

**Editor's note: appealed -- sub nom. Exchange Insurance Co. v. DOI, Civ.No. 3-92-683 (E.D. Tenn. Oct. 2, 1992); aff'd (April 11, 1993), 820 F.Supp. 357.**

EXCHANGE MUTUAL INSURANCE CO. (ON RECONSIDERATION)  
EXCHANGE MUTUAL INSURANCE CO.

IBLA 89-75, 91-452

Decided September 2, 1992

Motion for reconsideration of Exchange Mutual Insurance Co., 119 IBLA 296 (1991), consolidated with an appeal from a July 19, 1991, notice of bond forfeiture issued by the Knoxville, Tennessee, Field Office, Office of Surface Mining Reclamation and Enforcement.

Motion for reconsideration denied; decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Generally

A performance bond, issued in 1981 during the interim program, when a bond was required by the State but was not required by SMCRA, and utilized again as the bond required by the State's surface mining act and by SMCRA for the grant of a permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains enforceable by OSM despite repeal of the State's surface mining act.

APPEARANCES: Susan E. Jackson, Esq., and Gary S. Rubenstein, Esq., Nashville, Tennessee, for Exchange Mutual Insurance Co.; Margaret H. Poindexter, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Exchange Mutual Insurance Co. (EMI) has appealed two decisions by the Director, Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), providing notification of bond forfeiture for failure to reclaim mined land. <sup>1/</sup> One of EMI's appeals was decided in Exchange Mutual Insurance Co., 119 IBLA 296 (1991), and is before this Board again due to a

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<sup>1/</sup> The failure to reclaim mined land is undisputed and well supported by the agency files submitted on appeal.

petition for reconsideration filed on July 5, 1991. 2/ Due to the similarity of the cases, the petition for reconsideration was consolidated by order dated February 19, 1992, with EMI's appeal, docketed IBLA 91-452, of a July 19, 1991, notice of forfeiture. The issue in both cases is whether OSM may pursue bond forfeiture.

In 1980, the State of Tennessee (the State) enacted the Tennessee Coal Surface Mining Law of 1980 (TCSML), Tenn. Code Ann. §§ 59-8-301 through 59-8-339. Effective August 10, 1982, the State's program was granted conditional approval (47 FR 34724 (Aug. 10, 1982)) pursuant to section 503 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1253 (1988). Effective April 30, 1984, pursuant to 30 CFR 733.12(f), OSM instituted Federal enforcement of certain portions of the State program. 49 FR 15496 (Apr. 18, 1984). Effective October 1, 1984, the State repealed TCSML. OSM withdrew approval of the State program in full, effective October 1, 1984, and promulgated a Federal program for lands in the State. 49 FR 38874 (Oct. 1, 1984).

The principal on bond No. EM139025, dated August 7, 1981, is San Jose Minerals, Inc. (SJM) and the surety is EMI. 3/ In 1982 SJM submitted an

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2/ Although the July 5, 1991, filing was styled an appeal, the brief filed Aug. 5, 1991, was labelled "brief in support of motion for reconsideration" and we will treat the July 5 filing as a petition for reconsideration pursuant to 43 CFR 4.21(c) and 4.1276.

3/ The SJM bond reads:

"KNOW ALL MEN BY THESE PRESENTS, That the undersigned San Jose Minerals & Development Company, Inc., 102 Miller St. of Lake City, Tenn., principal, and Exchange Mutual Insurance Company of Nashville, Tenn., as surety, are held and firmly bound unto the State of Tennessee (and its successors and assigns) in the penal sum of Forty-five Thousand and 00/100 Dollars (\$45,000.00) for payment of which well and truly to be paid to the said State of Tennessee, we hereby jointly and severally bind ourselves, our heirs, administrators, executors, successors, and assigns.

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, whereas, the above named principal did on the 26 day of March, 1981, file with the Division of Surface Mining an application to secure a permit to engage in surface mining in the State of Tennessee; and that in said application the principal estimates that 15 acres of land will be affected by surface mining during the period of one year following the date of beginning of the permit issued pursuant to the aforesaid application requiring this bond.

