

Editor's note: Erratum filed Dec. 4, 1995 – see 134 IBLA 18A through X below; appeal filed, sub nom. Cook and Son, Inc. v. Babbitt, Civ. No. 95-367 (E.D. Ky. Nov. 1, 1995)

ESTILL STONE ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 92-517

Decided October 2, 1995

Appeal from a decision of Administrative Law Judge David Torbett affirming issuance of cessation orders Nos. 90-84-132-001, et al. (Hearings Division Docket Nos. NX 90-37-R, et al.).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders:
Generally—Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre—Surface Mining Control and Reclamation Act of 1977: State Program:
Generally: 10-day Notice to State

Surface mining operators who created a related surface mining disturbance on four sites that aggregated more than 2 acres were responsible for compliance with permanent surface mining program performance standards notwithstanding unsupported contentions that enforcement of those standards by OSM was unauthorized in law and fact.

APPEARANCES: Billy R. Shelton, Esq., Pikeville, Kentucky, for appellant Estill Stone; Bennett E. Bayer, Esq., Lexington, Kentucky, for appellant Cook and Son, Inc.; Margaret H. Poindexter, Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Estill Stone and Cook and Son, Inc., have appealed from a May 26, 1992, decision by Administrative Law Judge David Torbett that sustained issuance of imminent harm cessation orders (CO) Nos. 90-84-132-001, -002, -003, and -004 (and subsequently, CO Nos. 90-84-132-005, -006, -007, and -008 for failure to abate the underlying CO). The underlying CO's were issued to appellants by the Office of Surface Mining Reclamation and Enforcement (OSM) for mining without a valid surface disturbance permit.

Appellants were ordered to cease all coal mining activities except reclamation, to submit an administratively complete permanent program application covering the entire disturbed area, and to obtain a permanent program permit or reclaim all disturbance to permanent program standards. When they failed to abate the violation contained in the original CO within the time allowed, they were issued failure-to-abate CO's.

Pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. § 1275 (1988), appellants filed applications for review of the CO's with the Office of Hearings and Appeals. A hearing on permanent relief was conducted by Judge Torbett on May 29, and July 17, 1991, in Hazard, Kentucky. His decision sustaining issuance of the CO's issued on May 22, 1992, and timely appeals were taken therefrom.

[1] Appellants have raised no new issues of fact or law on appeal that were not addressed by Judge Torbett in his decision, nor have they shown how his decision might be in error. It is once again contended, as it was before Judge Torbett, that the CO's issued by OSM were inappropriate because they were time barred, or were barred under the doctrines of res judicata or collateral estoppel, or were in excess of the authority of OSM, or because the several sites that were found to comprise a related mining operation were not related. It is also contended that the refusal of appellant Cook, at hearing, to answer questions concerning his mining operations was privileged and could not be held against him and that temporary relief from the CO's should have been granted. None of these arguments, however, finds support in the Act, case law, or the transcript of hearing. On the contrary, the record before us supports the findings by Judge Torbett, whose decision we affirm and adopt and attach hereto as Appendix A.

After summarizing the evidence presented at hearing, Judge Torbett concluded that OSM was not required to send a 10-day notice to the State before taking enforcement action. It is true that the Act provides that "primary governmental responsibility for * * * enforcing regulations for surface mining and reclamation operations * * * should rest with the States." 30 U.S.C. § 1201(f) (1988). It is also correct that when a state regulatory program is approved (as is the case here) "primacy" is achieved. However, even in a primacy state, the Act authorizes OSM to make inspections and issue cessation orders where there is "significant, imminent environmental harm" without first issuing a 10-day notice to the state. 30 U.S.C. § 1271(a)(2) (1988).

The record on appeal establishes that the four operations reviewed in this case were related under criteria established by 30 CFR 700.11(b)(2) (1992). As such, the total affected area of the four sites was properly considered together to determine whether the operations qualified for a 2-acre exemption from permanent program standards (see Appendix A at 17). Since the accumulated affected area exceeds 2 acres, the less stringent

standards of Kentucky's 2-acre program do not apply, and each site must be reclaimed to permanent program standards. Because their operations were not entitled to a 2-acre exemption, appellants were conducting surface mining operations without a valid surface disturbance permit; OSM therefore acted appropriately in issuing its enforcement actions without first sending a 10-day notice to the State (see Appendix A at 15).

Judge Torbett correctly found that "principles of res judicata and collateral estoppel do not bar" OSM's enforcement action (Appendix A at 14). As the decision points out, OSM was compelled, under the circumstances of this case, to issue its own enforcement action. See 30 U.S.C. § 1254 (1988). Moreover, the Act gives OSM jurisdiction to issue enforcement actions to operators in Kentucky (which has primary responsibility for enforcement of an approved state program for regulation of surface mining under the Act). Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1056 (E.D. Ky. 1987). Nonetheless, appellants assert that when Kentucky dismissed its own enforcement action against them, it thereby barred OSM from enforcement of the Act. The Act does not, however, permit OSM enforcement actions to be barred by prior state action; instead, the Act prevents operation of the doctrines of collateral estoppel and res judicata arising from the State action taken in this case, as explained in Appendix A at 11-14.

Uncontradicted evidence offered by OSM at hearing proved the four subject sites were related operations. All the operations were under the common control of Estill Stone, and, for some time in 1983 on the William and Russell Fleming permits, Ernest Cook. See Appendix A at 16-20. While both Stone and Cook have pleaded the 2-acre exemption as a defense, neither has offered any proof in support of it. As a consequence, neither appellant sustained the burden of persuasion of the affirmative defense he claimed (see Appendix A at 3-7, 22).

The contention that OSM was barred by a statutory time limitation was rejected by Judge Torbett for reasons explained at pages 8 through 11 of Appendix A. No error in his ruling on this aspect of the case has been shown. Similarly, Appendix A at page 19 correctly analyzes the law concerning the effect of appellant Cook's refusal to testify concerning his operations on the subject sites. No error has been shown in this ruling or in any of the other findings made by Judge Torbett's opinion.

It is therefore concluded that the sites at issue are not exempt from OSM's regulatory jurisdiction and are subject to permanent program performance standards. Because appellants were the operators who created the disturbance, they are responsible for compliance with those standards. Consequently, the decision sustaining the validity of the subject CO's must be affirmed.

Accordingly, 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.

Franklin D. Amess
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

May 26, 1992

COOK AND SON, INC. : Docket Nos. NX 90-35-R, NX 90-
and ESTILL STONE, : 37-R, NX 90-42-R, NX
Applicants : 90-44-R
:
v. : Applications for Review
:
OFFICE OF SURFACE MINING : Cessation Orders
RECLAMATION AND ENFORCEMENT : Nos. 90-84-132-001, 90-84- (OSMRE), :
132-002, 90-84-132-003,
Respondent : 90-84-132-004, 90-84-132-
:
: 005, 90-84-132-006, 90-
:
: 84-132-007, 90-84-132-008

Appearances: James D. Asher, Attorney for Applicant Cook and Son,
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Margaret H. Poindexter, Attorney for Respondent, Office of
the Field Solicitor, Knoxville, TN

Before: Administrative Law Judge Torbett

DECISION

Procedural History

The Applicants, Cook and Son, Inc, and Estill Stone, have exercised their right of administrative review under § 525(c) of the Surface Mining Control and Reclamation Act of 1977 (hereinafter, "the Act"). Applicants filed timely Applications for Review of the above listed Cessation Orders, issued by the Office of Surface Mining Reclamation and Enforcement (hereinafter, "OSMRE").

On February 6, 1986, OSMRE Inspector Gail Smith and a state inspector, Debbie Collins, conducted a two-acre inspection of a site previously mined under a Kentucky two-acre-or-less permit, referred to herein as the William Fleming permit. As a two-acre-or-less site, the miners were only required to operate under the two-acre program standards rather than the more stringent permanent program standards and were entitled to disturb only up to two acres

of surface land. Inspector Smith's survey found that the former operations had instead disturbed 4.38 acres of land. While investigating the William Fleming permit, inspector Smith was led to three other permits for nearby sites – the Estill Stone permit, the Stone Lumber Company permit and the Russell Fleming permit. She concluded that the four separate mining operations had in fact been related because of their timing, their close proximity and their common control. In her assessment, the total acreage of the four sites violated the two-acre-or-less limit of each of the four Kentucky permits by virtue of their relatedness. OSMRE then issued a Ten-Day Notice to the state of Kentucky, advising that the operator, Applicant Estill Stone, was mining without a valid surface mining permit. (Respondent's Exhibit, cited hereinafter as R-#, R-2). The notice advised that Mr. Stone had exceeded the two acre limit because of the relatedness. (R-2).

The state of Kentucky, through the Department of Surface Mining Reclamation and Enforcement (hereinafter, "DSMRE") responded to the notice by issuing a Notice of Noncompliance to William Fleming for over-acreage and for a relatedness violation of KRS 350.060. (R-3). DSMRE issued three additional Noncompliances to Russell Fleming, Estill Stone and Stone Lumber Company for the relatedness violation. (R-4 through R-6). The state notices were subsequently modified to include Estill Stone as individually responsible on each of the permits. (R-7 through R-9). The Kentucky Natural Resources and Environmental Protection Cabinet held a Temporary Relief hearing on the Noncompliance issued to Stone Lumber Company on April 2, 1986. The Cabinet determined that the Kentucky relatedness regulations had not gone into effect until March 1984, sometime after the mining operations had ceased. As a result, the Cabinet vacated the Noncompliances on the relatedness issue. (R-10 through R-12).

Nearly three years later, OSMRE Inspector Robert Hamilton inspected the four permits on December 4, 1989, and again on January 25, 1990. Like Inspector Smith, Inspector Hamilton also believed the four operations had been related. On February 2, 1990, he issued the following four Cessation Orders (hereinafter "CO") for mining without a valid surface mining permit due to relatedness in violation of state law, KRS 350.060, and in violation of federal laws, § 506(a) of the Act and 30 C.F.R. 843.11(a): CO No. 90-84-132-001 to Estill Stone on his permit; CO No. 90-84-132-002 to Stone Lumber Company and to Estill Stone on the Stone Lumber Company permit; CO No. 90-84-132-003 to Russell Fleming, Estill Stone and Cook and Son, Inc. on the Russell Fleming permit; and CO No. 90-84-132-004 to William Fleming, Estill Stone and Cook and Son, Inc., on the William Fleming permit. (R-22 through R-25). Although no actual mining had taken place for several years, the CO's ordered the operators to immediately cease all coal mining activities except for reclamation. They were also ordered to submit a complete permanent program permit application by March 3, 1990, and to obtain a permanent program permit by May 3, 1990. Alternatively, they were to reclaim all the disturbed areas to permanent program standards by March 4, 1990.

Inspector Hamilton returned to the sites following the abatement date on March 5 1990. Upon finding that the operators had failed to either submit a

proper permit application or to reclaim the sites, he issued four corresponding Failure-To-Abate Cessation Orders (hereinafter "FTACO") citing a violation of § 521(a)(3) of the Act as follows: FTACO No. 90-84-132-005 to Estill Stone and to Stone Lumber Company on the Stone Lumber permit; FTACO No. 90-84-132-006 to Estill Stone on his permit; FTACO No. 90-84-132-007 to William Fleming, Estill Stone and Cook and Son, Inc., on the William Fleming permit; and FTACO No. 90-84-132-008 to Russell Fleming, Estill Stone and Cook and Son, Inc., on the Russell Fleming permit. (R-31 through R-34). Two informal mine site hearings were held at the Applicants' requests to review the CO's and FTACO's on March 8, 1990, and on March 22, 1990.

Applicant Cook and Son filed an initial Application for Review and Temporary relief from CO's Nos. 90-84-132-003 and -004 on March 2, 1990, now docketed as NX 90-35-R. Cook and Son's separate Application for Review of FTACO Nos. 90-84-132-007 and -008, docket No. NX 90-42-R, was filed on March 15, 1990. In response, OSMRE filed a Motion to Dismiss the applications as insufficient under the regulatory pleading requirements. The undersigned agreed with the motion and ordered Cook and Son to file proper pleadings. On July 2, 1990, Cook and Son filed a single Amended Application for Review asserting that OSMRE's enforcement action was barred by res judicata, the statute of limitations, and that Applicant was not a responsible party.

Applicant Estill Stone filed separate Applications for Review and Temporary Relief for CO's Nos. 90-84-132-001, -002, -003, -004 and for FTACO Nos. 90-132-84-005, -006, -007, -008, now docketed as NX 90-37-R and NX 90-44-R, respectively. Mr. Stone filed a single Amended Application on April 23, 1990, claiming that he was not conducting surface coal mining, that he was not an operator and that OSMRE was barred by the doctrines of res judicata and collateral estoppel.

OSMRE filed Interrogatories and a Request for the Production of Documents from Estill Stone on May 6, 1990. When Mr. Stone had not responded as of November 8, 1990, OSMRE filed a Motion to Compel Discovery. Mr. Stone complied with the discovery request on January 17, 1991 and contemporaneously issued similar requests on OSMRE. OSMRE answered Mr. Stone's discovery requests on April 22, 1991. After several continuances, a consolidated hearing on the four cases was held before the undersigned on May 29, 1991, and July 17, 1991. The undersigned granted the parties' joint motion to extend the time to file briefs until December 18, 1991, following which the parties all filed their briefs by January 6, 1992.

Summary of The Evidence

OSMRE's evidence consisted of the testimony of six witnesses, Gail Smith, Robert Hamilton, William Rowe, Earnest Cook, Rick Rice and Paul Little, and sixty-two exhibits properly introduced and admitted as R-1 through R-29, R-31 through R-51 and R-52 through R-64. The evidence presented for the Applicants consisted of the testimony of James Asher. Applicant Estill Stone also introduced twenty-one exhibits, marked as ES-1 through ES-8 and ES-10

through ES-22. Applicant Cook and Son introduced two additional exhibits, marked as Cook-1 and Cook-2.

In 1986, OSMRE Inspector Gail Smith was assigned to conduct a federal oversight inspection of the William Fleming permit. (Transcript of Hearing at 30, cited hereinafter as "Tr."). Inspector Smith inspected the site on February 6, 1986, accompanied by a state Inspector, Debbie Collins. All mining activity had ceased by the time of the inspection. (Tr. 48). Together, the two inspectors measured the size of the site as indicated by the actual mining boundaries. (Tr. 33). Using a three hundred foot tape, a clinometer and a Bruton compass, they determined the disturbed area to be 4.38 acres. (Tr. 31 and 38). The survey has an error margin of plus or minus 10 percent. Tr. 37.

After her two-acre field inspection, Inspector Smith made a relatedness investigation which led her to the three other permits – the Russell Fleming, the Stone Lumber and the Estill Stone permits. (Tr. 30). Her administrative investigation revealed that all four of the permits had been issued within a period of a few months. The Estill Stone permit (# 098-0210) was issued on March 29, 1982. (R-40). The William Fleming permit (# 098-0247) was issued on June 23, 1982. (R-42). The Russell Fleming permit (#098-0246) was issued on June 28, 1982. (R-41). The Stone Lumber permit (# 098-0234) was issued on July 1, 1982. (R-39). Applicant Estill Stone was listed as the operator for all four permits in the Department of Mines and Minerals (hereinafter "DMM") records, having acquired the DMM licenses for each of the mines. (Tr. 42 and R-43 through R-46). Three of the licenses were acquired on the same day – July 22, 1982. (R-43, R-45 and R-46). Inspector Smith also checked the Mine Safety and Health Administration (hereinafter "MSHA") records and discovered that all four of the mines had been operated under the mine identity number assigned to Applicant Estill Stone. (Tr. 44). Inspector Smith testified that Applicant Estill Stone told her that he had mined under the Estill Stone and Stone Lumber permits and that he had begun to mine both of the Fleming permits. (Tr. 60-61). He also roughly estimated the tonnage he had removed under the Fleming permits as 1000 tons from the William Fleming site and 1500 tons from the Russell Fleming site. (Tr. 61).

The four mine sites are all in close proximity to one another. The Russell Fleming and William Fleming sites are contiguous. The Estill Stone site lies seven hundred feet away from the Fleming sites and immediately adjacent to that is the Stone Lumber site. (Tr. 45). All four sites drain into the watershed of Sycamore Creek. (Tr. 45). On the basis of her investigation, Inspector Smith concluded that the four operations were related. She then issued a Ten-Day-Notice advising the State of Kentucky of the over-acreage violation on the William Fleming permit and of the relatedness of the four permits. The Kentucky DNR responded by issuing Notices of Noncompliance for the over-acreage and relatedness violations on the William Fleming permit, and for the relatedness violation on the other three permits. (R-3 through R-8). OSMRE considered the Noncompliances to be appropriate and did not institute federal enforcement procedures in 1986. (Tr. 54). In April 1986, the state regulatory authority vacated the Noncompliance

on the issue of relatedness. (Tr. 56, R-10 through R-12). Inspector Smith testified that she was unaware of OSMRE ever notifying Kentucky that it considered vacating the Noncompliances to be inappropriate. (Tr. 76).

The next witness to testify on OSMRE's behalf was Inspector Robert Hamilton, who issued the CO's and FTACO's in question. Inspector Hamilton began investigating the four permits as a member of the Two-Acre Task Force in December 1989. (Tr. 82). On December 4, 1989, he met with OSMRE Inspector Sharon Hall and OSMRE Inspector Mike Rowe to Survey the Stone Lumber site. (Tr. 87). Inspector Rowe delineated the disturbed area which measured 1.7 acres, including the access road. (R-15). The site had been reclaimed to two-acre standards with 95% vegetative cover. A highwall three hundred thirty feet long by fifty feet high remained. (Tr. 89). According to the close out reports, 11,729 tons of coal were produced from the site. (Tr. 92, R-14).

A similar survey of the Estill Stone site revealed that the disturbed area measured 1.21 acres. (Tr. 96). Again the vegetation was good and there was a highwall three hundred forty-five feet in length by fifteen feet in height. The tonnage reported from the site was 6,100 tons. (Tr. 99, R-13). Inspector Hamilton also visited the Russell Fleming and William Fleming sites but he did not measure either one because they had already been surveyed by the state. The disturbance on the Russell Fleming permit was 2.18 acres. (R- 15). A six hundred foot by fifteen foot highwall remains unreclaimed on the Russell Fleming site. (Tr. 102). Inspector Hamilton found two DMM licenses for the site. One had been issued to Estill Stone, who reported having mined 2,300 tons of coal from the site. (Tr. 103 and 107). An additional license had been obtained by Earnest Cook for Cook and Son in March 29, 1983, under which 5,582 tons of coal were removed by October 4, 1983. (Tr. 104-105, R-54).

On the William Fleming site, Inspector Rowe gave Inspector Hamilton a copy of the findings of a survey completed by himself and Clyde DeRossett which measured the disturbance as 1.97 acres. (Tr. 108, R-16). Both Estill Stone and Earnest Cook had obtained DMM licenses for the site. (Tr. 109). Estill Stone reported 1,960 tons of coal removed in 1982. (Tr. 111). Earnest Cook reported 5,582 tons removed from the site by Cook and Son in 1983. (Tr. 109). DMM employee, Paul Little introduced copies of the annual tonnage reports for the Fleming permits which were signed by Mr. Cook as the principal officer. (R-62 and R-63).

Inspector Hamilton corroborated Inspector Smith's findings that Applicant Estill Stone acquired DMM licenses for each of the four permits and that all four mines were operated under Mr. Stone's MSHA mine identity number (Tr. 244-245). Inspector Hamilton determined that all four operations were related in regard to Applicant Estill Stone's activities and that the two Fleming operations were related in regard to Applicant Cook and Son's activities. Consequently, he issued the four CO's for mining without a valid surface mining permit due to relatedness in violation of Kentucky statutory law, KRS § 350.060, and in violation of federal law, § 506(a) of the Act and 30 C.F.R. § 843.11(a) of the implementing regulations. (Tr. 114-122, R-22 through R-25). The inspector returned to the sites after the abatement date

and found that no remedial work had been undertaken to bring the sites to permanent program standards. Because Applicants had failed to begin reclamation or to obtain permit program permits, the inspector issued the FTACO's for failure to abate the violations under § 521(a) of the Act. (Tr. 200-202, R-31 through R-34).

The inspector did not issue a second 10-Day-Notice to the state before instituting federal enforcement actions because it was no longer OSMRE's procedure to give prior notice to the state for relatedness violations. (Tr. 235). When Gail Smith wrote a Ten-day-Notice a few years earlier, it was still OSMRE's policy to do so. Since that time, OSMRE and the state of Kentucky entered a Memorandum of Understanding whereby Kentucky waived its right to such notice for alleged Relatedness violations. (R-64). Inspector Hamilton added that he did write a Ten-Day-Notice concerning the over-acreage charge on the William Fleming permit. (Tr. 226). The state rejected the over-acreage charge and OSMRE decided not to pursue it, but to enforce only the relatedness claims. (Tr. 226).

When asked about who was in control of the mining operations, Inspector Hamilton introduced copies of two OSMRE inspection reports which had been signed by Applicant Estill Stone on March 4, 1983. (Tr. 206-207, R-59 and R-60). Likewise, Applicant Earnest Cook had signed for a state Noncompliance. (Tr. 232). The bonds on three of the permits had been released by the time of Inspector Hamilton's investigation. The Russell Fleming permit went into inactive status on November 14, 1983 and the bond was released on February 2, 1986. The Stone Lumber permit was reported as inactive on March 24, 1984 and the bond was released on September 2, 1988. The Estill Stone permit was reported as inactive on November 14, 1983 and the bond was released on September 9, 1988. The William Fleming went inactive on November 14, 1983, but the bond had not yet been released during the relatedness investigation. (Tr. 213-219, R-13 through R-16).

DSMRE Inspector William Rowe also testified on OSMRE's behalf. Inspector Rowe was the state inspector assigned to the four permits during the active mining operations. (Tr. 145). Inspector Rowe could not recall visiting the mine sites with Inspector Hamilton in December 1989. (Tr. 153). He did agree that he had assisted in the survey of the William Fleming permit when the state engineer, Mr. DeRossett determined the site was 1.97 acres. (Tr. 155). In regard to control of the mines, Inspector Rowe testified that Applicant Estill Stone was present on the Estill Stone site when the state Noncompliance was served and appeared to be in charge. (Tr. 146). The inspector could recall seeing Applicant Earnest Cook on the William Fleming site. (Tr. 147). He could not remember ever seeing either Applicant Estill Stone or Earnest Cook on the Russell Fleming site. He also stated that he had no reason to think that either of the men were in control of the site but that at the time of his inspections it did not matter to him who was in control. (Tr. 151 and 178).

OSMRE also called Mr. Earnest Cook as a witness. Mr. Cook asserted his Fifth Amendment right against possible self-incrimination and refused to

answer the questions concerning who mined the coal, who profited from the sale of the coal, who was in control of the operations and whether there had been an agreement with Estill Stone to mine the Fleming permits. (Tr. 272-285).

OSMRE's next witness was Rick Rice, who presided as hearing officer at one of the two informal conferences held between Applicants and OSMRE. Mr. Rice testified that at the conference, Mr. Cook stated that he was the contract miner for someone named General Meade on the Russell and William Fleming sites. (Tr. 291). He also allegedly stated that he and General Meade obtained these two permits from Applicant Estill Stone. (T. 298). According to Mr. Rice, Mr. Cook admitted to selling the removed coal, some of which was trucked to Virginia, but that he did not know what percentage of the sale proceeds he received. (Tr. 291 and 299). Mr. Cook also reportedly acknowledged obtaining the DMM licenses for the permits.

On cross-examination, Mr. Rice agreed that he never determined Mr. Cook to be the owner of the permits. (Tr. 302). He had also not asked Mr. Cook who was in charge of the operations. (Tr. 302). The attorney for Cook and Son, Mr. James Asher, testified in rebuttal to Mr. Rice's assertions that Mr. Cook spoke at the informal conference. Mr. Asher testified that all statements were presented by him for Mr. Cook or for Cook and Sons. (Tr. 365). On the basis of Mr. Asher's testimony, the undersigned did not admit the hearing officer's written summary of the informal conferences into evidence.

Issues

The five issues for resolution in this review proceeding are:

- (1) Whether OSMRE's enforcement action is time barred by an applicable statute of limitations?
- (2) Whether this review proceeding is barred by the doctrines of res judicata or collateral estoppel?
- (3) Whether OSMRE improperly failed to issue a second Ten-Day-Notice to the state of Kentucky before issuing the cessation orders?
- (4) Whether the four mining operations were related such that they were not entitled to the two-acre-or-less exemption from the permanent program standards?
- (5) Whether OSMRE is estopped under 30 C.F.R. § 700.11(c) from assessing a civil penalty?

Findings, Discussion, Conclusion

1. The Statute of Limitations.

Applicants claim that OSMRE was barred from initiating enforcement procedures because the statute of limitations had run. In raising this affirmative defense, Applicants bear the burden of proving it. Generally, the United States is not bound by statutes of limitation in enforcing its rights unless Congress explicitly provides otherwise. See Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); see also United States v. Tri-No Enterprises, 819 F.2d 154 (7th Cir. 1987); United States v. Podell, 517 F.2d 31 (2d Cir. 1978); United States v. 93 Court Corp., 350 F.2d 386 (2d Cir. 1965, cert. denied 382 U.S. 984 (1966)); and United States v. Summerlin, 310 U.S. 414 (1940). Courts have long held that "Congress may create a right of action without restricting the time within which the right must be exercised." United States v. City of Palm Beach, 630 F.2d 337, 339 (5th Cir. 1981) cert. denied 454 U.S. 1081 (1981) (cited hereinafter as City of Palm Beach) (citing Occidental Life Insurance co. v. EEOC, 432 U.S. 355 (1977)). The justification behind this principle stated by the United States Supreme Court is:

... to be found in the great public policy of preserving the public rights, revenues and property from injury or loss, by the negligence of public officers. . . . [T]he rule is supportable now because its benefits and advantages extend to every citizen, including the defendant."

City of Palm Beach, 630 F.2d at 340 (quoting Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938)). The court in City of Palm Beach applied this same principle to a suit by the federal government concerning a federally constructed public hospital under the Hill-Burton Act. Because the Hill-Burton Act had no prescribed limitations period, the Fifth Circuit Court of Appeals concluded "that Congress intended to allow the United States . . . to bring an action under the Act at any time unless the City can demonstrate that Congress intended one of its independent, general statutes of limitations to apply to suits under this Act." City of Palm Beach, 630 F.2d at 340.

Applying the rationale of City of Palm Beach to this proceeding, Applicants must prove that a general statute of limitations applies to OSMRE's enforcement actions because the Act does not provide an explicit limitations period. Applicants suggest that the Kentucky five year general statute of limitations should be applied on the basis of a United States Supreme Court decision acknowledging that "[w]hen Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." Wilson v. Garcia, 471 U.S. 261, 266-267 (1985) (cited hereinafter as Wilson). In Wilson, the Court adopted New Mexico's three year personal injury statute of limitations for a § 1983 civil rights claim. The Court recognized that in § 1988, "Congress has implicitly endorsed this approach with respect to claims enforceable under the

Reconstruction Civil Rights Act." Id. at 269-270. Unlike Wilson, nothing in SMCRA suggest that Congress would condone the application of a state limitations period to federal surface mining enforcement actions.

Even assuming Congress implicitly accepts the application of state law, Applicants have not presented an appropriate Kentucky statute to be applied in this case. Whether a state limitations statute is appropriate for applying to federal claims depends on the substantive similarities between the two laws. The Sixth Circuit Court of Appeals suggests that in order to evaluate the state law "we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle." Caruthers Ready Mix, Inc. v. Cement Masons Local Union No. 520, 779 F.2d 320, 322 (6th Cir. 1985) (cited hereinafter as Caruthers). As an example of this approach in action, the Caruthers court applied Tennessee's three years statute of limitations for claims of inducing contract breaches in a suit by a subcontractor against the union which was encouraging strikes in order to dissuade general contractors from dealing with the subcontractors. Id. In the instant case, Kentucky does not have a specific time limitation on enforcement procedures under the state surface mining program. Applicant Cook and Son cites § 413.120(2) of the Kentucky Revised Statutes which imposes a five years limitations period for "a liability created by statute, when no other time is fixed by the statute creating the liability." The Kentucky statute is inappropriate for two reasons. First, there is no essential similarity tying the Kentucky statute to SMCRA's goal of surface mining reclamation – a necessity under the Caruthers approach. Second, § 413.120(2) does not fill a gap in the federal laws, so there is no need to apply it. Section 413.120(2) is merely a general statute of limitations – generally applicable where no specific statute applies. Congress has enacted several such statutes for limiting federal actions; therefore, there is no gap for the Kentucky statute to fill.

The next obvious question is whether any of the federal general statutes of limitations apply here. Applicant Cook and Son cites a relatively recent case from the Western District of Pennsylvania for the proposition that this action is barred by the five year limitations period provided in 28 U.S.C. § 2462. See United States v. Graham, 1989 WL 248111 (W.D. Pa. July 20, 1989) (cited hereinafter as Graham). In Graham, OSMRE issued an FTACO to the coal operator in May 1981. Eighteen days later, OSMRE issued a Notice of Proposed Civil Penalty in the amount of \$22,500.00. OSMRE subsequently terminated the CO and later vacated that termination in 1983. OSMRE then waited until September 1987, to institute an action to collect the civil penalties – some

six years after the CO was issued. ^{1/} The district court ruled that OSMRE's collection suit was time barred by 28 U.S.C. § 2462.

Section 2462 imposes a five year time limit for actions to enforce "any civil fine, penalty or forfeiture." This statute is of little value to Applicants Estill Stone and Cook and Son because the present enforcement action does not involve a civil fine, penalty or forfeiture. The purpose of this review is to determine the Applicants' potential responsibility for reclaiming the mine sites to permanent program standards. Reclamation responsibilities are an incident of being granted a proper coal mining permit. The right to mine coal is conversely conditioned on fulfillment of reclamation responsibilities. In no way are these responsibilities punitive in nature. They are simply the minimum requirements attendant to operating a coal mine. Only when these minimum requirements are not met will the government proceed to the next step of assessing penalties.

The Court of Appeals for the Seventh Circuit has rejected three primary statutes of limitation of general application, including § 2462 as applied to suits by OSMRE to collect reclamation fees under the Act. See United States v. Tri-No Enterprises, 819 F.2d 154 (7th Cir. 1987) (cited hereinafter as Tri-No Enterprises). In Tri-No Enterprises, the court of appeals declined to apply § 2462, reasoning that the reclamation fees are "simply an assessment or excise tax on all coal produced for sale by surface or underground mining." Id. at 158. The court also rejected the general six year statute of limitations for contract actions codified at 28 U.S.C. § 2415(a), stating that the responsibility to pay reclamation fees arises out of the Act and its implementing regulations, and not out of contract obligations. Id. at 159; accord United States v. Ringley, 750 F. Supp. 750 (W.D.Va. 1990) (six year contract statute of limitations does not apply to the United States' claim against partners for reclamation fees). A third general statute of limitations, 26 U.S.C. § 6501(e)(3), setting a six year time limit for government suits to collect delinquent excise taxes was summarily rejected on the ground that the statute was confined to taxes under subtitle D of the Internal Revenue Code, whereas reclamation fees arose under the wholly separate surface mining act. In summary, the Seventh Circuit held that OSMRE's suit was not time barred because "SMCRA does not explicitly limit the period in which the government may bring an action to collect delinquent

^{1/} OSMRE has apparently assessed \$ 90,000.00 in civil penalties against Applicant Estill Stone soon after the CO's were issued in January 1990. However, OSMRE does not seek to collect them in this review proceeding. If the government was seeking payment, then under Graham's rationale, the suit would be timely under 30 U.S.C. § 2462. The point of this discussion is not to discuss the propriety of Graham's conclusion that § 2462 applies to civil penalty proceedings under the Surface Mining Coal and Reclamation Act. That analysis must be postponed until the civil penalties are directly in issue if need be. Even if we concede for the sake of argument that the Pennsylvania district court is correct, Graham does not apply to the present case.

reclamation fees. No other general statute of limitations applies to the government's action to collect delinquent reclamation fees." Id. at 159.

Applicants have not shown that a federal general statute of limitations applies to this case. And although this proceeding does not expressly involve delinquent reclamation fees as in Tri-No Enterprises, the reasoning in that case likewise requires rejecting the three general statutes in this case as well because the enforcement actions arose under the Act as an incident to mining coal. Thus, Applicants have failed to prove their defense, and therefore, OSMRE's enforcement action against them was not time barred.

2. Res Judicata and Collateral Estoppel.

Applicants also claim that this tribunal lacks jurisdiction under the doctrines of res judicata and collateral estoppel to reconsider the issues previously decided in the state proceedings. The doctrine of res judicata holds that a judgment on the merits in a prior suit involving the same parties or their privies bars a second suit on the same cause of action. See Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955).

Closely related to this rule is the doctrine of collateral estoppel which holds that a "judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Id. at 326. Courts now widely accept that both of these doctrines apply to decisions of administrative agencies acting in a judicial capacity. See United States v. Utah Construction Co., 384 U.S. 394 (1966). Applicants contend that Inspector Smith's participation in the state hearing binds the federal government to the Cabinet's decision to vacate the relatedness violations. ^{2/} On the other hand, OSMRE asserts that it is free to relitigate the relatedness issue because it was not represented at the state hearing.

The fact that the federal and state governments operate as separate sovereigns will not necessarily preclude the application of res judicata and collateral estoppel. Applicants insist that the concurrent enforcement scheme in and of itself creates an "uneasy partnership" such that the relationship between OSMRE and its state counterparts is one of substantial identity. (See Brief of Applicant Cook and Son at 17). In support of their position they rely heavily on the Ninth Circuit Court of Appeals decision in United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980) (hereinafter ITT Rayonier). In ITT Rayonier, the court held that preclusion doctrines applied

^{2/} The state hearing officer concluded that the state relatedness regulations did not go into effect until March 1984, after the mining operations ceased. Actually, Kentucky enacted temporary relatedness regulations as an emergency measure which went into effect on October 31, 1983. Prior to adopting state regulations, the Kentucky program adhered to the federal relatedness regulations. Hence, Kentucky law recognized relatedness violations of the two-acre-or-less regulations at the time of the mining activity on the Stone and Fleming permits.

to concurrent state and federal enforcement actions under the Federal Water Pollution Control Act (FWPCA), codified at 30 U.S.C. §§ 1251 - 1376 (1982).

Under ITT Rayonier's test, preclusion principles apply if the non-party is so closely aligned with the party's interest as to be its virtual representative. Id. However, the court also noted that there could be "countervailing policy reasons" that would justify abrogating both res judicata and collateral estoppel. Id. at 1002. In 1987, the Interior Board of Land Appeals examined the state and federal relationships under the Act in light of ITT Rayonier. See Bemos Coal Co. and Excello Land and Mineral Corp. v. OSMRE, 97 IBLA 285 (1987) (hereinafter Bemos Coal). The Board reviewed the legislative history as well as the explicit statutory provisions of the Act to determine if there were "countervailing policy reasons" that would prevent the use of preclusion doctrines in subsequent OSMRE proceedings. The Board found that there were such countervailing statutory policy reasons, noting especially § 521(a)(3) of the Act which requires the issuance of an NOV where the Secretary discovers a federal violation, even in a primacy state. Id. at 298. The legislative history reveals that Congress intended a strong enforcement policy at the federal level:

Efficient enforcement is central to the success for the surface mining control program contemplated by H.R. 2. For a number of predictable reasons – including insufficient funding and the tendency for State agencies to be protective of local industry – State enforcement has in the past, often fallen short of the vigor necessary to assure adequate protection of the environment. The committee believes, however, that the implementation of minimal federal standards, the availability of federal funds, and the assistance of the expertise of the Office of Surface Mining . . . will combine to greatly increase the effectiveness of State enforcement programs operating under the Act. H.R. Rep. No. 218, 95 Cong., 1st Sess. 129 (1971).

Bemos Coal, 97 IBLA at 299. Based on this language, the Board concluded that res judicata and collateral estoppel principles were inconsistent with OSMRE's independent oversight role and that allowing permittees to rely on the doctrines as a defense would divest OSMRE of the authority expressly conferred upon it by Congress. Id. at 300-301. Consequently, the Board ruled that ". . . the legislative history, when read in conjunction with Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1), which provides for Federal inspection and enforcement in states with primacy, requires the conclusion that a countervailing statutory policy warrants an exception to the preclusion doctrines." Id. at 300. This exception equally applies here where the CO's and FTACO's were issued in the course of OSMRE's oversight duties under the authority of § 521(a).

Even if there were no "countervailing policy reasons" under the Act, the preclusion doctrines do not apply in this case because two of their crucial elements are lacking – a judgment on the merits and privity. The state agency vacated the violations on the ground that the state relatedness regulations had not been in effect at the time. Although the state

regulations had not yet been adopted, the Kentucky program was using the federal relatedness regulations at the time. The state's decision was not a judgment on the merits because it summarily dismissed the alleged violations without reviewing them under the criteria of the federal relatedness regulations which were incorporated into the Kentucky program at the time. Thus, the state never made a judgment as to whether the four sites were or were not related as that term is defined by Kentucky law, albeit law borrowed from the federal program.

Second, there was no privity between OSMRE and DSMRE. The depth of federal participation in state proceedings is the determining factor as to whether privity exists. The test, as stated by the United States Supreme Court, is whether the federal government had a sufficient "laboring oar" in the conduct of the state litigation in order to activate estoppel principles when later suits with the same issues are instituted by the federal government or at its direction. Montana v. United States, 440 U.S. 147, 155 (1979) (cited hereinafter as Montana). In Montana, a contractor attacked the state constitutionality of a state gross receipts tax levied on contractors performing public construction. The federal government was deeply involved with the state actions from their inception. The United States required the contractor to file the original suit in the state court, reviewed and approved the complaint, paid the attorneys fees and costs, directed the appeal in the state courts, appeared and submitted briefs as amicus in the state supreme court, directed the filing of the notice of appeal to the United States Supreme Court and directed the contractor's abandonment of its appeal. Id. On appeal, the Court held that the federal government was estopped by the state court decision because of its intense participation at the state level. Id.

