

JERRY HYLTON ET AL.

IBLA 93-618

Decided June 6, 1996

Appeal from a decision of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, authorizing the State of Virginia to request informal review. 93-1-Hylton.

Appeal dismissed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal--Surface Mining Control of 1977 and Reclamation Procedures: Generally

An appeal from a decision by the Assistant Deputy Director, OSM, allowing the State of Virginia 5 days in which to request informal review, is properly dismissed as moot since, as a result of events occurring after the appeal was filed, there is no effective relief that can be given the appellants and no reasonable expectation or demonstrated probability the same controversy will occur again involving the same complaining parties.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for appellants; Mark Siegel, Esq., Office of the Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Jerry and Jenny Hylton have appealed from a December 4, 1992, decision of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement (OSM). The decision reversed an October 13, 1992, decision of the Big Stone Gap Field Office (BSG) finding that the State of Virginia had shown good cause for not taking appropriate action. The decision instructed BSG to inform the State of the decision and order a Federal inspection immediately following expiration of a 5-day period provided to allow the State to request informal review. The Hyltons appealed only that part of the decision that authorized the State to request informal review of the OSM decision pursuant to 30 CFR 842.11(b)(1)(iii)(A).

This case began when the Hyltons filed a citizens complaint on July 16, 1992, against Dennis Barnette, president of Kodiak Mining Company (Kodiak), for failure to replace a water supply feeding a lake on the Hylton property that was interrupted by Kodiak operations. After

receiving the complaint, BSG sent Ten-Day Notice No. (TDN) X-92-13-289-03 to the Virginia Division of Mined Land Reclamation (DMLR) on July 21, 1992. In response to the TDN, DMLR found that, by drilling a well on Kodiak property and providing a distribution system so that water from the well could be pumped to the lake, Kodiak had satisfied Virginia requirements for water replacement in such cases and no further action was required. This was so, despite the fact that the system provided by Kodiak would require the Hyltons to pay electrical and other maintenance costs to maintain the replacement system; no such payments were needed before the lake's underground water sources were interrupted by Kodiak's mining.

Reviewing the response to the TDN, BSG found that "DMLR's written policy, Section 3.3.8 Water Rights and Replacement, effective May 4, 1983, requires the property owner to pay the costs of using and maintaining the replaced water supply." This State policy statement had not been previously submitted to OSM for approval. Nonetheless, BSG considered it to be an "adjunct" to the Virginia State program, and applied it to find that DMLR had shown good cause for failing to take action.

The Hyltons requested informal review of the BSG decision and, in the decision at issue here, the Assistant Deputy Director concluded that BSG had erred by giving deference to section 3.3.8. The Assistant Deputy Director determined that an adjunct policy could properly be considered to be part of an approved State program only if application of such a policy were consistent with the approved State program provisions and terms of the Secretary's approval. Her decision found that section 45.1-258 of the Virginia Code mirrors section 717(b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1307(b) (1994), and requires the operator of any coal surface mining operation to replace the water supply of a property owner whose supply has been diminished by a surface coal mining operation.

She also found that OSM interprets SMCRA's water replacement requirements to allow operating and maintenance costs associated with water replacement to be borne by the landowner, unless such costs would be higher than those existing before mining. Where such costs are higher, the permittee should offset the increase. The Assistant Deputy Director concluded that the Virginia program could only reasonably be interpreted to require Kodiak to pay costs associated with maintaining the level of the Hyltons water supply at levels existing before mining. She found BSG could not defer to state interpretation of an unapproved policy that was inconsistent with requirements of the approved state program; because the State's interpretation was wrong, a violation of the State program existed and the State had not shown good cause for refusing to take action. The Assistant Deputy Director therefore reversed BSG's decision, and directed BSG to inform the State and order a Federal inspection immediately following expiration of a 5-day period allowed for the State to request informal review.

On December 15, 1992, the Hyltons appealed the decision of the Assistant Deputy Director to offer informal review to the State. They objected that, if informal review were requested, OSM would consider itself barred

from taking action until the Deputy Director issued a decision on that request. Meanwhile, they asserted, the level of their lake would continue to fall. On December 17, 1992, DMLR requested informal review by the Deputy Director to reverse the Assistant Deputy Director's conclusion that the State response to the TDN was inappropriate. In a decision dated February 18, 1993, the Deputy Director upheld the decision of the Assistant Deputy Director and ordered a Federal inspection.

OSM argues that the issue raised by the Hyltons is moot and the case no longer presents any justiciable issue because the informal review objected to by Hyltons has been completed and a decision favorable to the Hyltons has been made. As a consequence, OSM asserts that there is no effective relief this Board can give the Hyltons and that no issue remains that is "capable of repetition, yet evading review." It is argued that "[i]f any future case arises in which a citizen complainant objects to a regulatory authority being afforded §842.11(b)(1)(iii) review, that case would be subject to resolution based on the facts of that particular controversy" (Answer at 6).

In reply, the Hyltons insist their appeal should not be dismissed as moot, contending that the practice of allowing the State to seek informal review is an event that is "capable of repetition, yet evading review." They contend that even though the Deputy Director's decision directed BSG to conduct a Federal inspection they have not been notified of any such inspection and assume none took place. Therefore, they maintain, OSM was incorrect in asserting that there are no justiciable issues left. Moreover, they assert, even if OSM did conduct a satisfactory Federal inspection before the Board decided the appeal, the Board would still have sufficient reason to continue to exercise jurisdiction because they remain neighbors to the Kodiak mining operation which has repeatedly violated SMCRA and the Virginia program. They contend that if this pattern of conduct continues they will file additional citizens complaints, leading to additional informal review decisions and to additional appeals on this issue of informal review.

On September 7, 1993, the Hyltons filed a "Notice of Settlement of Damage Claims and Release of Kodiak Mining Company and Barnette Contractors" with the Board. Therein, they amended their statement of reasons to delete reliance upon OSM's failure to conduct an immediate inspection, because one had been conducted on July 22, 1993; further, they no longer contend there is a possibility that a dispute might arise between them and the BARNETTES as a result of the inspection. They still, however, argue that their appeal is not moot because their land abuts Kodiak's mining operation and there is a reasonable probability they will again seek Federal action against Kodiak.

[1] An appeal should be dismissed as moot if, as a result of events occurring after the appeal is filed, the Board can give no effective relief. Wildlife Damage Review, 131 IBLA 353, 355 (1994); Oregon Cedar Products Co., 119 IBLA 89, 93 (1991). Admittedly, this rule, which we

have borrowed from the courts, has an exception: The Board will not dismiss an appeal as moot if issues raised are, in the words of the United States Supreme Court in Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911), "capable of repetition, yet evading review." See Oregon Cedar Products Co., supra. That an issue may occur again will not save an appeal from dismissal if future actions will be subject to review. See In Re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990).

There is no further relief the Board can give appellants. As a result of Jerry Hylton v. George W. Bamette, Jr., Civil Action No. 93-0046-B, a suit filed in the United State District Court for the Western District of Virginia, the Hyltons reached a settlement with Dennis Bamette, d/b/a Kodiak and George W. Bamette, Jr., d/b/a/ Bamette Contractors. This agreement, dated August 13, 1993, settled all claims "the Hyltons have or may have asserted against the Barmettes or either of them for damages the Hyltons or either of them sustained prior to the date of this agreement as a result of the Barmettes' operation of a surface coal mining and reclamation operation adjacent to the Hyltons' property" (Agreement at 1). The agreement also bound the Hyltons and Barmettes "regardless of any ruling by an administrative or judicial authority that limits or negates landowners' rights to permanent replacement of water supplies damaged by surface coal mining operations or operators' liability for the costs of such replacement" (Agreement at 6).

The settlement agreement resolves the issue of payment for water replacement. The agreement also provides for binding arbitration to resolve any disputes arising under the agreement. Furthermore, the Deputy Director has issued a decision on the State's request for informal review and a Federal inspection has been conducted. As a result, there is no effective relief the Board can give the Hyltons. If, as they argue, they will again need to complain against Kodiak, they will then have the entire appeal process available to them. Should OSM again allow the State a right of informal review, the question raised thereby may be adjudicated at that time. Dismissal of this appeal as moot will not, therefore, avoid review of a recurring issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Franklin D. Amess
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

