily designed to address violations of performance standards or permit conditions that would be ascertainable by inspection of the surface coal mining operation. Thus, in Turner Brothers * * *

[92 IBLA at 320], OSM conducted an investigation of a minesite pursuant to a citizen's complaint and issued a 10-day notice to Oklahoma's regulatory authority citing violations of the State's program. OSM determined, and this Board affirmed, that the State's issuance of a notice of violation (NOV), given that the State had issued an NOV a year before for the same violation, did not amount to "appropriate action" under section 521(a)(1).

On the other hand, a citizen's complaint which sets forth allegations of irregularities in the issuance of permits by the State regulatory authority may involve different considerations and consequences than one which alleges violation of a performance standard, such as in *Turner Brothers*. * * * [I]n this case the State reviewed the permits * * * and uncovered none of the alleged irregularities. Under the circumstances, OSM acted properly in referring the complaint to the State. Our only other inquiry is whether the State's response was "appropriate * * *."

Id. at 58-59.

In that case at footnote 4, this Board noted that the legislative history of SMCRA indicates an intent by Congress to place primary control of permit issuance within state jurisdiction, even during interim Federal enforcement. Even so, where it is evident that a permit has been issued in violation of state regulatory requirements, this Board has declared such action inappropriate, and has ordered Federal enforcement. See W. E. Carter, supra.

Both Federal and state regulators issue permits within procedures set forth in the Act and accompanying regulations. An operator has a duty to prepare permit applications that are legally sound. See 30 CFR 778.15. Opportunity for public scrutiny of permit applications must be provided

prior to approval by appropriate state or Federal authorities. See 30 CFR 773.13. Under 30 CFR 773.13(a), a permit applicant must "place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operation at least once a week for four consecutive weeks." The advertisement must contain, among other information, "[a] map or description which clearly shows or describes the precise location and boundaries of the proposed permit area and is sufficient to enable local residents to readily identify the proposed permit area." Any citizen having an interest which is or may be adversely affected by the decision on the application may request an informal conference, which, unless otherwise agreed, shall be preserved on electronic or stenographic record. 30 CFR 773.13(c). Pursuant to section 503(a)(4) of SMCRA, Ohio law must provide citizens with similar safeguards. See 30 U.S.C. § 1253(a)(4) (1988).

Kuhn has not alleged that these procedural safeguards were not made available to him prior to issuance of permit D-217-2 to Empire. While this Board has jurisdiction under section 521(a)(1) to hear appeals where state action pertaining to permit issuance is inappropriate, no facts are brought before us here to establish that DOR did not follow appropriate procedures in issuing Empire's permit. See Samuel M. Mullinax, supra at 59. Kuhn would have us rule, however, that DOR alone is responsible to insure that mining permits correctly describe the area on which the applicant is authorized to mine. We find no authority for this proposition. Not only does the permitting scheme place significant responsibility on adjacent landowners to diligently defend their boundaries, DOR's position that it is

powerless to adjudicate property title or rights disputes is well-taken. See 30 U.S.C. § 1257(b)(9) (1988); 30 CFR 778.15(c). 7/

[3] Kuhn would further have us penalize Empire for actions taken in trespass (see note 6). This Board has no authority under SMCRA to award damages for any purpose. While section 520 of the Act permits a damage action by "[a]ny person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this chapter" (30 U.S.C. § 1270(f) (1988)), those actions are to be brought in either the state or Federal courts in the jurisdiction in which the "surface coal mining operation complained of is located." *Id.* See *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 495-98 (3rd Cir. 1987). SMCRA provides that, in the event of operator error, malfeasance, or damage to a citizen's private property, the citizen's remedy is with the courts. 30 U.S.C. § 1270(f) (1988). Indeed, Kuhn has brought an action before the Ohio Court of Common Pleas. 8/

7/ 30 CFR 778.15(c), stating regulatory requirements for right-of-entry information, provides: "Nothing in this section shall be construed to provide the regulatory authority with the authority to adjudicate property rights disputes."

Section 507(b)(9) of the Act, 30 U.S.C. § 1257(b)(9) (1988) provides:

"[T]he applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: Provided, That nothing in this chapter shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes." (footnote omitted).

8/ According to Empire's response dated Nov. 15, 1990, this action was then still pending in the Court of Common Pleas.

[4-6] Nonetheless, we find that the Assistant Director erred when he reversed CFO's decision that DOR's failure to suspend mining in the disputed area was arbitrary and

capricious and therefore was "inappropriate action." ^{9/} Specifically, CFO had ruled that:

OAC 1501:13-4-03(C) requires that the Chief [of DOR] review information to determine if the operator has the right to enter and to conduct surface mining operations. In this case a landowner has provided evidence * * * that * * * [the Chief's] initial decision may be in error as to whether the operator has the right to enter and mine an area that has been permitted. While the rule expressly states that the Chief does not have the authority to adjudicate property disputes, the Chief has to assure that the right to enter and mine is valid before an area is mined. [DOR's] * * * position that it will not assure that the operator has the right to enter has the de facto effect of adjudicating the dispute. The Division must take action to prevent surface coal mining operations from occurring on the questioned area until it is assured that the permit is correct or that the permit is corrected if necessary.

