

**Editor's note: 93 LD. 460; Appealed – vacated and remanded (for further proceedings), Civ.No. 87-P-0045-S (N.D. Ala. July 2, 1987); IBLA decision reinstated by order dated Dec. 30, 1987 – See 95 IBLA 15A th C below.**

McWANE COAL CO., INC.

IBLA 85-621

Decided December 11, 1986

Appeal from a decision by the Office of Surface Mining Reclamation and Enforcement, Birmingham Field Office, Alabama, ordering McWane Coal Company, Inc., to make payment of unpaid reclamation fees plus interest, and imposing an "administrative offset" for that amount against an overpayment of reclamation fees.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Reclamation Fees: Liability–Surface Mining Control and Reclamation Act of 1977: Words and Phrases–Words and Phrases

"Operator." Identification of the "operator" responsible for payment of reclamation fees under sec. 402(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232(a) (1982), does not turn solely upon a literal interpretation of the phrase "removes or intends to remove" coal in 30 U.S.C. § 1291(13) (1982), but involves consideration of business realities. The person or entity who exercises control over the person or entity who actually removes the coal is responsible for payment of the reclamation fees.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally–Surface Mining Control and Reclamation Act of 1977: Reclamation Fees: Liability

When an operator has made an overpayment of reclamation fees to the Office of Surface Mining Reclamation and Enforcement, and when that operator is responsible for payment of unpaid reclamation fees, the office may reasonably impose an "administrative offset" for the amount of the unpaid fees, provided it gives written notice to the operator which confirms with the requirements of 31 U.S.C. § 3716 (1982).

APPEARANCES: Arthur J. Sharbel III, Esq., Cathy S. Wright, Esq., David M. Smith, Esq., Birmingham, Alabama, for McWane Coal Company, Inc.; Melissa Gallivan, Esq., Alice P. L. Schwartz, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

McWane Coal Company, Inc. (McWane), has appealed an April 16, 1985, decision of the Office of Surface Mining Reclamation and Enforcement (OSM), Birmingham Field Office, Alabama, informing McWane that it was responsible for \$8,286.19 in unpaid reclamation fees due in accordance with section 402(a) and 402(b) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1232(a) and (b) (1982), for coal produced by Omega Fuels, Inc., (Omega), McWane's contract miner. OSM also stated that it was deducting the unpaid reclamation fees from an \$11,000 overpayment made by McWane. OSM further provided that its decision was appealable pursuant to 43 CFR 4.1280.

By letter dated September 6, 1984, OSM notified McWane that it had completed a reclamation fee audit of McWane's surface coal mines for calendar

quarters 80-2 through 84-1 and had discovered discrepancies in reported coal production. OSM determined that McWane had underreported its coal production by the following amounts: 90.22 tons for the period 82-1, and 23,584.62 tons for the periods 80-2 through 84-1. The latter tonnage actually represented coal fines removed from McWane's sedimentation ponds by Omega. The letter stated that McWane had agreed with the first determination, but that the parties could not reach agreement concerning the second. Subsequently, OSM issued the decision presently under appeal.

The basis for OSM's action in this case is two written agreements, dated June 23, 1980, and July 19, 1983, between McWane and Omega. In interpreting those agreements, OSM determined that Omega functioned as an agent of McWane was responsible for payment of the unpaid fees.

On appeal, McWane relies upon those same agreements in arguing that Omega, and not itself, is the "operator" responsible for paying the reclamation fees with respect to the coal removed from McWane's ponds by Omega. <sup>1/</sup> McWane maintains that Omega bore all costs associated with, and financed every aspect of, the coal fine pond operation, with no assistance from McWane; that Omega bore all of the risks associated with the operation; and

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<sup>1/</sup> McWane does not contend that the removal of coal fines from sedimentation ponds does not constitute "surface coal mining operations" under section 701(28) of SMCRA, 30 U.S.C. § 1291(28) (1982). There is no doubt that such activities are regulated by SMCRA. United States v. H.G.D. & J. Mining Co., 561 F. Supp. 315 (D.C. W.Va. 1983) (dredging coal from river is a surface coal mining operation); United States v. Devil's Hole, Inc., 548 F. Supp. 451 (D.C. Pa. 1982) (removal of coal from silt dams constructed a surface coal mining operations); Brentwood, Inc., 76 IBLA 73 (1983) (dredging to recover coal from a lake or river is a surface coal mining operation).

that Omega and McWane understood that Omega's mining operation was independent of McWane's mining or coal-washing activities in the area.

[1] OSM's determination that McWane was responsible for payment of the \$8,286.19 in unpaid reclamation fees was based upon section 402(a) of SMCRA, 30 U.S.C. § 1232(a) (1982), which provides:

All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, \* \* \* a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine \* \* \*.

The term "operator" is defined in section 701(13) of SMCRA, 30 U.S.C. § 1291(13) (1982), as "any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one "location."

OSM's reclamation fee collection regulations do not define the term "operator," simply providing that "[t]he operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining." 30 CFR 870.12(a). The preamble to OSM's initial reclamation fee regulation contains a discussion pertinent to resolving the issue of which entity, as between McWane and Omega, is the "operator" liable to OSM for the \$8,286.19 in unpaid reclamation fees:

Several commentors raised questions as to who is an operator responsible for payment of the fee. Section 402 of the Act [30 U.S.C. § 1232 (1982)] requires that all operators pay the fee. Section 1701 [30 U.S.C. § 1291] of the Act defines "operator" as the "person \* \* \* engaged in coal mining who removes \* \* \*" the coal. Commenters pointed out that in some cases the one who removes the coal is actually a contractor who may be paid only for his services and who has no ownership or beneficial interest in the coal. The number and variety of business arrangements employed in the coal industry make it difficult to further define "operator" without considering the specific facts of particular cases. We believe that Congress intended the burden of fee payment to fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal. This intent will guide the Office in making decisions as to who is liable for the fee. The identification of operators will be made in light of the realities of the business work and will not turn solely on a literal interpretation of the word "removes." [2/]

42 FR 62713 (Dec. 13, 1977) (comment 2).

The contractual relationship between McWane and Omega is embodied in a letter dated June 23, 1980. The letter details the parties' respective rights and obligation, and served to convince OSM that McWane was the "operator" responsible for paying the reclamation fees. It stated:

This letter will confirm the understanding between your Company and McWane Coal Company concerning the conditions under which you are to be permitted to process coal fines by washing. The conditions are as follows:

1. The reclaiming of coal fines shall be performed at the McWane Coal washer site located at Coyle Station, Alabama. Your operation will be allowed to be upon McWane Coal property and permitted area so long as the operation is not in conflict with the primary washing operation of McWane Coal and your

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2/ The 1977 reclamation fee regulation, 30 CFR 837.12(a), contained law coverage identical to the current regulation, 30 CFR 870.12(a)

operation is in compliance with the instructions of the mining superintendent and washer superintendent at that location.

2. You will process the coal designated by McWane Coal in a workman like manner consistent with good coal washing practices and in compliance with all State and Federal mining laws and regulations and specifically agree that you are an independent contractor and not an employee or agent of McWane Coal and hereby agree to indemnify and hold harmless McWane Coal against any claims, demands, actions or causes of actions which arise in connection with your mining operation.

3. During the term of this agreement your company will maintain a labor contract with United Mine Workers of American and all coal processing on McWane Coal property will be done in accordance with the terms and conditions of that agreement.

4. McWane Coal Company has first call on all coal processed by your company. Were coal is of acceptable quality McWane Coal Company will purchase such coal at the rate of \$15.00 per net ton F O B processing point. No coals processed from McWane Coal's property shall be sold or shipped to anyone other than McWane Coal without permission in writing signed by an officer of McWane Coal Company.

5. At its sole discretion McWane Coal Company shall determine whether the coal processed pursuant to this agreement is of acceptable quality. Coal which does not meet the quality standards established by McWane may be rejected in any point by McWane notwithstanding whether the coal has been previously accepted by McWane. If coal is rejected by McWane pursuant to this provision, you will have the right to offer the coal for sale to others.

6. Should McWane Coal Company either reject the coal or decide not to exercise its option to purchase coal provided permission is secured by Omega Fuels, your Company may offer such coal for sale. In the event any coal taken from McWane Coal property is offered for sale to others, the price to be paid to McWane Coal Company for such coal shall be \$20.00 per net ton F O B processing point.

7. Your Company shall be responsible for all power, water connections and any cost associated

hereto. At the conclusion of the coal washing operation, you will be responsible for clean up of materials and leaving the site in a workman like manner and in the as received condition.

8. This agreement may be terminated at any time and by either party by giving 30 days written notice of an intention to terminate.

Additionally, by letter dated July 19, 1983, McWane confirmed its agreement with Omega regarding its "independent contract operation at McWane's Coal Company's washer site at Coyle, Alabama \* \* \*." The parties agreed McWane would continue to purchase Omega's processed fines deemed of acceptable quality by McWane; Omega would pay the full cost of backhoe rental from a specified company; Omega would pay McWane's backhoe operator; Omega would be responsible for cleaning out all ditches and settling ponds and maintaining good water flow in conjunction with McWane's normal plant operation; and the agreement could be unilaterally terminated with 30-day notice.

The question of whether McWane or Omega is the "operator," and accordingly responsible for payment of the reclamation fees, turns upon which party actually controlled Omega's operation. The U.S. District Court for the Western District of Virginia addressed a similar issue in United States v. Rapoca Energy Co., 613 F. Supp. 1161 (D.C. Va. 1985), in which Rapoca Energy Company (Rapoca), owner of large coal reserves, argued that independent coal companies who actually mined the coal were responsible for payment of reclamation fees under section 402 of SMCRA, 30 U.S.C. § 1232(a) (1982), since they, as "independent contractors," met the statutory definition of "operator" set forth at section 701(13) of SMCRA, 30 U.S.C. § 1291(13) (1982).

Rapoca, like McWane, argued that it was not an operator within the meaning of section 701(13), since the independent contractors, and not Rapoca, physically removed the coal from the earth.

The court in Rapoca applied principles of agency law in concluding that Rapoca exercised "direct control over the mining companies," and, thus, was responsible for payment of the reclamation fees. Two elements must be present to establish an agency relationship, the court stated: (1) the agent must be subject to the principal's conduct with regard to the work to be done and the manner of performing it, and (2) the work has to be done on the business of the principal or for his benefit. 613 F. Supp. at 1163, quoting Whitfield v. Whittaker Memorial Hospital, 169 S.E. 2d 563, 567 (Va. 1969). The court stated that "the mere fact that these companies are termed 'independent contractors' is not a conclusive indication of the relationship between the parties." 613 F. Supp. at 1163. The right to control, not the degree of actual control exercised by the principal, is determinative. Id.

The Rapoca court examined the "actual relationship" between Rapoca and the independent mining companies, finding that Rapoca had the degree of control necessary to establish a principal/agent relationship. Rapoca determined, inter alia, what locations were suitable for coal mining operations, performed engineering work for the site, began actual site development work provided engineering and mapping services for the contractors, and even provided instructions pertaining to extraction of the coal.

Most fatal to Rapoca's claim that the coal companies which actually removed the coal were independent contractors was the payment arrangement

agreed by the parties. The companies delivered the coal to a processing plant owned by one of Rapoca's subdivisions, and were paid a fixed sum for every ton of coal delivered. The court stated that the relationship was not that of owners and independent contractor, otherwise "the mining companies would undoubtedly be free to sell to whomever would pay the highest price, with only per ton of coal mined or percentage of the sales price being remitted to Rapoca." 613 F. Supp. at 1164. The court's conclusion provides the standard by which we must evaluate the business arrangement between McWane and Omega:

Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the corresponding lack of freedom regarding the mining companies [sic] ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents. Thus, it is Rapoca Energy Company that is liable for payment of the reclamation fees.

Id. 3/

The business reality of the contractual arrangement between McWane and Omega belies McWane's characterization of Omega as an "independent contractor." Based on the court's analysis in Rapoca, we must affirm OSM's determination that McWane was the "operator" responsible for payment of

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3/ In S & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350 (1984), this Board addressed the question of which coal company, as between the company which owned the coal in place and a second company which actually removed the coal, was the "operator" of the surface coal mining operations and thus responsible for complying in by the Rapoca court, and supports our ruling in this case.

the reclamation fees due on the coal recovered by Omega. We cannot accept McWane's oversimplistic explanation that Omega was the operator since it removed the coal. In the preamble to the initial reclamation fee regulations, OSM rejected a literal interpretation of the word "removes." Reading the agreements between McWane and Omega most favorably to McWane, we could say, at best, that Omega exercised control over the operations on a day-to-day basis within the analysis of the court in Rapoca.<sup>4/</sup> However, that would overstate McWane's case, since the June 23, 1980, letter expressly states that Omega's operations would be allowed upon McWane's property "so long as the operation \* \* \* is in compliance with the instructions of the mining superintendent and washer superintendent at that location." Obviously, McWane's superintendents possessed contractual authority to "control" Omega's day-to-day operation.