Montana is scarcely comparable to the present scenario because OSMRE's participation in the state enforcement action was minimal. OSMRE had no control whatsoever over the state proceedings. Indeed, Kentucky's DSMRE could have simply refused to take any enforcement action and OSMRE would have been powerless to instigate any state proceedings. Admittedly, OSMRE's inspection and the Ten-Day-Notice spawned the state investigation. However, OSMRE's actual involvement was limited to Inspector Smith's testimony. The Inspector's act of testifying hardly constituted a laboring oar in the state enforcement action.

The Board in Bemos Coal determined that there was no identity of interests between OSMRE and the Tennessee state regulatory authority so that OSMRE was not a privity to the prior state proceedings. Bemos Coal, 97 IBLA at 302. The same can be said of the relationship between OSMRE and DSMRE in this case. The Secretary has neither controlled nor financed the state litigation. Once Kentucky gained primary regulatory control, the Secretary had little, if any, contact with the State enforcement proceedings. While Kentucky may have received financial assistance from the federal government to help support its program, there is no evidence that direct federal financial assistance was forthcoming to support DSMRE's litigation against Applicants Estill Stone and Cook and Son. For the above state reasons, the undersigned concludes that the

principles of res judicata and collateral estoppel do not bar OSMRE's enforcement actions in this case.

3. The Ten-Day-Notice.

Applicants' third challenge to the propriety of the federal enforcement action is that OSMRE failed to notify the state that it considered vacating the Noncompliances to be inappropriate and to issue a second Ten-Day-Notice before reinspecting the sites and issuing the CO's. Applicant's argument fails for several reasons. To begin with, the state had contracted away its right to receive notice in relatedness cases. On September 16, 1986, Kentucky's Natural Resources and Environmental Protection Cabinet, DSMRE and OSMRE entered a Memorandum of Understanding whereby OSMRE would conduct relatedness investigations on all previously unreviewed two-acre permits and on all previous state bond-released two-acre permits. (R-64). As part of the agreement, Kentucky waived its right to receive Ten-Day-Notices when OSMRE discovered relatedness violations in the course of these investigations. (R-64). Applicants protest that the Memorandum of Understanding is tantamount to a rewriting of the law and violates their constitutional rights. (See Brief of Applicant Stone at 15 and of Cook and Son at 26). Applicants are wrong to suggest that the Ten-Day-Notice requirement was intended for their benefit. Actually, the notice requirement was promulgated to protect only the independence of the regulatory programs in primacy states. States can freely waive the notice revision because:

... Congress did not enact the ten-day-notice provision for the operator's benefit but rather to allow the state, as primary regulator, the first opportunity to correct the violation. In essence, the ten-day-notice is a comity provision. The Surface Mining Control and Reclamation Act of 1977 (SMCRA) does not require the state to take any enforcement action and the state is free to totally disregard the notice if it so desires. It is principally for the benefit of the state. See F. R. 15305 (Mar. 13, 1979). ... Therefore, the conclusion logically follows that the state can waive a provision intended solely for its benefit.

Patrick Coal Co. V. OSMRE, 661 F. Supp. 380, 384 (W.D. Va. 1987). Thus, the state of Kentucky was fully within its rights in waiving the notice requirement and the Applicants have no standing to complain.

A second shortcoming in Applicants' argument is that a Ten-Day-Notice was not required in the first place. The Act waives the notice requirement when an imminent danger of environmental harm exists. See 30 U.S.C. §1271(a)(1). ^{3/} Under the agency's regulations, the lack of a proper surface

^{3/} Section 521(a)(1) of the Act, codified at 30 U.S.C. § 1271(a)(1) provides for a waiver as follows:

mining permit is a condition reasonably expected to create an imminent danger of environmental harm. See 30 C.F.R. §843.11(a)(2). ^{4/} When OSMRE determined that the sites were related and were required to be permitted under the permanent standards, it was duty bound to issue the CO's under § 521(a)(2) of the Act which provides that:

When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, . . . which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm . . . the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations . . .

30 U.S.C. § 1271(a)(2) (1986). As an authorized representative of the Secretary, Inspector Hamilton was required to immediately issue the CO's without having to first issue a Ten-Day-Notice.

To argue as Applicants do that there was no imminent danger because all mining operations had ceased years before is an untenable position. Followed to its logical conclusion, this reasoning suggests that mine operators are not accountable for violations of the Act once they are no longer committing them. If a violation has been committed, the Act requires that it be redressed even after the fact. The CO's and FTACO's obviously could not bring about the cessation of mining but they were not entirely moot because they also impose affirmative reclamation responsibilities and mark the date from which civil penalties can begin to run if a relatedness violation had in fact been committed during the active operations. The fact that all mining had ceased by the time the CO's were issued does not detract from their validity, nor does it reinstate the Ten-Day-Notice requirement.

. . . 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.

^{4/} 30 C.F.R. § 843.11(a)(2) provides that:

Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources.

The third reason why Applicants' argument must fail lies in 30 C.F.R. § 843.17 which states that NOV's and CO's can not be vacated simply because OSMRE failed to give the state a Ten-Day-Notice. 5/

4. Relatedness.

OSMRE carries the initial burden of proof in this review proceeding. This burden is set forth at 43 C.F.R. 4.1171(a) (1990). Section 4.1171(a) provides that in issuing a cessation order, OSMRE has "the burden of going forward to establish a prima facie case as to the validity of the . . . order . . ." A prima facie case is shown when sufficient evidence is presented to establish sufficient facts which, if not contradicted, will justify a finding in favor of the party presenting the case. See S & M Coal Co., 79 IBLA 350, 91 I.D. 159 (1984); Tiger Corp., 4 IBSMA 202, 89 I.D. 622 (1982); Miami Spring Properties, 2 IBSMA 399, 87 I.D. 645 (1980); and James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). Specifically, OSMRE must establish a prima facie case that the Applicants were "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Once OSMRE establishes the validity of the CO's, the burden of going forward and the ultimate burden of persuasion shift to Applicants as to "(1) whether [they were] conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether this activity is excepted from the coverage of the Act or regulations and therefore not subject to OSMRE jurisdiction." Fresa Construction Co. v. OSMRE, 106 IBLA 179, 186 (1988).

The Act defines surface coal mining operations as:

(A) activities conducted on the surface of lands in conjunctions with a surface coal mine or subject to the requirements of section 1266 of this title surface operation and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce; . . .

5/ 30 C.F.R. § 843.17 states that:

No notice of violation, cessation order, show cause order, or order revoking or suspending a permit may be vacated for failure to give the notice to the State regulatory authority required under § 842.11(b)(ii)(B) of this chapter or because it is subsequently determined that the Office did not have information sufficient, under §§ 842.11(b)(1) and 842.11(b)(2) of this chapter, to justify an inspection.

30 C.F.R. § 842.11(b)(1)(ii)(B), referred to above, is the implementing regulation for § 521(a)(1) of the Act which requires OSMRE to issue Ten-Day-Notices.

30 U.S.C. § 1291(28)(A) (1986). There is no real question that surface mining activities were conducted on the four permit sites. The Kentucky DMM tonnage reports irrefutably prove that coal was mined from the four sites during the relevant time period. Applicant Cook and Son reported having removed 5,582 tons from each of the Fleming sites. (R-62 and R-63). Inspector Smith testified that Applicant Estill Stone estimated that he had removed 1,000 tons from the William Fleming site and 1,500 tons from the Russell Fleming site. (Tr. 61). Inspector Hamilton added that Applicant Stone had reported removing 11,729 tons from the Stone Lumber site and 6,100 tons from the Estill Stone site. (Tr. 92 and 99, R-13 and R-14). This evidence is ample proof that Applicants conducted surface mining activities.

Having established that Applicants were engaged in surface mining, the essential question becomes whether those four operations were related. ^{6/} Under the current federal regulations, two or more sites are deemed related and must be combined when calculating the affected area if the operations (1) occurred within twelve months of one another; (2) are physically related, meaning they drain into the same watershed within five aerial miles of one another; and 3) are under common ownership or control. See 30 C.F.R. § 700.11(b)(2). ^{7/} The first two criteria are not really in dispute. The parties agree that all of the sites were mined within a twelve month period. (Tr. 85). The four sites also lay in the Sycamore Creek watershed within five aerial miles of each other. (Tr. 45 and 94).

As for the third criterion, OSMRE claims that the operations were commonly controlled rather than commonly owned. The term "control" when used in the context of the relatedness regulations is defined as:

... ownership of 50 percent or more of the voting shares, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

^{6/} The version of § 528(2) of the Act which was in effect at the time Applicants acquired their permits exempted "the extraction of coal by a landowner for commercial purposes where the surface mining operations affects two acres or less." 30 U.S.C. §1278(2). The two-acre exemption has since been repealed. See 30 U.S.C. § 1278(2) (1991 Supp.) (as amended Pub.L. 100-34, Title II, §201(a), May 7, 1987, 101 Stat. 300). The Kentucky regulatory program also exempted two-acre-or-less operations at KRS 350.060. The implementing federal regulations for determining whether an entity was entitled to the exemption include a provision that related operations are not exempt.

^{7/} This same regulation is now separately codified into the Kentucky regulatory program at 405 KAR 7:030.

30 C.F.R. § 700.11(b)(2)(iii). The proof is sufficient to prove that Applicant Estill Stone was in control of all four operations at one time or another. In addition to obtaining mine licenses and using his single MSHA identity number for each of the four mines, Applicant Stone directed the manner and means for removing and selling the coal. In his answers to Interrogatories, he admitted that he made all the day-to-day decisions regarding acquiring the mineral rights, acquiring the mining equipment, borrowing capital and the coal sales. (Response to Interrogatory No. 9(b)). He also admitted to mining coal from all of the sites. (Response to Interrogatories Nos. 15(h), 25 and 33). Applicant Stone sold the coal and retained the proceeds after paying a royalty to the mineral owners under the lease terms. The royalties he paid were fifteen percent of the gross on the Estill Stone and Stone Lumber sites and \$1.75 per ton of coal on the Russell and William Fleming sites. (Response to Interrogatory No. 29, and Attachment of Leases, Tr. 44 and 112). The mine licenses, the identity number and the leases combined gave Applicant Stone the unequivocal authority to determine how the coal would be mined and thus put him in control of the operations.

The proof concerning Applicant Cook and Son on the Fleming permits is more problematic. The documentary evidence merely showed that Earnest Cook had obtained the mine licenses and had reported the tonnage of coal removed. Of the three inspectors questioned, one never mentioned Mr. Cook and the other two could only testify that they had seen him on the sites. The state inspector, William Rowe, agreed that he did not know if Mr. Cook was in control of the mining. (Tr. 169-170). He had not seen Mr. Cook doing any thing other than just standing on the site. (Tr. 169). Inspector Hamilton's testimony was no better. He testified that some of the state inspection reports relating to the earlier Noncompliances had been signed for on the site by Mr. Cook. (Tr. 231). The sum and substance of his finding of control was that Mr. Cook had acquired the mine licenses, reported tonnage and had signed for some inspection reports.

When OSMRE tried to elicit the necessary proof directly from Mr. Cook, he repeatedly asserted the Fifth Amendment right against self-incrimination, despite warnings from the undersigned that the privilege did not apply. The Fifth Amendment privilege offers limited protection in the civil realm. Counsel for OSMRE astutely cites United States v. Ward, where the Supreme Court denied the privilege in a civil penalty collection suit brought under the Federal Water Pollution Control Act. 448 U.S. 242 (1980) (cited hereinafter as Ward). The privilege applies in those civil suits where the penalty is quasi-criminal in nature and effect, that is, where the penalty is so punitive as to "transform what was clearly intended as a civil remedy into a criminal penalty. Id. at 249 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1955)). The Court decided that civil penalties under the FWPCA were not quasi-criminal because there was "overwhelming evidence that Congress intended to create a penalty civil in all respects and quite weak evidence of any countervailing effect." Id. at 254. The court distinguished a United States v. Boyd, 116 U.S. 616 (1886), upholding the privilege in a property forfeiture case because that penalty did not correlate to any of the damages sustained by society or the cost of enforcing the law. Id. Boyd is the

perfect antithesis to the present case where the redress OSMRE seeks is directly related to the harm caused by Applicants' failure to reclaim to permanent program standards. This case is even more compelling than Ward because civil penalties are not even at issue. This proceeding simply does not present enough of a threat to Mr. Cook's liberty to trigger Fifth Amendment protection, nor the other procedural guarantees normally associated with criminal prosecutions. Therefore, it was improper for Mr. Cook to assert the privilege.

The effect of Mr. Cook's refusal to testify is two-fold. First, Mr. Cook made himself unavailable as a witness under the Federal Rules of Evidence. The five definitions of unavailability include situations where a potential witness "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Fed. R. Evid. 804(a)(2). 8/ Mr. Cook persistently refused to testify about who was in control of the mining operations on the Fleming permits, despite the undersigned's warnings that his refusal was not privileged. Mr. Cook's persistence opened the door to admit into evidence his statements made at the informal conferences under the former testimony exception to the hearsay rule found in Federal Rule of Evidence 804(b)(1). Mr. Rice, who presided over one of the informal conferences, testified that Mr. Cook had admitted to mining the Fleming sites. (Tr. 298). 9/ Mr. Cook and General Meade had obtained the

8/ The definition of unavailability pertaining to privileges does not apply here. Federal Rule of Evidence 804(a)(1) states that a declarant is unavailable when he or she "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." The notes of the Advisory Committee to the proposed rule emphasize that this definition applies only when the judge makes a ruling that the privilege is valid. The undersigned advised Mr. Cook to the contrary, that he was not entitled to avail himself of the Fifth Amendment privilege from testifying.

9/ Mr. Rice summarized the events of the informal conference in a report. Applicants contend that Mr. Cook's alleged statements therein had actually been made by the attorney for Cook and Son, and objected strenuously to the report as inadmissible hearsay. The undersigned forbade the use of any statements made by the attorney, ruling that they were not admissions of a party opponent made by its agent under Federal Rule of Evidence 801(d)(2). The hearing officer's report was not admitted into evidence but Mr. Rice was allowed to testify from the report about the statements Mr. Cook purportedly made to him at the conference. Hearsay problems are largely questions of reliability and credibility. Applicant had a full opportunity to cross-examine Mr. Rice about who actually made the alleged statements. However, the cross-examination could not effectively diminish the reliability of Mr. Rice's insistence that the statements were indeed made by Mr. Cook.

Fleming permits from Applicant Estill Stone. Mr. Cook had also said that he sold the coal which was mined, but he did not know what percentage of the monies he received. (Tr. 299).