(CFO Decision dated Apr. 5, 1989, at 3).

CFO further supported the conclusion that DOR should have suspended mining on disputed land within the permit boundaries by citing two additional provisions of the Ohio Codes. CFO quoted OAC 1501:13-5-01(F)(1), which provides that "except to the extent that the Chief otherwise directs in the permit that specific actions be taken, the permittee shall conduct

^{9/} Although neither OSM nor Empire has raised the question, it might be argued that the issue whether OSM should have suspended mining in the disputed permit area pending resolution of the boundary dispute is now moot, because Empire has conceded that its permit boundaries were in error and DOR has approved Empire's request for Negative Incidental Boundary Revision. We decline to dismiss this issue as moot, however, because we find it presents an issue "which is capable of repetition, yet evading review." See Southern Utah Wilderness Alliance, 114 IBLA 326, 329-30 (1990); Southern Utah Wilderness Alliance, 111 IBLA 207, 208-10 (1989).

all coal mining and reclamation operations as described in the complete application (emphasis added)"; and ORC 1513.09(B)(1)(e), which provides:

For the purpose of administration and enforcement of any requirement of this chapter or in the administration and enforcement of any permit under this chapter or of determining whether any person is in violation of any requirement of this chapter. (1) The Chief shall require any permittee or operator to: . . . (e) Provide such other information relative to coal mining and reclamation operations as the chief considers reasonable and necessary.

Id. CFO concluded that

These program requirements give the Chief authority to specifically direct that the permit be conditioned or suspended so that surface coal mining operations do not occur on the area in question until the Chief is assured that the operator has the right to enter and operate. It also gives the Chief authority to require the permittee to provide information to demonstrate that the permit map is accurate.

The Division's rationale used in the response to this issue abuses the discretion provided to the Chief by the program and its interpretation of the program requirements is arbitrary and capricious as it applies to the concerns of the complainant. OSM[RE], therefore, has determined that the response to the TDN is inappropriate.

Id. at 3, 4. Reversing CFO, the Assistant Director, OSM, stated:

While I agree that your agency does not adjudicate property disputes, it is appropriate for your agency under program provisions such as ORC 1513.09(B)(1)(e) to notify the permittee that his right to enter is subject to dispute and to require reasonable and necessary information to ensure that the permittees' basis for right of entry remains consistent with program requirements. In this regard, the record indicates that your agency has taken such action. Although the Ohio program may authorize a range of actions short of adjudicating a property dispute which

could serve as a basis to restrict mining operations on the disputed area until there is a resolution, such actions are not mandatory. Therefore, I find that your agency's response does not constitute an abuse of discretion under the approved program and I hereby reverse the written determination of the Columbus Field Office Director.

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(Decision at 1).

The decision of the Assistant Director was sustained by the Director on appeal by Kuhn. We are not able to uphold this determination. Under SMCRA, a permit applicant is required to file legal documentation of the right to mine an area under consideration and maps which accurately depict the area within which the applicant possesses the legal right to mine. 30 U.S.C. § 1257(b)(9) (1988). These requirements come within section 521(a)(1) of the Act, which provides that,

[w]henever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority * * * [emphasis in original] [,]

and the State authority shall take "appropriate action." When a citizen alleges that the boundaries of an adjacent permit are inaccurate, a state is required by section 521(a)(1) to take any "appropriate action" short of adjudication of property rights disputes. See W. E. Carter, supra.

DOR eventually approved Empire's application for a Negative Incidental Boundary Revision which conceded the boundary error alleged by Kuhn. Consequently, DOR's failure to suspend mining in the disputed area within

the permit boundaries until resolution of the matter was arbitrary, and fell short of "appropriate action." While DOR alleged that, at the time of its inspection, "Empire * * * [was] not affecting any of the disputed area 80 feet east from its permit boundary running along the Paul and Jean Kuhn property; * * * [nor did] Empire propose to affect such disputed area," CFO correctly determined that "where a landowner provides evidence that an initial decision that an operator has a right to enter and mine an area that has been permitted may be in error, state authorities must assure that the right to enter and mine is valid before the area is mined." See 30 U.S.C. § 1257(b)(9) (1988); 30 U.S.C. § 1271(a)(1) (1988).