McWane's exercise of control was quite pervasive. Not only did McWane have right of first refusal as to all coal fines removed and processed by Omega, the June 23, 1980, letter provides that "[n]o coal processed from McWane Coal's property shall be sold or shipped to anyone other than McWane Coal without permission in writing signed by an officer of McWane Coal Company." McWane had retained the right to reject coal which was not of acceptable quality, at the same time, set a minimum price for sale of rejected coal to others. Thus, if Omega produced coal of less than acceptable quality,

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<sup>4/</sup> The court in Rapoca recognized that day-to-day control of the operation by the contractor is not necessarily persuasive as "an agency relationship impliedly carried with it the authority for the agent to use all means necessary for the accomplishment of the work to be performed." 613 F. Supp. at 1164.

it could only accept a premium price for that coal. The result of this dual requirement is to force Omega to adjust the quality of the coal to meet McWane's needs, rather than choosing to produce coal of a lower quality for sale to others. This indirect, but real restriction on Omega's ability to produce coal for sale on the open market also dictates a finding that Omega has "no economic interest in the coal in place." 613 F. Supp. at 116. Our conclusion that OSM correctly determined that McWane was the operator responsible for payment of the reclamation fees due on coal removed by Omega from McWane's ponds is consistent with congressional intent that the burden of fee payment "fall upon the person who stands to benefit directly from the sale, transfer, or use of the coal." 43 FR 62713 (Dec. 13, 1977) (comment 2); see also Rapoca, 613 F. Supp. at 1167. 5/

[2] In November 1984, McWane, due to a bookkeeping error, overpaid reclamation fees due OSM by \$11,000. McWane requested a refund of the overpayment, but OSM declined the refund until an audit was conducted to verify the overpayment. In its April 16, 1985, decision OSM informed McWane that it would credit the \$11,000 overpayment against the unpaid reclamation fees due on the coal retrieved by Omega, for which OSM had decided McWane was responsible as operator. 6/

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5/ We note the court in Rapoca found the ownership of or economic interest in the coal to be a compelling factor where the question of the agency relationship is inconclusive. 613 F. Supp. at 1165. The court's analysis of that issue provided an alternative ground on which to find Rapoca liable for payment of reclamation fees. That analysis also compels the conclusion in this case that appellant is responsible for payment of reclamation fees.

6/ This overpayment indirectly benefited McWane, as interest should accrue only to the date of overpayment.

McWane contends that there is no statutory or regulatory authority for OSM's decision to "offset reclamation fees claimed by OSM to be due from McWane against an unrelated overpayment made to OSM by McWane" (Statement of Reasons at 11). McWane relies upon SMCRA section 402(e), 30 U.S.C. § 1232(e) (1982), in making this argument. That section provides that "[a]ny portion of the reclamation fee not properly or promptly paid pursuant to [30 U.S.C. § 1232] \* \* \* shall be recoverable, with statutory interest, from coal mine operators, in any court of competent jurisdiction in any action at law to compel payment of debts." The implementing regulation is drafted in similar language: "OSM will bill delinquent operators on a monthly basis and initiate whatever action may be necessary to secure full payment of all fees and interest." 30 CFR 870.15(c). McWane would limit OSM to initiating an action in a court of competent jurisdiction to collect the disputed unpaid reclamation fees.

McWane's analysis ignores statutory and regulatory authority for imposing an "administrative offset" in this situation. The head of an executive agency may collect a claim by administrative offset, provided it follows the procedures set forth in 31 U.S.C. § 3716 (1982). That statute provides that the Department may collect a debt by administrative offset only after giving the debtor:

- (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
- (2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

31 U.S.C. § 3716(a)(1982).

The Department's policies and procedures concerning debt collection are published in the Departmental Manual. <sup>7/</sup> 50 FR 8400 (Mar. 1, 1985). That manual, at Part 344, established procedures for the use of administrative offset: "A bureau may collect debts owed by persons or entities \* \* \* by means of offsets against monies due from the United States under the procedures, examine the debt to see whether the likelihood of collecting the debt and the best interest of the United States justify the use of administrative offset. The Departmental Manual requires that the Department provide written notice to the debtor in accordance with 31 U.S.C. § 3716 (1982), set forth above. 344 DM 3.1A(2).