The second result of Mr. Cook's refusal to testify is that we can presume that the answers he withheld are favorable to OSMRE. Mr. Cook was forewarned that the undersigned might make this very judgment and yet he resolutely refrained from answering the government's questions. Counsel for OSMRE asked Mr. Cook several very specific questions regarding Cook and Son's role in the mining of the Fleming permits:

Q: Did you ever strip coal on the William Fleming permit in Pike County, Permit Number 098-0247?

Q: Did you operate as a contract miner for anyone on the William Fleming Permit Number 098-0247?

Q: What is the reason that your company, Cook and Son, obtained Mines and Minerals licenses for the William Fleming permit in Pike County?

Q: Did anyone instruct you to obtain a Mines and Mineral license in the name of Cook and Son for the William Fleming permit in Pike County?

Q: Did Cook and Son have an agreement with any other person or any other company to obtain a mine license for the William Fleming permit in Pike county?

Q: Did you personally have a contract mining agreement with anyone or any company to mine on the William Fleming permit in Pike County?

Q: Did Cook and Son have an agreement with anyone or any company to mine the William Fleming permit in Pike County?

Q: Did you sell or broker any coal from the William Fleming permit in Pike County, in either 1982 or 1983?

Q: Did Cook and Son sell or broker any coal from the William Flenin permit, in either 1982 or 1983?

Q: Have you ever been in business with Mr. Stone?

(Tr. 272-280). Credibility plays a large part in these review proceedings.

The whole tenor of Mr. Cook's silence in the face of the direct warnings leads one to suspect that the witness was faced with the unsavory alternative of implicating his company, Cook and Son. Therefore, the undersigned concludes that if Mr. Cook had answered the questions candidly and honestly, that the

responses would have bolstered the government's position that Cook and Son controlled the mining on the Fleming permits after Applicant Estill Stone's operations ceased. Mr. Cook's obtaining the DMM licenses, reporting the tonnage as the operator, his admissions that the company mined the sites and sold the coal for profit, and his silence when given the opportunity to extricate his company from responsibility all combine to lead to the reasonable conclusion that the Russell and William Fleming mining operations were under Cook and Son's common control.

5. Estoppel.

In his brief, Applicant Stone argues that if the undersigned concludes that the operations were related, that OSMRE can not assess civil penalties under 30 C.F.R § 700.11(c). This regulation protects coal operators from excessive penalties when their exemptions are reversed:

... If a written determination of exemption is reversed through subsequent judicial or administrative action, any person, who, in good faith, has made a complete and accurate request for an exemption and relied upon the determination, shall not be cited for violations prior to the date of the reversal.

30 C.F.R. § 700.11(c). Applicant Stone asserts that OSMRE is estopped from assessing civil penalties because the state of Kentucky never reversed the two-acre-or-less exemptions. However, the exemptions were effectively reversed by OSMRE itself. While § 700.11(c) provides an estoppel defense, it does not bar OSMRE's enforcement actions altogether. Section 700.11(c) is intended to prevent regulatory authorities from penalizing the operator for its good faith reliance on a valid two-acre determination. But by the same token, the rule is not intended to circumscribe OSMRE's jurisdiction to correct continuing violations. On the contrary, "if a decision of exemption is reversed, the operations must immediately begin to comply with the Act's requirements." 47 Fed. Reg. 33,424 (August 2, 1982). "To read § 700.11(c) so broadly as to prevent OSM from issuing a[n] NOV or CO would effectively cripple OSM of any enforcement power and render 30 U.S.C. § 171 (sic) [§ 1271] meaningless. OSM could reverse a state regulatory authority's decision for exemption, but would be powerless to correct the existing violation. This expanded interpretation is not the Secretary's intended meaning." Harman Mining Corp. v. Hodel, 662 F. Supp. 629, 634 (W.D. Va. 1987); see also Cherry Hill v. United States, Civil Action No. 90-224, slip. op. (E.D. Ky Nov. 6, 1990); and Patrick Coal Co. v. OSMRE, 661 F. Supp. 380 (W.D. Va. 1987).

The federal District Court for the Western District of Virginia has twice held specifically that the regulation does not prevent OSMRE from reversing the state's finding of a two-acre-or-less exemption and subsequently issuing NOV's or CO's. See Harman Mining Corp. v. Hodel, 662 F. Supp. 629, 634 (W.D. Va. 1987); and Patrick Coal Co. v. OSMRE, 661 F. Supp. 380 (W.D. Va. 1987). The rationale behind these decisions is that the operator had relied on the state's decision of exemption and not on OSMRE's advice. See Patrick Coal Co. v. OSMRE, 661 F. Supp. at 386. The same rationale applies with full

force in this proceeding where the decision of exemption had been made by DSMRE under state law in releasing the permits, and not by OSMRE. Therefore, Applicants can not validly assert that he detrimentally relied on any representations made by OSMRE and thereby raise an estoppel defense. After inspecting the sites and determining them to be related, OSMRE was fully within its authorized powers to reverse the exemptions recognized by DSMRE and enforce the Act and regulations against Applicants' operations. Once OSMRE reversed the exemptions, it was free to assess civil penalties to accrue thereafter. 10/

OSMRE has provided ample proof to show that the four mining operations were related under Applicant Stone's common control and that the Fleming operations were related under Applicant Cook and Son's common control. As related operations, both the Act and Kentucky law required Applicants to operate under permanent program permits and that the sites be reclaimed to permanent program standards. Consequently, OSMRE has met its initial burden of proof of establishing a prima facie case as to the validity of the CO's and FTACOS. On the other hand, Applicants have not sufficiently rebutted their control of the mines. Their collective exhibits merely show the procedural steps that have brought this case before the undersigned – the Ten-Day-Notice, the Noncompliances, and the Cabinet's decision to vacate the violations. Beyond their mere denials, they have presented virtually no evidence to prove that they did not in fact control the operations. Since the federal government's proof remains uncontroverted, OSMRE is entitled to a finding in its favor.

Order

The undersigned hereby finds that Applicant Estill Stone controlled the four related surface coal mines on the Estill Stone, Stone Lumber, Russell Fleming and William Fleming permits. Applicant Cook and Son subsequently controlled the related mining operations on the Russell and William Fleming permits. OSMRE's assertion of jurisdiction for enforcing the Act and its implementing regulations was a proper exercise of its powers upon determining that the operations were related in time, distance and control. Accordingly, Cessation Orders Nos. 90-84-132-001 through -004 and Failure-To-Abate

10/ Applicant Stone did not challenge the correctness of the civil penalties but only OSMRE's authority to do so under § 700.11(c). Therefore, this decision will not evaluate OSMRE's assessment under the penalty criteria to determine if the assessment is appropriate. That analysis must wait until such a time when it is directly raised as an issue. The issue of civil penalties herein is limited to a discussion of whether OSMRE was jurisdictionally estopped from assessing them in the first instance.

Cessation Orders Nos. 90-84-132-005 through -008 are sustained against Applicants Estill Stone and Cook and Son, and Applications for Review, Docket Nos. 90-35-R, 90-37-R, 90-42-R and 90-44-R are hereby dismissed.

David Torbett
Administrative Law Judge

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Appeal Information

This decision may be appealed in accordance with the applicable provisions in 43 C.F.R. Subtitle A, Part 4, Subpart L, Section 4.1100 through 4.1394, Special Rules Applicable to Surface Coal Mining Hearings and Appeals.

Dec 4, 1995

IBLA 92-517 : NX 90-34-R et al.
ESTIL STONE ET AL. : Surface Mining
v.
OFFICE OF SURFACE MINING RECLAMATION :
AND ENFORCEMENT

ERRATUM

Appendix A, omitted from the decision in the above entitled decision at the time of publication, is attached. The appendix is paginated with numbers beginning at 134 IBLA 18a.

Franklin D. Amess
Administrative Judge

I concur.

C. Randall Grant Jr.
Administrative Judge

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134 IBLA 18X