Of particular interest here is CFO's written summary of a telephone conference held on April 4, 1989, between CFO and DOR officials regarding DOR's 10-day notice response, in which CFO stated:

It is the CFO's position that the DOR must require that all mining on the disputed area be postponed until it can be accurately determined whether the permit has or has not been approved to include a portion of Mr. Kuhn's property. The DOR disagreed with the CFO's position and opted not to initiate any action to prevent mining on the area in question. DOR felt they have no authority to do so. [C]FO suggested possible suspension or permit condition be imposed on the area in question. DOR indicated that there is no immediate threat to the questioned area since mining is not expected to progress into the area at least for a couple weeks. [C]FO indicated that Kuhn had indicated otherwise and he felt they in the area at this time [sic]. DOR felt he is protected by the court order he obtained, [C]FO indicated that the order according to Kuhn only required that he have a representative present during augering and did not prevent mining on the area. [C]FO has requested a copy of the order from Kuhn[.]

Under the circumstances, it was reasonable that CFO would question DOR's assumption that a 2-week hiatus in Empire's mining schedule would not

constitute an "immediate threat to the questioned area," and would determine DOR's conduct to be inappropriate. So long as the operator retained full authority to mine the disputed area under a validly issued permit, the intent and purpose of the Act stated in section 102(b) (30 U.S.C. § 1202(b) (1988)) to "assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations" was jeopardized.

[7, 8] Kuhn's allegations regarding a natural gas pipeline allegedly laid across his land in furtherance of Empire's surface coal mining operations remains to be considered. In his complaint filed with CFO on March 23, 1989, Kuhn alleged:

During the time from 6/6/88 to the present Empire had the adjacent home and out-building relocated from the mining area to a bottom adjacent field. They relocated the natural gas line through my woods and out of their mining area. No request was made to me to go on my property by Empire nor was any permission granted.

DOR declined to investigate Kuhn's complaint regarding the gas pipeline, finding that "[t]he Division does not regulate private gas line relocation by a neighboring landowner. This is a private contractual matter between the parties involved" ([DOR] Addendum to 10-day Notice 89-07-117-003 Response). In an April 4, 1989, visit to CFO, Kuhn disputed the finding by DOR, claiming that "the gas line had been removed from the area of the permit and placed on his property to facilitate the mining operation" (CFO Telephone Record dated Apr. 4, 1989). Nevertheless, CFO

found DOR's response to this allegation appropriate, "since no surface area was affected, ie. disturbance to the actual ground surface" (Apr. 5 Decision at 2). CFO further stated: "It is our understanding that the gas line is a plastic line laid across the surface of the ground and could not be construed as a surface coal mining operation activity." Id.

In a personal communication with CFO officials on April 12, 1989, Kuhn "noted that the gas line placed on his property had resulted in the company cutting trees on his land in order to route the line around the mining operation" (CFO Telephone Record dated Apr. 12, 1989). According to this record, "[p]ictures were taken by Mr. Kuhn of the cut trees. Because of this disturbance he believes routing the gas line through his property is an operation to facilitate the mining and warrants a violation." The record notes, parenthetically: "(This information had not previously been provided to the CFO)." According to an OSM call-visit record dated April 14, 1989,

Kuhn said the the company's representative had testified that they had moved the gas line to * * * mine the coal. He [Kuhn] was going to send the transcript so that we could see that the movement of the gas line was part of the mining operation. I told him that I would review it.

The record indicates that the transcript of the preliminary injunction proceeding was probably received by CFO on or about April 17, 1989, 10/ but

10/ On Mar. 27, 1989, at the hearing on Kuhn's motion for preliminary injunction in the Tuscarawas County Court of Common Pleas, Empire's chief engineer admitted that the relocation of the natural gas pipeline onto the Kuhn property furthered its coal mining activity. OSM's copy of this partial transcript of proceedings is not date-stamped as to receipt; it is

no follow-up on Kuhn's allegations occurred until CFO's May 9, 1989, letter to Kuhn, which stated:

The relocation of a gas line is not considered as a surface coal mining operation, even though the line was moved to facilitate the removal of coal on the permit. The definition of a coal mining operation (Ohio regulation OAC 1501:13-1-01 S) specifies the activities which are to be regulated. The placement or relocation of a gas line is not specified as an activity to be regulated.

Your concerns about a gas line being placed on your property without your permission, and the resultant loss of trees, are appreciated. However, this is an issue that is not within our purview, regardless of who the responsible party may be.

Id. at 2.

