

MID-MOUNTAIN MINING, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-52

Decided April 30, 1986

Appeal from a decision of Administrative Law Judge David Torbett (NX 5-136-R) granting temporary relief from Cessation Order No. 85-83-103-003.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Environmental Harm: Generally -- Surface Mining Control and Reclamation Act of 1977: Federal Lands: Permits -- Surface Mining Control and Reclamation Act of 1977: Permits: Temporary Relief -- Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Significant, Imminent Environmental Harm

An application for temporary relief from a cessation order is properly denied where the applicant acknowledges that he conducted surface mining operations on Federal lands without a Federal permit. Under regulation 30 CFR 843.11(a)(2), the conduct of such operations without a Federal permit constitutes a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Issuance of a cessation order is required by regulation 30 CFR 843.11(a)(2) when a condition or practice exists which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

APPEARANCES: Eugene C. Rice, Esq., Paintsville, Kentucky, for Mid-Mountain Mining, Inc.; R. Anthony Welch, Esq., Office of the Field Solicitor, Knoxville, Tennessee, Susan K. Hoven, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a decision of Administrative Law Judge David Torbett, dated

October 16, 1985, granting temporary relief from Cessation Order No. 85-83-103-003 issued to Mid-Mountain Mining, Inc. (Mid-Mountain), on September 17, 1985. OSM issued this cessation order because it found that Mid-Mountain was engaging in surface coal mining and reclamation operations without first obtaining a valid permit covering the area of land to be affected. Section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1982), and Kentucky regulation 405 KAR 7:040, sec. 1(1), were cited by OSM as authority for its action. ^{1/} Mid-Mountain's failure to obtain the proper permit, OSM found, was a condition, practice, or violation that was causing or could reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

Examination of the cessation order reveals that OSM believed Mid-Mountain to be conducting underground mining operations in Morgan County, Kentucky, on property owned by the United States and managed by the Army Corps of Engineers. Adjoining these Federal lands, known as tract 1315, are private lands for which, the cessation order acknowledges, Mid-Mountain has a permit to mine (No. 488-5011) issued in 1984 by the Kentucky Department for Surface Mining Reclamation and Enforcement; a previous permit had been issued in July 1982. Thus, the thrust of the cessation order is the allegation that Mid-Mountain has failed to obtain a Federal permit to mine Federal lands.

At the hearing conducted by Judge Torbett, the parties stipulated that the surface of tract 1315 is owned by the United States (Transcript (Tr.) 10). Evidence offered by OSM established that title to tract 1315 was vested in the United States upon its filing of a declaration of taking and its deposit of \$ 24,000 in the Registry of the District Court of the United States for the Eastern District of Kentucky (Tr. 6; Exh. R-7). Notice of this condemnation action was given by a lis pendens filed on June 18, 1980, the same day as title was deemed to have vested in the United States (Tr. 4; Exh. R-2). This notice set forth the interest acquired by the United States in these words:

The fee simple title to Tract No. 1315, subject, however, to existing easements for public roads and highways, public utilities, railroads and pipelines; excepting and excluding from the taking all interests in the coal, oil and gas which are outstanding in parties other than the surface owners and all appurtenant rights for the exploration, development and removal of said coal, oil and gas so excluded.

Neither Mid-Mountain nor its predecessor in interest was named as a defendant in this condemnation action, nor was either included among those persons

^{1/} Section 521(a)(2) of SMCRA requires the Secretary to order the cessation of surface coal mining operations determined to be a condition, practice, or violation that is causing or can reasonably be expected to cause, inter alia, significant, imminent environmental harm to land, air, or water resources. Section 1(1) of 405 KAR 7:040 provides that no person or operator shall engage in surface coal mining and reclamation operations without first having obtained from the Department for Surface Mining Reclamation and Enforcement a valid permit covering the area of land to be affected.

having or claiming an interest in the condemned land (Exhs. R-2, R-6, R-7). As a result, Mid-Mountain was unaware that it was mining on Federal land until after such mining had begun (Tr. 10, 18). Because Kentucky has not entered into a cooperative agreement under section 523(c) of the Act, 30 U.S.C. § 1273(c) (1982), 2/ a Federal permit is required before mining on Federal lands. 30 CFR 740.13(a)(1). Indeed, upon recognizing its error, Mid-Mountain filed an application for a Federal permit to mine tract 1315 (Tr. 11, 12).

Judge Torbett granted temporary relief from the cessation order because he held that under the law and customs of the State of Kentucky the Corps of Engineers was "more negligent" than Mid-Mountain for Mid-Mountain's failure to learn of the interest of the United States in tract 1315. Moreover, if the cessation order were affirmed, Judge Torbett found, Mid-Mountain would suffer a financial disaster. Describing the mining operation as "apparently well run with no history of violations against it," the Judge held that closing down Mid-Mountain's operation while it sought a Federal permit would benefit neither the public nor the best interests of SMCRA.

Section 525(c) of SMCRA, 30 U.S.C. § 1275(c) (1982), authorizes the Secretary to grant temporary relief from a cessation order, inter alia, if -- (1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given the opportunity to be heard; (2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and (3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. Procedural regulations are set forth at 43 CFR 4.1260. The parties are in agreement that the hearing requirement, set forth as (1) above, has been satisfied, and hence our review of Judge Torbett's decision may proceed to elements (2) and (3).