"NOW, if the said San Jose Mineral & Development Company shall faithfully perform all the requirements of Section 58-1540 et seq., Tennessee Code Annotated, and all requirements of all rules and regulations lawfully promulgated and adopted by the Commissioner, Department of Conservation, State of Tennessee, then this obligation shall be void; otherwise, it shall remain in full force and effect." (Emphasis in original). The Ross bond was apparently produced using the same form and the operative language is identical.

application for a "repermit of 81-158" and in a November 19, 1982, letter addressed to the Division of Surface Mining, Department of Conservation, requested, "Please transfer the above bond from the present permit No. of 81-158 to the new permit number." A new permit No. 82-213 was issued to SJM on November 22, 1982. According to EMI, it continued to collect on the bond until 1986 (Affidavit of Bobby Stout).

The principal on bond No. 8461 R, dated September 8, 1981, is Ross Coal Company (Ross) and the surety is EMI. OSM has submitted a copy of a December 29, 1982, letter from EMI which states: "Exchange Mutual Insurance Company consents to move forward the captioned bond from the old permit number #81-190 to the new permit." A new permit No. 83-C-018, was issued to Ross effective March 23, 1983. On July 23, 1991, J. W. Luna, Commissioner, Department of Environment, State of Tennessee, assigned the State's right, title, and interest in bond No. 8461 R to OSM.

[1] Both bonds were originally issued at a time when a bond was required by State law, but not by Federal law. Therefore, EMI contends, the bonds may not be considered statutory bonds for Federal purposes, and may not be forfeited by OSM. This argument was rejected in Exchange Mutual Insurance Co. and EMI has provided no grounds for reversal of that decision. In our initial decision, we stated:

Bond No. EM139025 was issued during the initial program period, and at that time it was required only by State law. In part on the strength of the bond, initial program permit No. 81-158 was issued. In 1982, bond No. EM139025 was evidently again used as the statutory bond required for a permit. At the time of issuance of the second permit, No. 82-213, however, bonding was required by both TCSML and SMCRA. Thus, bond No. EM139025 became a statutory bond pursuant to both statutes.

119 IBLA at 299.

OSM has provided additional evidence on reconsideration which further weakens EMI's argument by establishing that EMI explicitly consented to use of its bonds when permanent program permits were issued. In each case, written consent by EMI was given and the new permit was issued when both Federal and State law required bonding. We find that the bonds became statutory bonds under Federal law and are therefore enforceable by OSM.

EMI also contends its obligation terminated because following resumption of Federal primacy, OSM initially operated as though it was without authority to enforce these bonds. The following quotation is cited in support of this contention:

OSM has considered whether it can assume any responsibility over those interim program bonds for which the Tennessee Department of Health and Environment has not commenced forfeiture. There is no express requirement under the Act for a reclamation bond until a permanent program permit is to be issued (SMCRA

section 509(a)). Although OSM may have authority under Section 201(c) of the Act to require interim program bonds, requiring assignment of existing interim program bonds now made payable to Tennessee could unreasonably interfere with existing contractual relationships. OSM therefore will not seek to assume responsibility over interim program bonds.

49 FR 38877 (Oct. 1, 1984).

EMI has not established that any action of OSM relieved EMI of its obligation under the statutory bonds. The Federal Register language quoted above clearly refers to interim program bonds while the subject bonds, although initially issued as interim program bonds, became permanent program bonds. Moreover, EMI has not established that the language quoted above would prevent enforcement of the bonds by OSM even if the bonds issued by EMI had been interim program bonds.

EMI presents no arguments which were not already considered in Exchange Mutual Insurance Co. EMI agreed to be bound to the State and its successors and assigns pursuant to section 509 of SMCRA. OSM is the successor to the State's responsibilities as the primary regulatory authority under SMCRA, and may therefore pursue forfeiture of the bonds.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion for reconsideration filed August 5, 1991, is denied and the notice of bond forfeiture dated July 19, 1991, is affirmed.

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David L. Hughes  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge