

Editor's note: appeal filed Civ.No. CA 93-0317-B (W.D. VA. Nov. 23, 1993); dismissed with prejudice (failure to prosecute) (Dec. 13, 1999)

DELMAR ADKINS

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-392 Decided November 2, 1993

Appeal from a decision of Administrative Law Judge David Torbett vacating Notice of Violation No. 88-132-299-11(1-4). NX 88-72-R.

Affirmed in part; reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

When, despite an applicable interim program regulatory requirement that all highwalls be completely eliminated, a state erroneously determined that a surface coal mine operator who failed to totally eliminate a disturbed pre-existing highwall listed as a violation in a 10-day notice issued by OSM had, nonetheless, satisfactorily reclaimed the highwall because insufficient available spoil existed to completely eliminate it, the state's response to the 10-day notice based on such an erroneous reclamation determination did not constitute appropriate action designed to secure abatement of the violation, and OSM properly issued an NOV requiring complete elimination of the disturbed highwall.

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

Issuance of a notice of violation will be affirmed only where OSM makes a prima facie case by presenting evidence sufficient to establish facts essential to justify a finding that there were violations of SMCRA as alleged in the NOV.

APPEARANCES: J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Elsey A. Harris, III, Esq., and Don R. Pippin, Esq., Norton, Virginia, for Delmar Adkins.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a March 26, 1990, decision of Administrative Law Judge David Torbett vacating Notice of Violation (NOV) No. 88-132-299-11(1-4) issued by OSM to Delmar Adkins. On May 3, 1990, Adkins filed a notice purporting to cross-appeal any part of the decision that adversely affected him. The certificate of service attached to the notice showed it was sent on April 30, 1990. Under 43 CFR 4.1271(b), a notice of appeal from an Administrative Law Judge's decision must be filed with the Board on or before 30 days from the date of receipt of the decision. The record shows that Adkins received Judge Torbett's decision on March 28, 1990; his appeal was therefore due on or before April 27, 1990. Because Adkins failed to transmit his notice of cross-appeal before the end of the period in which it was required to be filed (see 43 CFR 4.401(a)), his cross-appeal is dismissed as untimely. Consequently, issues sought to be raised in Adkins' Reply to Appellant's Statement of Reasons and Cross Appeal, alleging that OSM lacked the authority to issue the NOV to Adkins, that OSM was precluded by the doctrines of res judicata and collateral estoppel from prosecuting this action, that some of OSM's evidence was inadmissible under Federal Rule of Evidence 803, and that OSM's action was barred by laches, that relate to his untimely cross-appeal will not be discussed.

The only issues properly before us on appeal, therefore, are those relating to the appeal timely taken by OSM. We partially grant the relief sought by the OSM appeal and conclude that OSM's oversight inspection was proper in this case and reverse Judge Torbett's contrary conclusion and his order vacating the NOV, as discussed below.

Beginning in 1980, inspectors with the State of Virginia Department of Conservation and Economic Development, Division of Mined Land Reclamation (DMLR), conducted numerous examinations of an area approximately 10 miles north of Coeburn, off State Routes 640 and 72 in Dickenson County, Virginia. As a result of these inspections, on April 13, 1982, the State filed a complaint against Adkins in Dickenson County circuit court, alleging that from October 1980 until April 1982, Adkins unlawfully engaged in coal surface mining without a permit and without posting a bond in violation of provisions of Chapter 17 of Title 45.1 of the Virginia Code (Exh. A-1). An injunction was sought to prevent Adkins from surface coal mining without a permit and bond and to compel him to immediately reclaim disturbed areas.

The case was tried before the circuit court on June 28, 1983. On December 9, 1983, the court issued an order finding that Adkins had unlawfully engaged in coal surface mining without a permit and bond in violation of Chapter 17 of Title 45.1 of the Virginia Code, "specifically on the two areas designated as areas five and six and the haulroad connecting those two areas, as shown and designated on a map [showing the disturbed area to be divided into 6 distinct areas] received into evidence as Plaintiff's exhibit one" (Exh. A-2). The court permanently enjoined Adkins from conducting coal surface mining operations on the site and ordered him to prepare and file with DMLR a suitable reclamation plan for the described disturbed area.

On May 19, 1988, OSM inspectors Victor Brent Virts and D. E. Boothroy inspected the Adkins site and found an unreclaimed disturbance of approximately 64.5 acres. ^{1/} They issued Ten-Day Notice (TDN) No. X-88-132-299-8 to the State of Virginia on May 26, 1988, complaining that the Adkins secondary cut mining operation violated four provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988), and implementing regulations, including: (1) conducting surface coal mining and reclamation operations within 100 feet of a perennial stream in violation of 30 CFR 715.17(d)(3); (2) placing and allowing spoil to remain on the downslope in violation of 30 CFR 716.2(a)(1); (3) failing to transport, backfill, and grade all spoil material to eliminate all highwalls, spoil piles, and depressions in order to achieve the approximate original contour in violation of 30 CFR 715.14; and (4) failing to remove all topsoil as a separate operation before doing any drilling for blasting, mining, or other surface disturbance in violation of 30 CFR 715.16 (Exh. R-3).

DMLR responded to the TDN that:

A decree was entered 12/9/83 requiring Mr. Adkins to file a plan of reclamation with the Division. The areas involved were noted as areas 5 and 6 on the map entered into evidence in the court case. Mr. Adkins failed to comply with the order. DMLR is presently pursuing contempt charges against Mr. Adkins for not complying with the order. There is no evidence on file to show that any coal was removed from any areas except areas 5 and 6 in the court order. DMLR is proceeding with appropriate action pursuant to this Ten Day Notice.

(Exh. R-4). On July 12, 1988, OSM determined that the site would be reinspected and any violation still remaining at the time of the reinspection would be cited by OSM (Exh. R-4). Virts reinspected Adkins' site on July 12, 1988, and found that the violations listed in the TDN continued to exist. He then issued NOV No. 88-132-229-11 (Exh. R-5) to Adkins on July 14, 1988, citing the same four violations identified in the TDN and requiring abatement of violations 1-3 by October 10, 1988. Violation 4 was terminated at issuance because no corrective action was required (Exh. R-6). Adkins filed a timely application for review of the NOV.

After Virts reinspected the site on October 13, 1988, and found that remedial action required by the NOV had not occurred, he issued Cessation Order (CO) No. 88-132-299-8 (Exh. R-8) to Adkins on October 18, 1988, for failure to abate violations 1-3 of the NOV. Adkins filed a timely application for review of the CO.

On November 10, 1988, the Dickenson County circuit court issued an order upon motion by the Commonwealth of Virginia:

^{1/} On June 7, 1985, OSM accepted a settlement in Save Our Cumberland Mountains v. Hodel, No. 81-2238 (D.D.C.), that required inventory and inspection of specified surface mining operation sites in Kentucky and Virginia. The inspection conducted by Virts was part of the agency response to this settlement.

* * * requesting issuance of Show Cause Order, upon the Court's Decree of 9 December, 1983, finding no mining on areas 1 through 4, inclusive, and requiring reclamation on areas designated as 5 and 6, and upon the representations of the parties that Defendant, Delmar Adkins, has complied with the terms of the Court's Decree of 9 December, 1983, and, subject to establishment of vegetation, he has completed reclamation satisfactory to the [DMLR] as ordered on areas 5 and 6. Based upon Defendant's compliance with the Court's Decree of 9 December, 1983, and his completion of reclamation satisfactory to the [DMLR] subject, however, to establishment of vegetation, the pending Show Cause proceeding is ORDERED dismissed.

(Exh. A-2).

Virts and OSM reclamation specialist Susan Armentrout reinspected the Adkins site on November 21, 1988 (Exh. R-10). They reported that spoil had been graded to eliminate portions of highwalls affected by the secondary mining operations and that the graded spoil areas had been reseeded, but only in those areas where Adkins had been found guilty of mining without a permit in the State proceeding, and that no reclamation activity had begun on the remaining areas cited by OSM. Virts conducted a further follow-up inspection on May 9, 1989, and concluded that the violations cited in the NOV and CO remained unabated (Exh. R-11).

A hearing on the applications by Adkins for review of the NOV and CO was held on July 6 and 10, 1989. On March 26, 1990, Judge Torbett issued the decision here under review and determined, concerning the allegations that Adkins had conducted surface mining operations on five distinct areas, identified by Virts as areas A through E, within lands controlled by him, that the evidence at hearing established violation of Federal regulations on only one of the areas, Area D. He also found that arguments concerning collateral estoppel and res judicata did not bar enforcement proceedings within the Department, but decided that because DMLR had "taken appropriate action in this matter" that OSM did not properly exercise its oversight authority and he vacated the NOV issued by OSM, thereby effectively vacating the CO as well. OSM challenges this finding and the findings that the evidence at hearing did not support the NOV as issued. Considering first the question whether OSM properly conducted oversight inspections in this case, we conclude that Judge Torbett's finding that DMLR had taken all appropriate enforcement action against Adkins resulting in sufficient reclamation of Area D was incorrect.

The doctrines of res judicata and collateral estoppel do not prevent OSM from pursuing enforcement of SMCRA despite prior state enforcement proceedings. See Annaco, Inc. v. OSM, 119 IBLA 158, 164-67 (1991), and cases cited therein. While a state with an approved program assumes primary responsibility for issuing permits and enforcing its program, that enforcement jurisdiction is not exclusive, and OSM has the authority to enforce the state program on a mine-by-mine basis under appropriate circumstances. See Consolidation Coal Co., 127 IBLA 192, 194 (1993), and cases cited. OSM's retained oversight responsibilities include the obligation to order a

Federal inspection of a surface coal mining operation where the Secretary of the Interior has reason to believe that 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." 30 U.S.C. § 1271(a)(1) (1988); see 30 CFR 842.11(b)(1)(ii)(B). If such a Federal inspection uncovers a violation of SMCRA or a permit condition that does not create an imminent danger to public health or safety or cannot be expected to cause significant, imminent environmental harm, OSM must issue an NOV requiring the violation to be abated within a reasonable time, and if it is not timely abated OSM is required to immediately issue a CO. 30 U.S.C. § 1271(a)(3) (1988); see 30 CFR 843.11(b), 843.12(a)(2).

The regulation in effect at the time OSM issued the TDN to DMLR, 30 CFR 842.11(b)(1)(ii)(B) (1987), purposely did not define the phrase "appropriate action." See W.E. Carter, 116 IBLA 262, 267 (1990), and cases cited. As the preamble to the regulation makes clear, "[t]he 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); see W.E. Carter, 116 IBLA at 267. Whether a state response to a TDN is appropriate under the 1987 regulation is a matter committed to the discretion of OSM, and evaluation of the state response must focus on whether the response is calculated to secure the abatement of the violation. Id.; see Thomas J. FitzGerald, 88 IBLA 24, 29 (1985). Although the regulations were amended effective August 15, 1988, after OSM issued both the TDN to the State and the NOV to Adkins, and the rules now characterize "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)(B)(2)), we find that OSM properly evaluated DMLR's response to the TDN based on the regulatory interpretation then in effect. (Nor would our decision be different if we were to apply the current regulatory definition of "appropriate action".)

The State responded to the TDN by reactivating the state court proceeding against Adkins which had apparently lain dormant for several years. This action led to the Dickenson County circuit court order of November 10, 1988, that dismissed the State's show cause proceeding upon representations by DMLR and Adkins that, subject to the establishment of vegetation, Adkins had completed reclamation satisfactory to DMLR on Area 5 and Area 6.

[1] In order to determine whether DMLR's response to OSM's TDN was designed to secure the abatement of Adkins' violations on Area D, we must first clarify what constitutes abatement of those violations. The corrective action required by the TDN and NOV for Adkins' violations of 30 CFR 715.14 included the complete elimination of all highwalls in Area D affected by Adkins' surface coal mining operations (see TDN violation number 3). The performance standards established in 30 CFR 715.14 were promulgated as part of the Federal interim regulatory program, and surface coal mine operators were obligated to comply with the interim program requirements until they received a permit to operate under a permanent State or Federal regulatory program. 30 CFR 710.11(a)(3)(iii). Adkins neither applied for nor received

a permit to operate the site in question under Virginia's permanent regulatory program; consequently, the interim program regulations apply. See Harman Mining Corp. v. OSM, 114 IBLA 291, 296 (1990), and cases cited.

The provisions of 30 CFR 715.14 have been consistently interpreted as requiring the complete elimination of highwalls in all cases. See, e.g., Josephine Coal Co. v. OSM, 111 IBLA 316, 322 (1989); Cherry Hill Development v. OSM, 110 IBLA 185, 198 (1989). In contrast with the permanent program regulation, 30 CFR 816.106(b), which allows less than total elimination of an affected pre-existing highwall if there is insufficient reasonably available spoil to completely backfill the area, the elimination of highwalls mandated by 30 CFR 715.14 does not depend on the availability of sufficient accessible material to backfill the area. Josephine Coal Co. v. OSM, 111 IBLA at 322-23, quoting 51 FR 41735 (Nov. 18, 1986). Although Virginia permanent program regulation V816.106(b), which tracks 30 CFR 816.106(b), provides that the highwall elimination requirement does not apply on re-mined areas if the volume of reasonably available spoil is insufficient to completely backfill the affected highwall, compliance with the less stringent regulation would not excuse Adkins from satisfying the interim program standards. See Josephine Coal Co. v. OSM, 111 IBLA at 324, and cases cited. Therefore, in order to successfully abate his violation of 30 CFR 715.14 on Area D, Adkins was required to completely eliminate the disturbed highwalls in that area.

The testimony at hearing reveals that DMLR applied an incorrect standard in order to conclude that Adkins had satisfactorily reclaimed Area D. At the hearing, Danny Bailey, a DMLR inspector, testified that as of his July 5, 1989, inspection, the site had been reclaimed except for final vegetation (Tr. at 359-60). On cross-examination, however, Bailey admitted that the applicable Federal interim program regulations required the complete elimination of highwalls to return the site to the approximate original contours and that the highwalls in Areas 5 and 6 had not been completely eliminated (Tr. at 361). He explained that DMLR's determination that Adkins' reclamation was acceptable rested on the belief that there was insufficient available material to completely eliminate the highwalls (Tr. at 362). Bailey conceded that if the interim regulations required full highwall elimination, the reclamation performed by Adkins would not be sufficient (Tr. at 365).

DMLR's use of the incorrect abatement standard not only nullifies its conclusion that Adkins had successfully reclaimed Area D, but also undermines the effectiveness of DMLR's enforcement action as a means of securing proper abatement of Adkins' violations on Area D. Accordingly, we find that the State response to the TDN did not constitute appropriate action designed to achieve correction of Adkins' violation of 30 CFR

715.14 on Area D, and reverse Judge Torbett's decision finding that DMLR took appropriate action in response to the TDN. (We also conclude that the failure to require Adkins to completely eliminate the highwalls was arbitrary, capricious, and an abuse of discretion, and therefore would fail to qualify as appropriate action under the current regulatory definition of "appropriate action" found at 30 CFR 842.11(b)(1)(B)(2).)

[2] In a proceeding involving an application for review of an NOV, 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 has violated SMCRA, the regulations, or a permit condition. Rith Energy, Inc. v. OSM, 119 IBLA 83, 86 (1991), and cases cited; 43 CFR 4.1171(a). Although the ultimate burden of persuasion rests with the applicant for review (43 CFR 4.1171(b)), the NOV will be affirmed only where OSM has met its burden of establishing a prima facie case. See Alpine Construction Co. v. OSM, 114 IBLA 232, 235 (1990), and cases cited. OSM makes a prima facie case when sufficient evidence is offered to establish the essential facts of a violation: "It is evidence that will justify but not compel a finding [of such violation] unless it is contradicted and overcome by other evidence." Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982); accord, see S & M Coal Co., 79 IBLA 350, 354, 91 I.D. 159, 161 (1984).

Concerning the violations alleged, the OSM case at hearing rested on the testimony of Lisa Haga Crance, the DMLR inspector on the site from 1980 through 1982, and four other witnesses: Virts; Pamela Blevens, a friend of Adkins during the relevant time; Joyce Beverly, the wife of Adkins' chief assistant during this period; and Rob Poindexter, an employee of Virginia Iron Coal and Coke, a company that had purchased coal from Adkins from 1980 through 1982. OSM introduced 83 exhibits, including two TVA aerial photographs of the area, one taken in 1978 (Exh. R-14) and one from 1985 (Exh. R-15) and an overlay of the 1985 TVA aerial photograph depicting the areas OSM alleged Adkins had disturbed by surface coal mining (Exh. R-19).

Adkins' evidence consisted of the testimony of five witnesses: Scotty Burke, a coal miner familiar with the Mink Gap area and Alley's Creek in particular; Samuel Hall, a coal miner who worked for Virginia Iron Coal and Coke from 1980 through 1982; Tim Gresham, the Assistant Attorney General for the State of Virginia who had prosecuted the State's case against Adkins in 1983; Danny Bailey, the DMLR inspector (mentioned above in this opinion); and Charles Ramsey, an expert who was a former DMLR area inspector and who had worked with Adkins, advising him on reclamation and permitting for his coal mining sites. Adkins produced 12 documentary and photographic exhibits that were admitted into evidence.

In his decision, Judge Torbett summarized the evidence of disturbance for each discrete area separately, finding that OSM's Area A corresponded to Area 3 on exhibit A-3 (the map submitted in the Virginia state court proceeding), Area B coincided with Area 1, Area C with Area 2, and Area D with Area 6, but that OSM's Area E was not coterminous with Area 5. The evidence concerning surface mining for each of these areas consisted of the testimony of Crance and Virts. The Judge summarized testimony given by Crance about her inspections of the site between 1980 and 1982, which established the foundation for estimates of disturbance and coal removal provided by Virts. The evidence provided by Virts was based on his inspections of the site in 1988; he also made use of the TVA aerial photographs to compare the before-and-after-mining condition of the land and estimate amounts of coal removed. The Judge also outlined the other testimony concerning activity on the site from 1980 until 1982. We find that Judge

Torbett correctly described the evidence introduced at the hearing and adopt his summary of the evidence appearing at pages 3-9 of his decision as our own.

In his decision, Judge Torbett discussed the first issue in the case, which he characterized as "the extent to which Respondent has born[e] its burden of proof of presenting a prima facie case as to the existence of surface coal mining on areas A, B, C, D, and E" (Decision at 10). He made findings of fact and conclusions of law regarding each of these areas with references to evidence adduced at the hearing before him. He then turned to the second issue, which he described as "whether the undersigned properly has jurisdiction over this matter, or whether the proceedings are barred by the doctrines of res judicata and collateral estoppel" (Decision at 13). In the context of his discussion of issue two, Judge Torbett made the following statement regarding stare decisis:

However, the undersigned would note that the doctrine of stare decisis is as important here as that of res judicata. The undersigned will give deference to the proceedings of a tribunal that had proper jurisdiction to try and determine the matters in this case. The findings of the Dickenson County Court, given the fact that it had full access to fresh testimony by eye witnesses, should be given stare decisis effect here. Unless there had been compelling fresh evidence in this case, the holding of the prior proceeding is entitled to substantial precedential value.

(Decision at 15).

It is clear that the principle of stare decisis applies only to prior legal rulings and not, as the Judge found, to findings of fact. See United States v. Jones, 106 IBLA 230, 246, 95 I.D. 314, 322 (1988). While Judge Torbett's reference to stare decisis was clearly an incorrect application of that legal doctrine, it is unclear to what extent he actually gave deference to the state court's findings in reaching his own factual determinations. However, because of that ruling we will carefully evaluate its effect on the findings and conclusions he made from the evidence produced at the hearing.

That Adkins was engaged in surface coal mining in the general area of the 64.5 acre disturbance during the time in issue was initially established by testimony from Blevens and Beverly who testified generally that his mining operations in the general area of the disturbance from 1980 through 1982 were conducted at night and under conditions of secrecy. See Tr. 42-45, 66-68, 72-77. ^{2/} Judge Torbett correctly concluded (and the record clearly establishes) that Area D was a place concerning which OSM had established a

^{2/} The Judge refused to consider all references by Beverly to conversations with her husband (who she called a "partner" of Adkins) about the Adkins surface coal mining operation. The single reason for making this abridgment of the evidence offered by OSM was that it was hearsay, which the Judge concluded should be categorically excluded, despite controlling legal precedent to the contrary, because the contrary opinions "do not

prima facie case of violations of SMCRA as alleged. Testimony by both Crance and Virts established that it was, and Crance reported that she had seen a coal pit in operation on the area so designated. There was no contradictory evidence concerning Area D. We affirm his finding as to Area D.

For Areas A and B, Virts testified, based on his comparison of two TVA aerial photographs of the site, one taken in 1978 and the other in 1985, that the disturbed areas in Areas A and B were enlarged between 1978 and 1985. Crance observed equipment in these areas during her inspections, but never saw any coal pits or coal being mined. Virts was not on any of the areas in question until 1988. His conclusion that a surface coal mining operation existed on all the areas in question is based primarily on his comparison of the two TVA photographs, which, he testified, demonstrated that second cuts had been taken on the pre-existing highwalls depicted in the 1978 photograph and that spoil material locations had changed between 1978 and 1985. Crance, who inspected or visited the site approximately every two weeks from November 1980 through September 1983, based her testimony on a summary she prepared principally from written reports contained in the state investigative record concerning activities on the site from October 1980 through April 1982 (Tr. 224-26; Exh. R-13). She prepared the summary in anticipation of the state court proceeding and used it in preparation for her testimony in that proceeding (Tr. 287-88).