Pursuant to 30 CFR 842.15, Kuhn appealed this decision to the Assistant Director by letter dated May 17, 1989. On June 21, 1989, the Director issued a letter decision in response to Kuhn's allegation in his appeal that "Empire Coal Company in November of 1988 removed a natural gas line from their pit and ran it through my wood * * * destroying my forest" (emphasis in original), stating the following:

OSMRE shared this information with DOR. DOR determined that relocation of this pipeline by a neighboring landowner was not incidental to a surface mining operation. This is neither an arbitrary or capricious decision nor an abuse of discretion under the Ohio State program. The evidence attached to your May 5, 1989 letter to Tim Dieringer, Chief of DOR, indicates

fn.10 (continued)

therefore hard to tell when this transcript was received, or the source of its transmittal. The copy of the transcript appears to have been attached with a copy of the Miskimen letter, noted as received by CFO on Apr. 17, 1989.

that the pipeline was relocated onto your property by your neighbor, Frank Horsfall, not relocated by Empire Coal. Therefore, I have no reason to order a Federal inspection.

Id. at 2.

In response, Kuhn alleged that Empire's permit map D-0398, submitted to DOR on September 6, 1989, indicated that the plan for the natural gas line to be removed from the mining pit onto Kuhn's property was submitted by Empire to DOR and approved without Kuhn's notice or approval. On November 9, 1990, Empire responded in pertinent part to Kuhn's allegations as follows:

On August 28, 1988 Empire Coal Company provided David Horsfall a map showing the needed relocation of a gas line on his mother's property * * *. The purpose of the line was to supply gas for heating from a gas well on the Horsfall property to the new location of the Horsfall house. The Horsfall house was moved from its original location inside the mining area to a new location outside the mining area. The map showed a location for the line to remove it from the area to be affected by mining. The actual relocation of the gas line was the responsibility of the Horsfalls and the work was performed by the Horsfalls. When the auger mining encroachment was determined it was discovered that the gas line cut across the corner of the Kuhn property. I informed David Horsfall of their error in locating the line and he had the line moved shortly thereafter. [Emphasis supplied.]

Section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1988), provides, in pertinent part:

"[S]urface coal mining operations" means --

(A) activities conducted on the surface of lands in connection with a surface coal mine * * *

(B) the areas upon which such activities occur * * *. Such areas shall also include any adjacent land the use of which is incidental to any such activities, * * * and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities * * *. [Emphasis supplied.]

Pursuant to section 503(a)(1) of SMCRA, Ohio law must provide "a State law which provides for the * * * regulations of surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. § 1253(a)(4) (1988). Indeed, the pertinent language in the Ohio statute is nearly identical. See ORC 1513.01(G); see also OAC 1501:13-1-01 S, which states pertinently:

(S) Coal mining operation means: (1) [a]ctivities conducted on the surface of lands in connection with a coal mine, * * * and (2) [t]he areas upon which such activities occur or where such activities disturb the natural land surface. Such areas include any adjacent land, the use of which is incidental to any such activities * * *. [Emphasis supplied.]

OSM is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency refuses to take action because it does not consider the activity to be surface mining or a related activity and therefore finds no permit is required, and the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSM to order a Federal inspection. When,

after inspection, OSM determines that the activity is in violation of any requirement of SMCRA, OSM may issue a notice of violation or cessation order, as appropriate, to the operator, fixing a reasonable time for abatement. See Willowbrook Mining Co. v. Office of Surface Mining Reclamation & Enforcement, supra at 310-11.

Empire has admitted that "[t]he Horsfall house was moved from its original location inside the mining area to a new location outside the mining area"; and that "[t]he map showed a location for the line to remove it from the area to be affected by mining." There is no question but that this activity falls within the definition of "surface coal mining operations" set forth in section 701(28) of SMCRA, and companion Ohio law and regulations. The crucial factor is not who agreed to move the pipeline, but that the pipeline was ultimately moved onto Kuhn's property incidental to and in furtherance of Empire's surface coal mining activities. Under section 521(a) of SMCRA, a permittee of a minesite is a proper party to be cited for a violation of the Act notwithstanding the fact that the surface mining activity is conducted by a third party. See Clark Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 93 (1988); Wilson Farms Coal Co., 2 IBSMA 118, 87 I.D. 245 (1980).

Ultimately, OSM's review of DOR's course of action pertaining to Kuhn's allegation that a gas pipeline was relocated upon his property in furtherance of Empire's surface mining activities and without a valid permit should have proceeded in the same course as the review of DOR's action

with respect to Kuhn's allegations that Empire was encroaching on his property. Appropriate action by DOR should have encompassed an inspection to determine whether there was a nexus between removal of the gas pipeline onto Kuhn's property and Empire's surface mining activities, whether Empire had obtained a valid permit to conduct such activities upon Kuhn's property and "whether the areas upon which such activities occurred disturbed the natural land surface," and, if so, whether the affected lands were reclaimed. We therefore reverse OSM's determination that DOR acted appropriately with respect to its refusal to inspect the relocation of the gas pipeline, and remand this issue to OSM for further action consistent with this opinion and the requirements of section 521(a)(1) of the Act.

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, OSM, is reversed and remanded.

Franklin D. Arness
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge