

Editor's note: Reconsideration denied by order dated Feb. 14, 1996, Affirmed, Civ. No. 96-0001-BSG (W.D. VA Mar. 5, 1997), appeal filed, No. 97-1449 (4th Cir. March 28, 1997); dismissed (Sept. 17, 1997); rehearing granted, D.Ct. order vacated, IBLA decision vacated, (Dec. 30, 1997)

HARVEY CATRON
JO D. MOLINARY

IBLA 92-344, 93-125, 92-484

Decided November 30, 1995

Appeals from decisions of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, upholding the Big Stone Gap Field Office determinations that the Virginia Division of Mined Land Reclamation took appropriate action in response to appellants' citizen complaints, and refusing to order Federal enforcement.

Affirmed in part; set aside and remanded in part; petition for attorneys' fees denied.

1. Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Where a state administrative hearing officer has rendered a determination, the doctrines of res judicata and collateral estoppel will not preclude OSM from making an independent inquiry into whether a state action is arbitrary, capricious, or an abuse of discretion, nor will it constitute per se evidence of a state's good cause for failure to act on a 10-day notice.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Previously Mined Lands—Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State—Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Where limited spoil existed to backfill an existing highwall "to the maximum extent technically practical" as required by Virginia Coal Surface Mining Reclamation Regulation sec. 480-03-19.819.19(b), to the extent the State regulatory authority permitted a road across an existing bench below the highwall to be constructed

to standards beyond those necessary to accomplish the purpose for which the road was approved, the State's approval of the road as constructed conflicted with the regulation, and was therefore an arbitrary and capricious action.

3. Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Where OSM reviewed state action denying relief where citizens complained that limited spoil was used to build an improved roadway across an existing bench instead of to eliminate a previously mined highwall to the maximum extent technically practical, it was incumbent upon citizens to demonstrate to OSM that the state's action was arbitrary and capricious, or an abuse of discretion.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for appellants; Timothy W. Gresham, Esq., Abingdon, Virginia, for Powell Mountain Coal Company; and J. Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Harvey Catron and Jo D. Molinary have appealed from two decisions of the Assistant Deputy Director, Operations and Technical Services (Assistant Deputy Director), Office of Surface Mining Reclamation and Enforcement (OSM), dated February 18, and December 16, 1992, upholding determinations made by the Big Stone Gap Field Office (BSGFO), OSM, that the Virginia Division of Mined Land Reclamation (DMLR) took appropriate action in response to citizen complaints filed by appellants.

OSM's December 16, 1992, decision concerns its reconsideration and affirmance of an earlier decision not to assume Federal enforcement which was previously appealed to this Board in a case docketed as IBLA 92-82 and remanded to OSM by order dated April 28, 1992. That appeal, docketed by the Board as IBLA 93-125, was consolidated with appellants' appeal of the Assistant Deputy Director's February 18, 1992, decision by order of this Board dated February 4, 1993. Appellants' request for attorneys' fees pertaining to the remand of IBLA 92-82, docketed as 92-484, will be addressed in this opinion.

At various times relevant to these appeals, Powell Mountain Coal Company (Powell) was doing business as Wax Coal Company, and acted in conjunction with other affiliates. This opinion will refer to actions by Powell, Wax, and any other affiliates as actions by Powell.

I. Factual and Procedural Background

In April 1990, Powell obtained a permit from DMLR to conduct auger mining and construct a road across approximately 3 acres located within a 50-acre tract of mountain land known as the Pruitt Heirs tract, a corner of which interlocks with and separates two larger tracts of land owned in fee by Powell. The permit was issued for approximately 15 acres of land encompassing parts of the three tracts, which are located in the Pennington Gap, near St. Charles, in Lee County, Virginia, off State Route 634. Approximately 10 acres across the three tracts were disturbed by Powell's mining operation.

Portions of the permit area were previously mined in the late 1960's, prior to passage of Surface Mining Control and Reclamation Act of 1977 (SMCRA) by the contour mining method. Because of the steepness of the slopes, ranging from 30 to 38 degrees, only one contour cut was taken. This cut left a highwall and a bench which extended along an outslope at an approximate 2,700-foot elevation. Eighteen hundred linear feet of disturbed outslope was located on the Pruitt tract. Spoil was left both on the outslope and downslope of the bench. Subsequent to the pre-SMCRA disturbance, vegetation and, eventually, a stand of trees covered the bench and obscured the highwall. The highwall, however, contained unstable areas, and, on occasion, landslides occurred from above it.

Although Powell represented to DMLR that it had the legal right to mine the Pruitt tract, Powell did not obtain consent of the surface owners as required by Virginia coal surface mining law and regulations, and DMLR revoked Powell's permit in January 1991. Before the permit was revoked, however, augering on the tract had been completed, and Powell had constructed an improved roadway along the bench.

A. Appellants' October 25, 1990, Complaint: Powell's Right to Mine the Pruitt Tract and DMLR's Approval of Powell's Reclamation Plan

On October 25, 1990, pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), Catron filed a citizen's complaint with BSGFO alleging highwall instability, material on the downslope, and other violations of the Virginia Surface Mining Act and regulations on the Pruitt tract. Molinary joined Catron as a citizen complainant on December 18, 1990.

BSGFO issued a 10-day notice (TDN) to DMLR on November 1, 1990, and visited the site with DMLR officials on November 8, 1990. On November 20, 1990, DMLR responded to the TDN by issuing a Notice of Violation (NOV) to Powell for placement of material on the downslope. DMLR terminated this NOV upon reinspection, which, according to DMLR, revealed that the excess material had been removed. DMLR also issued a show cause notice to Powell

requiring it to produce evidence to show why its permit should not be revoked for failure to obtain consent to mine the Pruitt tract from the other surface owners.

On November 29, 1990, BSGFO determined that DMLR's actions regarding the October 22, 1990, complaint were appropriate, and declined to assume Federal enforcement.

Appellants subsequently requested informal review of BSGFO's findings by the Assistant Deputy Director for Operations and Technical Services (Assistant Deputy Director). They specifically requested review of DMLR's finding that the highwall was stable, its failure to issue an NOV for placement of spoil and trees on or below the haul road embankment, and its determination to issue a show cause notice, rather than a cessation order (CO) to Powell, for "false statements in obtaining its permit" (Appellants' Letter to Nina Rose Hatfield dated Dec. 26, 1990).

On January 11, 1991, DMLR declared Powell's permit "void ab initio" because "there was insufficient information in the permit package and in [a] subsequent submittal to justify a determination that [Powell Mountain] had the authority to engage in auger mining on the Pruitt Heirs tract" (DMLR Decision Letter dated Jan. 11, 1991). DMLR also issued a CO to Powell for failure to provide right of entry information in compliance with section 480-03-19.778.15(b) of the Virginia Coal Surface Mining Reclamation Regulations (VCSMRR). The CO required the company to cease all coal surface mining operations, including deep mining, on the entire permit area, and required the operator to complete reclamation of the site by March 1, 1991. Appellants consequently withdrew portions of their appeal relating to BSGFO's oversight of DMLR's action regarding permit issuance, and requested a deferment of other issues on appeal pending reclamation (Letter of Walter Morris to Nina Rose Hatfield dated Jan. 16, 1991).

Powell, however, appealed DMLR's decision finding the permit "void ab initio," pursuant to VCSMRR section 480-03-19.775.11. Subsequent to a formal public hearing, on August 21, 1991, a State hearing officer upheld DMLR's decision letter revoking Powell's permit in all respects, except that he declared the permit to be "terminated," rather than "void ab initio." On October 21, 1991, the Assistant Director for Mining, DMLR, modified the finding by declaring the permit "revoked."

By the time the August 1991 hearing was held, however, appellants had filed their second complaint with BSGFO alleging that DMLR had wrongfully approved reclamation on the site. The State hearing was expanded beyond the scope of Powell's appeal to include reclamation issues, and factual findings were made concerning whether DMLR had terminated the CO prior to achievement of reclamation on the tract which would meet the requirements of VCSMCRA. Specifically, the Pruitt heirs alleged that one of the sedimentation ponds, Pond 5, was improperly placed closer to the highwall than

called for in the permit design, and that available spoil was improperly used by Powell to the detriment of maintenance of highwall stability.

The State hearing officer held that the CO was properly terminated. Specifically, the hearing officer made findings of fact with reference to the efficacy of DMLR's "field approval" of Pond 5 as constructed, and with reference to whether the reclamation plan's approved use of available spoil was contrary to the requirements of SMCRA. In both cases, the hearing officer upheld DMLR.

B. Appellants' April 19, 1991, Complaint: Reclamation on the Pruitt Heirs' Tract

Subsequent to Powell's March 1 reclamation deadline, on April 19, 1991, appellants filed a second complaint with BSGFO, alleging that DMLR had wrongfully approved reclamation on the tract. They also renewed their informal review appeal with the Assistant Deputy Director (Letter of Walter Morris to Nina Hatfield dated Apr. 22, 1991).

In their complaint to BSGFO, appellants alleged that DMLR had not required reclamation of the land as nearly as practicable to its pre-mined contour, or, "at a minimum, to use all available spoil to cover the highwall to the maximum extent possible" (Letter of Walter Morris to BSGFO dated Apr. 19, 1991). They also alleged that DMLR did not require Powell to "stabilize certain portions of the highwall remnant which continue to deteriorate"; that DMLR did not require Powell "to remove the improved roadway constructed under the permit"; and that DMLR did not require Powell "to construct sediment control structures appropriate to the regraded spoil configuration specified in the permit"; or "to redistribute topsoil over the regraded spoil material, to reseed the area, and to refrain from conducting activities on the revegetated area which interfere with the establishment of a diverse, effective, and permanent vegetative cover." Id.

On April 23, 1991, BSGFO issued a second TDN to DMLR, to which it responded on May 1, 1991. DMLR maintained that all requirements for reclamation had been met.

To evaluate DMLR's response, BSGFO engaged the technical services of ESO, known as the Eastern Support Center (ESC). A joint on-site investigation was conducted on May 21, 1991, by BSGFO inspector Bill Amett (for purposes of responding to appellants' second complaint), and ESC technical staff member Ken Eltschlager (for purposes of conducting OSM's informal review of BSGFO's earlier determination not to assume Federal enforcement).

As a result of Amett's report, on August 21, 1991, BSGFO issued a decision letter finding DMLR had acted appropriately in taking no action to correct violations alleged in the April 1991 TDN. Specifically, BSGFO found that (1) "negligible additional spoil is available after regrading

to practically eliminate the pre-SMCRA highwall further * * *"; (2) "[t]he unstable pre-SMCRA highwall portion of the permit was not reaffected by the augering operation," therefore, the permittee was "under no lawful obligation to stabilize same * * *"; and (3) "[t]he permit allows road retention to support the approved post mining land use." BSGFO further determined that since the road construction was certified by a professional engineer, it complemented approved regrading and drainage control plans.

With regard to sedimentation controls, BSGFO stated:

Sedimentation control structures are RPE certified as designed and approved in the reclamation plan. Pond construction complements the approved regrading configuration. Although ponds 5 and 6 are located closer to the pre-SMCRA highwall than the approved three to five feet distance, no apparent drainage infiltration was detected into or from the coal seam augered by the operation. The three to five feet location deviation of the two ponds has not affected pool water quality or compliance with numerical effluent limitations.

As a final comment, the letter noted:

The auger operation affected only pre-SMCRA surface mining disturbances. The topsoil was destroyed prior to the effective date of SMCRA. DMLR approved use of the pre-SMCRA mine spoil as alternate topsoiling material in the permit. Revegetation materials were applied to the disturbance after regrading. Road use for revegetation follow-up and post mining land use support is the only redisturbance anticipated.

After receipt of Eltschlager's report, on or about August 21, 1991, Assistant Deputy Director Hatfield issued a decision finding "the alleged violations of Virginia regulations identified in your appeal do not exist on Wax Coal Company * * * permit number * * * 1601262," and sustaining BSGFO's November 29, 1990, decision that DMLR acted appropriately, except for BSGFO's approval of the deposition of "road embankment to portions * * * on pre-SMCRA outslope which may jeopardize stability of that [slope]." Hatfield further found that, although Eltschlager found an unstable highwall remnant within the permit, the "pre-SMCRA highwall portion was not reaffected or augered by the Wax operation * * * [and, therefore,] Wax is * * * under no lawful obligation to stabilize this highwall portion."

Highwall Instability: As stated supra, portions of Hatfield's August 1991 decision concerning Powell's responsibility for stabilization of the highwall were appealed to this Board by appellants on September 9, 1991, docketed as IBLA 92-82. That case, however, was remanded by order of the Board dated April 28, 1992, upon motion by OSM subsequent to receipt of Powell's answer in which it admitted that augering was performed in at

least a portion of the highwall remnant on the site which the ESO had determined unstable. We shall return to OSM's disposition on remand infra.

Stability of the Outslope: With regard to whether Powell had further disturbed the stability of the outslope, Assistant Deputy Director Hatfield directed BSGFO to inform DMLR that, according to Eltschlager, DMLR either did not require Powell (1) "to return all spoil to the mined-out area ([in compliance with Virginia regulation] 480-03-19.816.102[(b)])" or (2) has allowed placement of spoil outside the mined-out area in steep slopes (480-03-19.816.102[(d)]) (Letter of Robert A. Penn, Director, BSGFO, to Danny R. Brown, Commissioner, DMLR, dated Aug. 22, 1991), and to issue a TDN to DMLR to take appropriate action to have the violation corrected or to show why further action was not required.

BSGFO issued a TDN to DMLR regarding these concerns on August 22, 1991. DMLR inconclusively disputed the findings of the Assistant Director by letter dated August 30, 1991, and was directed by BSGFO 20 days later, on September 20, 1991, to provide evidence either that there was no violation or that it had required Powell to correct the violation. On September 25, DMLR provided BSGFO with information that it had issued a "Revision Order Notice" to Powell on August 29, 1991, to require Powell to "determine the location of the outer edge of solid bench and show that spoil was not placed outside the solid bench." DMLR's notice further required Powell to demonstrate that its mining and reclamation operations did not decrease the stability of the outsoles comprised of spoil from the pre-SMCRA mining.

According to DMLR's response submitted to BSGFO on September 25, Powell made two efforts to establish that spoil had not been placed outside the solid bench, and that its mining and reclamation operations did not decrease the stability of the outsoles. First, in the presence of DMLR Inspector Jaynes, on September 5, 1991, Powell dug a series of test pits at the outermost areas of spoil placement. Jaynes observed solid bench in each of the test pits. Second, on September 9, Powell retained a professional engineer, Robert Tuck, to examine the permit area for spoil placement and evidence of instability. Tuck's report concluded that "all spoil is on the solid bench."

BSGFO submitted DMLR's response to ESO for review on October 3, 1991. On October 23, 1991, ESO determined that DMLR's response to the August 22, 1991, TDN was appropriate, and BSGFO therefore found likewise.

On November 6, 1991, appellants filed a request for informal review of this decision with the Assistant Deputy Director. The request sought review of BSGFO's decision on two grounds:

- (1) OSM must require Powell Mountain to return the permit area to its approximate original contour or, at a minimum, to use all available spoil to cover the highwall to the maximum extent

technically practical, thereby requiring Powell Mountain to remove the improved roadway * * *;

and

(2) OSM must require Powell Mountain to construct sediment control structures appropriate to a properly backfilled and regraded spoil configuration, or, at a minimum, to relocate Pond 5 in accordance with the terms of Powell Mountain's former permit.

(Appellants' Nov. 6, 1991, Letter to Nina Rose Hatfield, at 5). This appeal generated Hatfield's February 18, 1992, decision now before us, and is discussed infra.

C. Appellants' October 7, 1991 Complaint: Leakage at Pond 5

On October 7, 1991, appellants filed a third complaint alleging that despite OSM's determination that Pond 5 was stabilized and no leakage was occurring from the pond back into the auger holes, appellants had discovered that leakage was in fact occurring. Photographs of Pond 5 were submitted with the complaint showing the exposed auger hole.

OSM issued a TDN to DMLR that day; on October 9 DMLR issued an NOV to Powell alleging violations of Virginia regulations section 480-03-19.816.13 for failure to properly case and seal drilled holes, and section 480-03-19.816.46(c)(1)(iii)(A) and (B) for failure to properly design, construct and maintain sediment ponds. Powell was given until October 28 to "perform repairs to Pond 5 in order to establish the original design function and storage and prevent the flow of surface water into auger holes so as to minimize disturbance to the hydrologic balance" (DMLR NOV 91-13-6).

An inspection by BSGFO personnel was conducted at the site on November 21, 1991. On November 27, 1991, BSGFO issued a notice to DMLR finding that DMLR had not taken appropriate action with respect to reclamation activity regarding Pond 5. The letter stated:

Current Pond 5 construction fails to satisfy approved permit design requirements provided to prevent pond water infiltration into auger holes and minimize prevailing hydrologic balance disturbances. Federal inspection November 21, 1991, found auger holes minimally covered with earth materials and Pond 5 not constructed according to approved permit designs. A Federal NOV will be issued Wax permit number 16012652 citing a violation of Virginia permanent program regulations Section 480-03-19.773.17(b) and (c) in operating contrary to approved plans relative to improper Pond 5 construction.

On December 6, 1991, DMLR notified BSGFO that Powell had eliminated and backfilled Pond 5 and had implemented alternative drainage controls in the vicinity, and that it had revised Powell's permit to reflect these changes. A BSGFO follow-up inspection was made on December 10, 1991. Reclamation at the site of Pond 5 was found to be satisfactory, and no Federal enforcement action was taken.

On January 6, 1992, BSGFO received notice from appellants that they were amending their November 6, 1991, request for informal review to include BSGFO's decision not to issue an NOV to Powell for its failure to construct Pond 5 in accordance with Virginia surface coal mining regulations.

In the January 1992 amendment to their November 1991 request for informal review, appellants argued before the Assistant Deputy Director that despite DMLR's refusal to issue an NOV in a situation which clearly did not comply with Virginia regulations, BSGFO had turned a blind eye, waiting to issue a TDN until complainants had shown that water in the pond was actually leaking into exposed auger holes. Appellants alleged that BSGFO then continued to delay action, permitting DMLR to approve a permit revision calling for removal of the pond, thereby allowing Powell to escape penalties it would have been forced to confront under the Virginia Coal Surface Mining Act had an NOV been issued. Furthermore, appellants maintained, contrary to State regulatory requirements, the State refused to provide appellants with notice of the permit revision, and that, as a result, appellants were denied meaningful participation in the revision proceedings. Appellants contended that Federal enforcement action should be taken by OSM when a citizen exposes a violation and the state refuses to issue an NOV, without regard to circumstances of abatement. DMLR's approval of a permit revision subsequent to revocation of the permit, appellants maintained, was improper, and merely a ruse to excuse Powell's noncompliance with Virginia regulations.

D. The Assistant Deputy Director's February 18, 1992, Decision

On February 18, 1992, Assistant Deputy Director Hatfield issued a decision pertaining to appellants' November 1991 request for informal review of BSGFO's finding that DMLR had acted appropriately with regard to their April 19, 1991, complaint, including the allegations set forth in their January 1992 letter.

Hatfield determined that while Powell was required to use all available spoil to cover the highwall to the maximum extent possible, it was not required to reclaim to the higher standard of approximate original contour (AOC). Additionally, Hatfield found that Powell Mountain had used all available spoil to eliminate the highwall to the maximum extent practicable. The decision stated:

The Eastern Support Center's finding that additional spoil existed within the roadway did not consider the fact that the

mined area is currently stabilized with vegetation. Removal of the excess material from the roadway would result in near total redisturbance of the entire area to eliminate a negligible amount (one to two feet) of additional highwall.

(Feb. 18, 1992, Decision at 2). Furthermore, Hatfield found that the roadway was in compliance with the reclamation plans set forth in the permit, was in stable condition, was not in violation of the approved program, and was not creating environmental problems. She therefore affirmed BSGFO's decision not to assume Federal enforcement to require removal of the haul road. In reference to other allegations of the appellants, Hatfield stated:

It is my understanding that the original plan approved by the DMLR has been revised in accordance with DMLR's approved program. As discussed above, revocation of a permit only effects the permittee's right to mine coal and does not affect the obligation to reclaim. OSM also takes the position that the reclamation plan that accompanied the permit remains in effect until the site is satisfactorily reclaimed. The revision to eliminate pond 5 was classified by the DMLR as an insignificant revision, thus the public notice requirements of the approved program do not apply. Additionally, the revision eliminates a pond that your clients and the BSGFO believe was improperly constructed. The removal of this structure and the installation of temporary alternative sediment controls is consistent with the overall reclamation plan and the approved program.

Your request for informal review also alleges that the BSGFO failed to take appropriate enforcement action regarding the construction of pond 5. Whenever a State is notified of an alleged violation by either a ten-day notice or letter and the State fails to act appropriately, the Field Office conducts a follow-up inspection. If the violative condition addressed in the ten-day notice/letter continues to exist, a Federal violation is issued. If the violative condition no longer exists, such as in this case, then further Federal enforcement action is not required. Our only variation from this policy is where effluent limitations have been violated. Therefore, I find the Field Office's decision regarding these matters to be appropriate.

E. New Evidence

On September 26, 1994, this Board received a motion from appellants to supplement the record with a July 21, 1994, report of Patrick M. Howard, a mining engineer retained by counsel for Molinary to present expert testimony in a citizens' suit filed by Molinary pursuant to section 520(f) of SMCRA, 30 U.S.C. § 1270(f) (1988), at that time pending before the United States District Court for the Western District of Virginia. Powell opposed

the motion, alleging that OSM had not yet issued a written decision considering the report. On May 2, 1995, this Board issued an order finding that the Assistant Director's February 1992 decision had placed into issue then current conditions of reclamation, and we held that the Board has "the authority to review evidence regarding conditions of reclamation, where those conditions may be relevant to a determination of whether OSM's findings were in fact reasonable under the circumstances" (Order dated May 2, 1995). We further held that fundamental fairness dictated that Powell be allowed to submit rebuttal evidence, and granted appellants time for reply to Powell's rebuttal. We held that, after that time, the record would be closed, and no new pleadings or evidence would be entertained.

Howard has been employed in the field of mining engineering since 1960, having worked for several corporations including Pittston Company, Kentucky Division, Rapoca Resources, Sandy Ridge Energy Corporation, and his own mining company, Howard Enterprises (Howard Rebuttal Report, Exh. 1).

Howard's July 1994 report essentially disputed OSM's findings that it was impractical to remove the road to access spoil material to cover the highwall. He concluded:

My cross sections now show approximately 23,150 cubic yards of spoil material reasonably available in the Pruitt Heirs Tract. This is enough material to cover the Limestone coal seam by at least four (4) feet and have an estimate[d] 10,000 cubic yards of material to place either on adjacent properties or to cover the Limestone coal seam by more than four (4) feet. There is enough material to completely cover the high wall on the points at the extreme ends of the Pruitt Heirs Tract.

Howard stated that, in addition to spoil taken from the road, Powell could access additional spoil "in nearby permit and adjacent areas," and by using "non-toxic refuse from a nearby preparation plant." He estimated costs of excavating and backfilling the highwall at \$1.75 per cubic yard, based on work "that I have supervised in Kentucky during the past year." Howard claims that this estimate is only 25 cents per cubic yard higher than Powell claimed on its permit application in February 1990.

Howard maintained in the July 1994 report that reclamation on the tract is substandard, as Powell's acts "have destabilized the geologic formations on The Trust's property and otherwise created a hazard to persons lawfully using the property." He alleges that the condition of the cliff above the Limestone coal seam is unstable, and should be addressed immediately. According to Howard, the "strata beneath this cliff and immediately above the Limestone coal seam is a shale that weathers rapidly. As the shale weathers and spalls from beneath the sandstone cliff, the cliff is weakened and eventually falls" (Howard Report at 2). In addition, according to Howard, "between [Tuck's] test hole[s] four and five there

is an area of unstable soils which, if not stabilized, will slide down the hill below the re-mined area much as happened in 1968 when the area was first mined and a land slide caused considerable damage." Id.

Powell submitted a report in rebuttal prepared by Randy Casey, Vice-President of Environmental Pollution Services, Inc. (EPS), and formerly employed as an environmental engineering consultant with DMLR. Casey had first investigated the Pruitt tract in March 1991, during his tenure with DMLR.

Casey claims that Howard's plan to remove the road and use the additional spoil to backfill highwall exposure failed to consider drainage concerns or provide adequate depth of material for vegetative growth and the tree root system. Casey concludes that if the road is removed down to the solid bench so that spoil can be regraded to cover the highwall, there will be inadequate soil cover to permit plants to take root, thus permitting erosion and affecting stability of fill material.

Furthermore, Casey maintains that Howard's report contains a 1-foot error in field survey calculations, which impacts several cross-sectional calculations, which, assuming "the solid bench is located at the same assumed elevation," would significantly lessen the amount of spoil actually available. Casey further challenges the Howard report because it assumes that excavation of old downslope mine spoil and original earth material could be used in the backfill operation. Casey states that old downslope mine spoil was not disturbed by Powell's operations, and maintains that to redistribute newly excavated materials of any amount would require the redistribution of the entire reclaimed area on this tract, destroying virtually all existing vegetative growth and established drainage ways. Moreover, excavation of the reclaimed material could expose potential acid producing material which could inhibit vegetative growth" (Casey Report at 9).

Howard's Rebuttal Report disputes Casey's findings and conclusions. Howard claims that no expert other than himself computed the amount of spoil which would be made available if the road were removed. Howard maintains that the elevation error identified by Casey is immaterial to his calculations because "the cross-sections from the bench to the top of the highwall reflect the same cross-sectional regardless of whether the bench is 2716 feet or 2715 feet above mean sea level."

Analysis

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so. Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 72, 102 L.D. 1 (1995).

Under the regulations relating to the TDN procedure, upon receipt of a TDN by the state regulatory authority, the state must take appropriate

action or show good cause for not taking action to cause the violation, if any, to be corrected and respond to OSM within 10 days. 30 CFR 842.11(b)(1)(ii)(B)(1).

Under 30 CFR 842.11(b)(1)(ii)(B)(2), both "appropriate action" and "good cause for failure to act" are to be measured by whether the state regulatory authority's action or response to a TDN is arbitrary, capricious, or an abuse of discretion under the state program. Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 72, 74, 75-77, 102 I.D. at ____ (1995).

"Appropriate action" is defined as "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 CFR 842.11(b)(1)(ii)(B)(3).

Regulation 30 CFR 842.11(b)(1)(ii)(B)(4) "lists five situations that will be considered 'good cause' for the state regulatory authority to fail to take action to have a violation corrected." 53 FR 26735 (July 14, 1988). A state may have good cause for failing to act on a TDN if, among other things:

(i) Under the State program, the possible violation does not exist;

(ii) * * * the State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist;

* * * * *

(iv) * * * the State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met.

30 CFR 842.11(b)(1)(ii)(B)(4).

Thus, by regulation, the Department has announced that it will not substitute its judgment for that of the state regulatory authority, except where OSM concludes that the response to the TDN was arbitrary, capricious, or an abuse of discretion. Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 60; 102 I.D. at ____ . These TDN regulations have been upheld as "based upon a permissible interpretation of SMCRA." National Coal Association v. Uram, No. 87-2076, et al., at 19 (D.D.C. Sept. 16, 1994). Duly promulgated regulations have the force and effect of law and are binding on the Department. Shamrock Coal Co. v. OSM, 81 IBLA 374 (1984). Where the rule exists as a Departmental regulation, we cannot depart from its clearly expressed meaning, and we must apply it to appellants' situation. Sam P. Jones, 71 IBLA 42 (1983).

As appellants filed their initial complaint with BSGFO in October 1990, OSM's oversight role as it has endeavored to apply it in this case is governed by these amended regulations. In none of the instances appealed by appellants has OSM concluded that DMLR's actions were arbitrary, capricious, or an abuse of discretion. OSM has therefore declined to substitute its judgment for that of DMLR.

Appellants' burden, therefore, is to establish that OSM erred in its good cause determination. To do so, they must show that DMLR's responses to the various TDN's were arbitrary, capricious, or an abuse of discretion. Ronald Maynard, 130 IBLA 260, 266 (1994). Where appellants have raised objections to the Assistant Director's decisions on informal review, our task is to determine if there is basis in the record to support OSM's conclusions (see Confidential Communications Co., 131 IBLA 188 (1994)), and, if so, whether appellants have established that the Assistant Director erred in reaching the conclusions that she reached.

Appellants present three broad areas of concern: (1) whether the Assistant Director erred in finding that the actions of DMLR with respect to the highwall destabilization located proximate to former Pond 4 were appropriate; (2) whether the Assistant Director erred in her decision finding that the actions of DMLR with respect to placement of Pond 5 and its subsequent leakage were appropriate; and (3) whether the Assistant Director erred in upholding the State's finding that Powell could reclaim the Pruitt tract using available spoil to build an improved roadway.

Using the regulatory framework set forth in 43 CFR 842.11, and referring to the State (and, where necessary and appropriate, Federal surface mining regulations) we shall direct our attention to each of these situations in turn. Prior to undertaking an analysis of these three factual situations, however, we shall address the issue, raised by Powell Mountain, of whether the State hearing officer's decision is dispositive of any of the issues on appeal.

A. The State Hearing Officer's Decision

[1] Powell argues that since a state hearing officer's decision ruling on issues of reclamation exists, appellants are bound by those findings pursuant to 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) (Powell Response at 9). The Board, however, has rejected both the argument that the existence of a state hearing officer's decision is per se evidence of good cause for failure of the state agency to take action, as well as the argument that once a state adjudicatory decision is issued, a party is precluded by either collateral estoppel or res judicata from litigating the matter before the Board. See Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 80-81, 102 I.D. at _____. In that case the Board stated that OSM must review the state adjudicatory findings under the deferential standard set forth in 30 CFR 842.11(b)(1)(ii)(B)(2). The Board further held that "[s]uch a ruling would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative

body were acting outside the scope of its authority under the state program in making such a ruling." Id. Absent an analysis of the underlying factual circumstances using the deferential standard, the State hearing officer's decision is not, therefore, controlling. It is this same analysis, undertaken by OSM, that we shall be reviewing to determine if it has proper basis. See also Lois J. Armstrong, 130 IBLA 228 (1994).

B. OSM and DMLR Actions Regarding the Highwall Destabilization Near Former Pond 4

On December 28, 1992, appellants filed with the Board an appeal of a decision apparently issued by Assistant Director Hatfield on December 16, 1992, in which Hatfield allegedly refused to assume Federal enforcement after issuing a TDN to DMLR with regard to the instability of the highwall at or near the location of Pond 4, which was the subject of the appeal and remand of IBLA 92-82. We say "apparently" because the Board has never seen a copy of Hatfield's December 1992 decision; yet, OSM does not deny that the decision exists.

Because the Board had received neither OSM's original case file nor a copy of Hatfield's December 1992 decision, the Board issued an order to OSM on February 6, 1995, requiring supplementation of the record with OSM's file. Having received no file or response, on March 22, 1995, the Board issued an order to OSM requiring submission of the original case file in IBLA 92-82, including "a record of all activity by OSM and DMLR * * * regarding the matter prior to the remand of IBLA 92-82 as well as documentation subsequent to its remand including the Assistant Deputy Director's decision on appeal." (Emphasis in original.) OSM was instructed to either produce the record or "show cause why the OSM decisions in this consolidated appeal should not be set aside as unsupported by an administrative record and the case remanded" (Order dated Mar. 22, 1995).

On April 13, 1995, the Board received the case file from OSM in IBLA 92-82. The file, however, contains no documentation of any activity which occurred in the matter subsequent to the Board's remand. We are, therefore, left in the position of having received an appeal of a decision we have not seen, without documentation of either BSGFO's or the Assistant Director's position on the matter. The Board, at this point, has no evidence that a written decision exists, or that OSM undertook any activity pertaining to this matter subsequent to our April 28, 1992, remand order.

An administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. Mesa Operating Limited Partnership (On Reconsideration), 128 IBLA 174, 185, 101 I.D. 8, 14 (1994). The reason for filing the complete agency record with the Board is evident: it is impossible for this Board to engage in intelligent, objective review of the agency's decision without knowing the circumstances leading to the action and the agency's reasons for taking the action. See Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982). Accordingly, we find it necessary to remand the matter to OSM for appropriate action.

C. Appellants' Petition for Award of Costs and Expenses in IBLA 92-82

After we issued our April 28, 1992, remand order in IBLA 92-82, on June 18, 1992, appellants filed with the Board a petition for award of costs and expenses, which the Board docketed as IBLA 92-484, including attorneys' fees reasonably incurred, against OSM pursuant to 43 CFR 4.1294(b).

That regulation provides that "appropriate costs and expenses including attorneys' fees may be awarded" to a citizen " who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues."

However, 43 CFR 4.1290(a)(2) provides that petitions for costs and expenses may be filed only after an administrative proceeding results in a final order issued by the Board. The threshold question before us, therefore, is whether the order, which set aside and remanded the Assistant Director's decision on informal review at OSM's request on the basis that "additional investigation of the case has shown that the material facts relied upon by OSM were in error" is a final order (OSM Memorandum in Support of Motion for Remand, IBLA 92-82, at 7).

Appellants claim that the order is a final order because it "anticipates a new OSM decision, subject to separate appeal by appellants if they perceive further error in OSM's handling of the matter" (Petition for Award of Costs and Expenses at 2). Appellants argue that they made only one claim in the appeal—that OSM's initial decision on informal review was incorrect—and that both Powell and OSM eventually conceded an error of fact identified by appellants. They maintain that the Board set aside the Assistant Director's decision based upon OSM's admission of error, and that, under standards for award of attorneys' fees in NRDC v. OSM, 107 IBLA 339, 369-73, 96 I.D. 99-101 (1989), their claim was successful.

OSM argues that the Board's order did not achieve a successful resolution on the merits in favor of appellants, but was no more than a procedural order, and, as such, is not subject to a petition for costs and expenses under Donald St. Clair, 84 IBLA 236, 92 I.D. 1 (1985). OSM asserts that appellants have not obtained the relief sought—that is, enforcement action by OSM—and therefore have not achieved success on the merits. In the alternative, OSM asserts that, if the Board finds appellants eligible for an award of costs, that the Board find that their entitlement to fees is significantly less than that alleged, as the issue was relatively simple.

Because the record OSM finally submitted contains no documentation of any activity which occurred in the matter subsequent to the Board's remand, we are unable to make an informed judgment concerning appellants' petition for costs and expenses. We therefore conclude the petition must be denied as premature. Appellants shall have an opportunity to refile their petition at such time as OSM takes appropriate action on our remand.

D. BSGFO and DMLR Actions Regarding Placement and Removal of Pond 5

It is undisputed that, despite requirements set forth in their permit, Powell constructed Pond 5 next to the highwall, rather than with a 3- to 5-foot buffer zone between the pond and the highwall called for by Powell's permit, and that DMLR initially "field approved" the location of Pond 5. ESO and BSGFO inspectors found no leakage during their May 1991 inspection, and therefore found DMLR's action appropriate.

Later events, however, proved initial judgements by DMLR and BSGFO mistaken. Commensurate with receipt of appellants' October 7, 1991, complaint alleging leakage from Pond 5 back into the auger holes, BSGFO issued a TDN to DMLR. On October 9, DMLR issued an NOV to Powell alleging violations of Virginia regulations section 480-03-19.816.13 for failure to properly case and seal drilled holes, and section 480-03-19.816.46(c)(1)(iii)(A) and (B) for failure to properly design, construct and maintain sediment ponds. Powell was given until October 28 to "perform repairs to Pond 5 in order to establish the original design function and storage and prevent the flow of surface water into auger holes so as to minimize disturbance to the hydrologic balance" (DMLR NOV 91-3-6).

BSGFO personnel conducted an oversight inspection at the site on November 21, 1991. The oversight inspection resulted in a November 27, 1991, letter from BSGFO to DMLR finding that DMLR had not "taken appropriate action to cause all alleged violations to be corrected or show good cause for not taking further action," because "[c]urrent Pond 5 construction fails to satisfy approved permit design requirements provided to prevent pond water infiltration into auger holes and minimize prevailing hydrologic balance disturbances." The letter threatened to issue a Federal NOV "citing a violation of Virginia permanent program regulations Section 480-03-19.773.17(b) and (c) in operating contrary to approved plans relative to improper Pond 5 construction." Those standards provide that reclamation operations shall be conducted "only as described in the approved application."

Powell subsequently sought a permit revision, which DMLR granted, and the pond was removed before a follow-up BSGFO inspection at the site on December 10, 1991. DMLR did not issue an NOV to Powell for building the pond without the buffer zone. Appellants contend that OSM should have assumed Federal enforcement and issued an NOV. The Assistant Director found that BSGFO committed no error in not assuming Federal enforcement.

While section 504(b) of SMCRA, 43 U.S.C. § 1254 (1988), provides for direct Federal enforcement under the provisions of section 521 of any part of a State program not being enforced by a state (see Lois J. Armstrong, supra), 30 CFR 842.11(b)(1)(ii)(B)(1) provides that OSM will make a written determination that a state has failed to take appropriate action to cause a violation to be corrected or has failed to show good cause for its failure to do so, before ordering an inspection that could lead to direct Federal enforcement against an operator in a primacy state. See 53 FR 26732. Under this regulation, we cannot find error in BSGFO's response.

Under the wording of the regulation, had DMLR not taken action to cause the violation to be corrected within 10 days after receipt of BSGFO's written notice, then BSGFO could have immediately conducted a Federal inspection. Powell, however, proposed to amend its permit to remove the pond, and such action was taken within 10 days, thereby removing the violation.

Appellants allege that DMLR was remiss in not issuing enforcement action, and that OSM should have undertaken Federal enforcement action when DMLR did not. In the 1988 final rulemaking revising the TDN procedure, however, the Department clearly rejected the contention that when a violation exists, the only appropriate action by the state regulatory authority in response to such notice is enforcement action. The Department recognized that other action, which would cause the violation to be corrected and was authorized by the State program, could be utilized by the State regulatory authority, unless it were arbitrary, capricious, or an abuse of discretion. See Pacificcorp v. OSM, 131 IBLA 17, 22-23 (1994).

Appellants have not shown that the State's action allowing permit revision to permit removal of the pond was arbitrary and capricious. Appellants suggest that the State's decision not to issue an NOV is in and of itself arbitrary and capricious; that alone, however, is insufficient under the 1988 rulemaking.

E. DMLR's Authorization of The Improved Roadway as an Approved Post Mining Land Use

Appellants maintain that OSM erred in finding that the State did not abuse its discretion in approving Powell's reclamation on the Pruitt property under the plan set forth in the permit, which calls for placement of a roadway along the 1,800-linear foot length of the bench connecting Powell's adjacent properties. Appellants contend that the road was placed on the bench at the expense of highwall recovery, which is not permissible under Virginia surface mining regulations.

OSM maintains that "the revocation of a State surface mining permit does not invalidate the reclamation plan approved for that permit" (Answer at 10); the State's decision to allow the haulroad to remain was therefore not arbitrary and capricious, given the technical impracticability

of eliminating the highwall (Answer at 11). OSM further argues that the record supports the presence of the haul road on the bench as an appropriate reclamation action and its removal is not required by any law or regulation, even if the permit approval process was defective in not providing adequate notice to surface landowners (Answer at 12-14).

The Assistant Deputy Director reviewed this question in terms of amendments to Federal surface mining regulations promulgated on April 5, 1989, which provide that when a permit is revoked, the obligation to reclaim according to the reclamation plan set forth in the approved permit is not impacted. See 54 FR 13814-15. The Federal regulation placing this amendment in effect, 30 CFR 773.11(a), provides that "[o]bligations established under a permit continue until completion of surface coal mining and reclamation operations, regardless of whether the authorization to conduct surface mining operations has expired or has been terminated, revoked or suspended."

We agree that 30 CFR 773.11(a) is unequivocal in stating that holders of a revoked permit are obligated to reclaim any resulting disturbance. See 54 FR 13814-15. The question, therefore, is what reclamation requirements were imposed by the permit, and were those requirements met?

While the record contains only excerpts of the Powell permit, it is clear that Powell and DMLR agreed to an AOC variance request because the area had been previously disturbed. This section of the permit is consistent with State regulations pertaining to backfilling and grading on lands remined by auger methods set forth in VCSMCRR § 480-03-19.819.19(b). That regulation states, in pertinent part:

(b) Remining. Where auger mining operations affect previously mined areas that were not reclaimed to the standards of this Chapter and the volume of all reasonably available spoil is demonstrated in writing to the Division to be insufficient to completely backfill the highwall, the highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria: * * *.

That regulation further requires that "[a]ll spoil generated by the auger mining operation and any associated surface coal mining and reclamation operation, and any other reasonably available spoil shall be used to backfill the area." Consistent with this requirement, Powell agreed to use "[a]ll available material * * * to backfill the existing wall to the extent possible" (Eltshlager's Report at 4, quoting from Powell's permit).

At some point, however, Powell made a request for a variance to allow retention of a road across the bench. On March 19, 1990, shortly before the permit was issued, a letter from DMLR Review Inspector Robert

Blackstock to Powell made the following pertinent notations concerning a request for variance pertaining to retention of the road:

1. The road retention variance request should be tied in with the need to allow access for the post-mining land use. Maintenance should be assured by the landowner requesting retention. * * * It is likely the road can be abandoned according to regulations and still provide access if the cross bars are not too large.

* * * * *

3. In addition, the variance request should include an assessment of adverse environmental consequences as per section 480-03-785-18(b)(6).

OSM's record before us does not contain the documentation of Powell's response to the Blackstock letter. Nor does it contain a final copy of the variance DMLR ultimately granted to Powell for the road retention.

Nonetheless, the variance was apparently granted. OSM and Powell do not argue, nor do we find evidence in the record to support a finding that road retention was permitted for any use other than reclamation maintenance.