A comparison of the two TVA photographs for Area A clearly reveals a greater area of disturbance in the 1985 photograph than in the 1978 photograph, but it does not establish that the increased disturbance was caused by surface coal mining activities. Crance testified that on August 14, 1981, she observed equipment working along the highwall marked as HW-1 to HW-1' on exhibit R-19, the overlay for the 1985 photograph (Tr. 252). This was within the area designated by OSM as Area A. She stated that 4 days later, on August 18, 1981, "work was still going on down along the highwall" (Tr. 253). Crance returned to the site on September 2 and 11, 1981, and on

fn. 2 (continued) really mean [what they say]" (Tr. 80). This ruling also was error. See, e.g., Harry Smith Construction Co. v. OSM, 78 IBLA 27, 32 n.13 (1983), finding that "hearsay is admissible in administrative proceedings and an objection to it goes only to its weight." Although there may be some debate whether the testimony excluded by Judge Torbett was relevant and material, it has little probative value in this case. Apparently, the testimony to which his ruling related was Beverly's testimony that her deceased husband had told her that the \$14,000 in cash he brought home one time came from the sale of coal he was mining at night. Since there is no dispute that Adkins, in fact, was surface coal mining in Area D, and Beverly did not clearly identify the year or area where her husband was working at night (see Tr. 67-69), admission of that evidence would not have aided OSM in establishing its prima facie case that Adkins conducted surface coal mining operations on any particular letter-designated area. To the extent Judge Torbett may have erred in excluding that evidence, such error is harmless.

September 12, 1981, she made an aerial inspection by helicopter, observing that "[a] hauler, a loader, and a dozer were working in what looked to be a coal pit" (Tr. 256). The summary from which Crance was testifying did not identify the area where this observation was made, and in response to a question concerning the location, she responded: "I think that was back in the Sally's Branch area * * *" (Tr. 256), which was in the area identified by OSM as Area B.

Crance's testimony regarding the work in Area A in August 1981 does not square with the mining sequence legend on map exhibit A-3. That legend indicates that mining took place in the areas designated 1-6, as follows:

- Oct. 1980 1 Around Sally's Branch
- Sept. 1981
- 2 Southward from Sally's Branch
- 3 Oct 1981 - November
- 4 December 1981
- 5 January 1982
- 6 April 6, to present

Based on exhibit A-3, mining did not take place in Area 3 (Area A) until October 1981. Crance later testified that on November 12, 1981, she observed earth-moving activity in progress "on the right hand side of the hollow above the VAB 3131 haul road below the Sally Branch area" (Tr. 266). No attempt was made to identify on any map the location of this activity. However, from the description, it would appear to be Area 1 or Area 2 on exhibit A-3, areas corresponding to OSM's Areas B and C.

Crance then testified that on December 3, 1981, "[t]he drill was working in a new area, still on the haul road" (Tr. 266). She also stated that she observed a loader and a hauler and spoil "being shoved out across the haul road into the old stream bed" (Tr. 266-67). She stated that all this activity occurred in Area A. Again, the mining sequence legend on exhibit A-3 indicates that activities in Area A (Area 3) occurred in October-November 1981. Although Crance observed a very large stock pile of coal on Area A at one time (Tr. 268), she did not testify that she saw coal extraction or, as she did for Area D, open coal pits. Judge Torbett found that OSM failed to establish a prima facie case that Adkins was surface coal mining in this particular area. While OSM argues on appeal that Judge Torbett should have given greater weight to Virts' testimony regarding the aerial photographs, Virts' testimony alone is insufficient to support a finding of violation as to this area. The testimony of Crance, in light of other record evidence, contains unresolved inconsistencies regarding what activities actually took place in Area A and when they occurred.

As pointed out by Judge Torbett, OSM bears the burden of establishing that the activities conducted on the land were performed for the purpose of obtaining coal, 30 U.S.C. § 1291(28) (1988). The evidence presented by OSM was insufficient to prove that Adkins conducted surface coal mining operations on Area A. We find that Judge Torbett correctly ruled that OSM failed to make a prima facie case as to Area A.