[1] Regulation 30 CFR 843.11 addresses both elements. Subsection (a)(1) requires an authorized representative of the Secretary to immediately order a cessation of coal operations if he finds "any condition or practice * * * which (i) creates an imminent danger to the health or safety of the public; or (ii) is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." (Emphasis added.) Subsection (a)(2) provides that surface coal mining and reclamation operations conducted without a valid 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. 3/

2/ See 30 CFR Part 917.

3/ Two exceptions to this principle are set forth in the regulation:

"(2) 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, unless such operations:

In slightly simpler language, this regulation says that a failure to obtain a valid permit is a condition that is causing or can reasonably be expected to cause significant environmental harm to land, air, or water resources and that a cessation order is required to address such failure. Given the unchallenged need for a Federal permit to mine under tract 1315, in accordance with 30 CFR 740.13, and the duty imposed on the Secretary to order the cessation of unpermitted operations, the likelihood that the Secretary would make findings favorable to Mid-Mountain in this regulatory framework is rather small. And while Mid-Mountain has not shown a substantial likelihood of favorable Secretarial findings, it has clearly failed to satisfy item (3) of the requirements for temporary relief. By regulation, the conduct of operations without a permit causes or can reasonably be expected to cause significant, imminent environmental harm. ^{4/} Although two exceptions ^{5/} to this principle are acknowledged by the regulation, neither is applicable to MidMountain and, accordingly, we hold that Mid-Mountain has failed to satisfy item (3) of the temporary relief requirements. Judge Torbett's decision must be reversed.

fn. 3 (continued)

"(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

"(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted."

The record indicates the first exception does not apply. There is no evidence of an extension of previously permitted operations where a permit which was valid when issued to cover the entire area permitted subsequently becomes legally insufficient because of the condemnation of a part of the tract for Federal ownership. In appellant's case, title had been acquired by the United States in 1980, prior to the time appellant obtained its state permit in 1984 (and prior to the previous state permit issued in July 1982), and a Federal permit was required at that time. Compliance with applicable regulations requiring identification of legal owners of the land covered by the permit would have disclosed the Federal ownership. See 30 CFR 740.11(a)(3), 740.13(b)(3), and 405 KAR 8:040. Thus, application for the Federal permit after commencing mining could not be considered timely as required for the exception. With respect to item (ii) above, the record shows that Mid-Mountain and its predecessors-in-interest conducted operations during the interim regulatory period under a state permit (Tr. 73). For a discussion of the interim and permanent regulatory programs, see Shamrock Coal Co. v. OSM, 81 IBLA 374, 376 (1984).

^{4/} The administrative law judge was aware of this regulation (Tr. 65). The preamble to 30 CFR 843.11(a)(2) makes clear that this regulation was intended to supersede a decision by the Interior Board of Surface Mining and Reclamation Appeals known as Claypool Construction Co., 2 IBSMA 81, 87 I.D. 168 (1980). That decision held that the conduct of surface coal mining operations without the requisite permit was inadequate to demonstrate the existence or reasonable expectation of significant, imminent environmental harm related to such operations. 47 FR 18555, 18557 (Apr. 29, 1982).

^{5/} See note 3 infra.

Our application of regulation 30 CFR 843.11 has not blinded us to the equities in Mid-Mountain's favor. The record supports a finding, for example, that Mid-Mountain's state permit included the area known as tract 1315 (Tr. 58, 61). That permit required Mid-Mountain to submit information substantially similar to that required for a Federal permit (Tr. 62). No violations of this state permit are outstanding (Tr. 22). Moreover, an application for a Federal permit was filed with OSM shortly after the cessation order issued (Tr. 62). The record also supports a finding that royalty payments have been paid by Mid-Mountain and its predecessor in interest to parties 6/ other than the United States since 1980 without protest by the United States (Tr. 59). 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Torbett is reversed.

Will A. Irwin

Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

6/ These persons are the heirs of L. R. Ferguson (Tr. 61). These heirs were named defendants in the condemnation action vesting title to tract 1315 in the United States and were, if in possession, entitled to notice of the Judgment on Declaration of Taking (Exh. R-7) in United States v. 88.86 Acres of Land, No. 80-73 (D.E.D. Ky. June 18, 1980).

7/ Mid-Mountain has apparently been the lessee of tract 1315 only since mid-1985 (Tr. 59). This lease was acquired by an assignment from Lick Falls Coal Company or from State Contractors, Inc., the record being inconsistent on this matter (Tr. 11, 59). State Contractors, Inc., received its lease from the Fergusons in June 1979, prior to the filing of a complaint in condemnation (Exh. R-6). Prior to receiving its lease in 1985, Mid-Mountain received a successor operator permit in 1982 during the interim regulatory program and a second permit during the permanent regulatory program (Tr. 73). Because it was not purchasing the leasehold when it acquired these permits, Mid-Mountain felt that obtaining a title opinion was unnecessary. Id. This approach appeared reasonable to Mid-Mountain because coal had been mined for 2 years and royalties paid to the Ferguson heirs without objection. Id.