Yet the record demonstrates that, contrary to the "typical road section approved in the permit * * * where the road elevation is proximate to the coal pavement and near the outslope area," the road was constructed at varying levels above the elevation of the Pardee pavement (Eltschlager Draft Report at 5, Figures 5 and 6). The road was also constructed at a width of 20 feet, rather than the 10 feet necessary for reclamation maintenance. *Id.* We must, therefore, conclude that spoil that could have been used to backfill the highwall was used to build improved roadway to an elevation higher than the permit called for, and to a width twice the amount necessary for reclamation maintenance. It therefore appears that Powell did not fulfill the requirement contained in its permit and mandated by VCSMCRR § 480-03-19.819.19(b) to eliminate the highwall to the maximum extent technically practical, but instead used available spoil to build a road of higher quality than that called for in the permit.

The Assistant Director did not find that DMLR's approval of construction of the upgraded road was arbitrary, capricious, or an abuse of discretion. Her February 1992 decision stated:

The road, as constructed and certified, complements the approved regrading and drainage control plans. In its current configuration the roadway has been found to be stable, is not in violation of the approved program and does not create any environmental

problems; therefore, I am affirming the Field Office's decision regarding this matter.

(Assistant Director's February 1992 Decision at 2). Her decision, however, failed to point out that the permit authorized the road for a limited purpose, and that the road, as constructed, prevented highwall recovery to the maximum extent technically practicable, in violation of the reclamation requirements set forth in the permit.

[2] We do not find DMLR's decision to permit a road for the limited purpose of access to maintain reclamation of the land arbitrary and capricious; we do, however, find that to the extent DMLR permitted a road to be constructed to standards beyond those necessary to accomplish the purpose for which the road was intended, the State's approval of the road conflicted with VCSMRR § 480-03-19.819.19(b) and the terms of the permit, which require that "[a]ll available material * * * [be used] to backfill the existing wall to the extent possible" (emphasis added). As such, DMLR's approval of the improved roadway was an arbitrary and capricious action, and, before its approval of site reclamation, DMLR should have required Powell to regrade the road, and to use the excess spoil placed on the roadway to backfill the highwall.

Appellants argue that the road should be removed, as its presence conflicts with VCSMRR § 480-03-19.816.150 (f)(1)-(6), which essentially requires that roads not retained under an approved postmining land use shall be reclaimed immediately after they are no longer needed. However, under the permit, while a variance was apparently granted to allow a road on the bench for a limited purpose, appellants have not shown that the purpose was temporary. Nor have they shown that the granting of the variance for the limited purpose of reclamation maintenance was arbitrary, capricious, or an abuse of discretion on DMLR's part.

[3] Appellants further argue that the road should be removed in order to permit the full amount of available spoil to be restored to highwall recovery.

With respect to whether the road should be removed, Assistant Director Hatfield found:

The Eastern Support Center's finding that additional spoil existed within the roadway did not consider the fact that the mined area is currently stabilized with vegetation. Removal of the excess material from the roadway would result in near total redisturbance of the entire area to eliminate a negligible amount (one to two feet) of additional highwall. Therefore, I am sustaining the Field Office's findings regarding this matter.

The presence of vegetative growth was a factor in Hatfield's decision not to redisturb. At the time she reviewed BSGFO's decision, however, only

one growing season had occurred since reclamation. That, in and of itself, is not sufficient justification for her decision. See Fremont Coal Co. v. OSM, 130 IBLA 41, 43 (1994), where the Board upheld an OSM determination that a state NOV requiring vegetation to be grown on a highwall does not constitute elimination of the highwall and is therefore unacceptable enforcement.

However, the Assistant Secretary further based her opinion upon Eltschlager's engineering report, which found the area stable (except for the area near former Pond 4), and found the amount of spoil available to recover the highwall negligible. At the time of informal review, Eltschlager's report contained the only assessment (other than DMLR's) concerning the potential for highwall recovery. Had the opinion of mining engineer Howard been available to Hatfield during informal review, she would have had an opportunity to review the differing opinions concerning the amount of spoil available, and to reassess her own expert's analysis in light of additional information. As it was, Assistant Director Hatfield obviously weighed the information before her at the time—that the area would have to be significantly redisturbed for negligible recovery—and found the evidence available to her insufficient to justify redisturbance.

Even though OSM may have erred in underestimating the amount of spoil available to eliminate the highwall to the maximum extent technically practical, we are not convinced that appellant has established, by a preponderance, that the Assistant Director erred in not requiring removal of the road and reconfiguration of the spoil.

Howard finds that there are "approximately 23,150 cubic yards of spoil material reasonably available in the Pruitt Heirs Tract." Howard's figures, however, assume total removal of the road and that spoil could be obtained off-site from nearby sources.

Eltschlager calculated available spoil in the neighborhood of 4,000 cubic yards (without considering spoil placed above the level of solid bench to cushion the road), and Casey claims the area contains approximately 4,900 cubic yards, claiming he found error in Howard's calculations. Casey, however, was not willing to concede that Tuck's test pits located the level of solid bench. On rebuttal, Howard established by a preponderance that Tuck's pits located the level of solid bench, and that the elevation error contained in his calculations did not significantly affect them.

In circumstances such as those presented by this case, we are unwilling to overturn a decision by OSM if the appellant merely presents some other course of action which may be theoretically as correct as that chosen by OSM. The Department is entitled to rely on the reasoned analysis of its experts in matters within the realm of their expertise. Animal Protection Institute of America, 118 IBLA 63, 76 (1991). In cases involving an expert's interpretation of data, it is not enough that the party

objecting to the determination demonstrates that another course of action or interpretation is available or that the party's proposed course of action is also supported by the evidence. The appellant must demonstrate by a preponderance of the evidence that the expert erred when collecting the underlying data, when interpreting that data, or in reaching the conclusion. King's Meadows Ranches, 126 IBLA 339, 342 (1993). Appellants in this case have failed to demonstrate such error.

To the extent appellants have raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part, and set aside and remanded in part. The petition for attorneys' fees is denied.

John H. Kelly
Administrative Judge

I concur.

Franklin D. Arness
Administrative Judge