Crance observed equipment working in what looked to her like a coal pit on September 12, 1981, which she thought was in an area included in OSM's Area B (Tr. 256). Judge Torbett held at the hearing, in ruling on an objection to this testimony, that the uncertainty regarding the location of the possible coal pit "goes to the weight" to be accorded her testimony. *Id.* In his decision, he characterized Crance's testimony as being "fraught with uncertainty as to the exact location of her sighting" of the pit (Decision at 12). He found that the record lacked any evidence of first hand observations of coal removal in this particular area or adequate circumstantial evidence pinpointing coal removal to this area. In addition, he found that comparing the two TVA photographs was difficult for this area because of the prevalence of shadows on Area B in the 1978 photograph. Judge Torbett concluded that OSM's evidence was insufficient to support a prima facie case that Adkins conducted surface coal mining on Area B.

On appeal, OSM requests that the Board take a "fresh look" at the evidence (Statement of Reasons (SOR) at 22). It states that the record shows a "strip mining operation that was conducted in a secretive, illusive manner" (SOR at 19). However, it is OSM that sought to pursue this case on an area-by-area approach, rather than charging Adkins with mining without a permit on the entire 64.5 acre site. The reason this approach was adopted is neither apparent nor explained. As a consequence of the method used, however, the record must show that OSM carried its burden for each particular area defined by the proof offered. ^{3/} For Area B, OSM again complains that Judge Torbett failed to give adequate weight to the testimony of Virts. Even if Virts' testimony concerning the increased disturbance is accepted, however, it has not been shown that the disturbance was undertaken for the purpose of obtaining coal. Also, Crance's testimony referred only to a possible coal pit and the exact location of that pit was not disclosed by her testimony. Judge Torbett correctly found that OSM had failed to establish a prima facie case as to Area B.

While Virts made calculations concerning the effect of inferred secondary surface mining on this area, Crance did not testify concerning observed conditions on the area during 1980 through 1982. As to Area E, while Virts

^{3/} There is another aspect of the administration of this case by OSM that is puzzling. Because this 64.5-acre site was listed on the Virginia two-acre inventory and inspected as part of the Two-Acre Task Force responsibilities (*see* fn. 1), OSM should have cited Adkins for mining without a permit. In such circumstances, issuance of a TDN would not be required.

As we have held, the regulations specifically provide that mining without a valid surface coal mining permit itself constitutes a practice which causes or can reasonably be expected to cause significant imminent environmental harm. 30 CFR 843.11(a)(2); *R.C.T. Engineering, Inc. v. OSM*, 121 IBLA 142, 146 n.5 (1991); *Slone v. OSM*, 114 IBLA 353, 357 (1990); *Firchau Mining, Inc. v. OSM*, 101 IBLA 144 (1988). Although there are some references in the hearing transcript to mining without a permit, there is no adequate explanation in the record for OSM's failure to issue a cessation order to Adkins for mining without a permit.

made calculations using the aerial photos, Crance testified that there was logging activity on the area that also disturbed the land. She disagreed with Virts about the location of the mining by Adkins in this area, stating that there was mining near, but not on, Area E. Her testimony concerning Area E was therefore inconsistent with that of Virts, and she did not support his conclusions about mining on Area C. As to Areas C and E, therefore, facts essential to show the violations alleged were not established. We therefore conclude that OSM failed to make a prima facie case of the existence of violations as alleged on those two areas, and we affirm the finding by the Administrative Law Judge that a prima facie case was not shown as to Areas C and E.

We therefore find that when Adkins failed to completely eliminate highwalls created by his secondary surface coal mining operation, OSM properly issued a TDN to the State. The State response to the TDN that highwalls on Area D had nonetheless been satisfactorily reclaimed was inadequate, and OSM was then obliged to issue an NOV to Adkins (and a subsequent CO requiring complete elimination of disturbed highwalls). For the above-stated reasons, we conclude that OSM properly issued the NOV and failure to abate CO for violations 2 and 3 of NOV No. 88-132-299-11 as it pertains to Area D of the disturbed area. ^{4/}

To the extent not specifically addressed herein, other arguments raised in this appeal have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge

^{4/} Violation 1 of the NOV charged Adkins with conducting surface coal mining and reclamation operations within 100 feet of a perennial stream. No specific evidence regarding this violation was presented by OSM for Area D.