OSM's April 16, 1985, letter complies with the notice requirements enunciated in 31 U.S.C. § 3716 (1982). The only arguable defect in the notice is that it does not specifically advise McWane of its right to inspect and copy

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<sup>7/</sup> The Comptroller General's regulations which implement 31 U.S.C. § 3716 (1982) are found at 4 CFR 102.3. That regulation sets forth procedures which must be followed by executive agencies in imposing an administrative offset. The Department's procedures, as published in the Department Manual, Part 344, reflect the standards required by 31 U.S.C. § 3716 (1982) and 4 CFR 102.3

the agency records relating to the debt. However, the file is replete with correspondence between OSM and McWane concerning the payment of the unpaid reclamation fees, and McWane's counsel appears to have had access to all documents in the file. Moreover, the Department's policy is to make its records available to the public under 43 CFR Part 2, Subpart B - Inspection of Records. Even if we were to rule that OSM's notice of administrative offset was technically deficient, OSM has the authority to proceed with the administrative offset prior to completion of the specified procedures if:

(1) failure to take the offset would substantially prejudice the bureau's ability to collect the debt, and

(2) the time before payment is made does not reasonably permit the completion of those procedures. Such prior offset must be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the bureau will be promptly refunded (see 4 CFR 102.3(b)(5)).

344 DM 3.1E.

Accordingly, we rule that (1) OSM properly concluded that McWane was the "operator" responsible for the unpaid reclamation fees due on coal retrieved by Omega from McWane's ponds; and (2) OSM's decision to impose an administrative offset against the \$11,000 overpayment was procedurally correct and substantively reasonable under 31 U.S.C. § 3716(b) (1982), 4 CFR 102.3, and the Department Manual. In light of our analysis and conclusions, we hereby deny the motions for a hearing submitted by both McWane and OSM.

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

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Bruce R. Harris  
Administrative Judge

We concur.

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C. Randall Grant, Jr.  
Administrative Judge

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R. W. Mullen  
Administrative Judge

December 30, 1987

IBLA 85-621 : 95 IBLA 1, 93 I.D. 460 (1986)  
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McWANE COAL COMPANY, INC. : Surface Mining--Reclamation  
(On Judicial Remand) : Fees  
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: Board Decision Reinstated

ORDER

On December 11, 1986, the Board issued its decision in McWane Coal Company, Inc., 95 IBLA 1, 93 I.D. 460 (1986). McWane sought judicial review of that decision and on July 2, 1987, the court vacated the Board's decision and remanded the case for "further administrative proceedings." McWane Coal Company v. Hodel, No. CV 87-P-0045-S (N.D. Ala. July 2, 1987).

On July 21, 1987, the Office of Surface Mining Reclamation and Enforcement (OSMRE) filed a "Report and Recommendation" with the Board pursuant to 43 CFR 4.29. OSMRE recommended that the Board issue a written plan specifying that the record would be reported for a definite time to allow submissions of affidavits, with a specified closing date. It also suggested the Board allow requests for an evidentiary hearing to be filed at any time prior to the closing of the record. OSMRE'S position was that the court did not require an evidentiary hearing.

The Board issued an order on August 3, 1987, accepting OSMRE's "Report and Recommendation" and granting McWane 30 days from receipt of the order in which to respond to OSMRE's filing and provide its own report. Counsel for McWane received the order on August 7, 1987, but filed no response or report. Despite McWane's representations in court that an evidentiary hearing. Nor did it request the Board to order a hearing.

Therefore, on October 22, 1987, the Board issued an order informing the parties that it would proceed to decide the case on the record before the Board, but in the same order the Board offered the parties the opportunity to supplement the record with additional documentary evidence in support of their respective positions prior to the issuance of any decision. The Board stated that it would hold the record open for a period of 45 days from the date of the order to allow the parties to make any desired filings. Both counsel for McWane and counsel for OSMRE received copies of the order on October 26, 1987. The time for filing has lapsed and the Board has received nothing from either party. The record is therefore closed.

95 IBLA 15A

In a memorandum opinion accompanying its July 2, 1987, order, the court stated:

After consideration, the court is of the opinion that the Board abused its discretion by never giving the parties notice that the matter would be summarily decided. Without such notice, McWane was never given a reasonable opportunity to present evidence in support of its position and to demonstrate that some material facts were in dispute, making summary disposition without an evidentiary hearing inappropriate.

Memorandum Opinion at 3.

In our August 3, 1987, order, we offered McWane the opportunity to recommend procedures to be followed to comply with the court's remand. It did not take advantage of that opportunity. In our October 22, 1987, order, we informed McWane that we would decide the case on the basis of the record before us; however, we allowed McWane an additional opportunity to supplement the record. It filed nothing. We have complied with the court's directive to provide "further administrative proceedings."

The evidentiary record presently before us relating to McWane's responsibility for the payment of reclamation fees is exactly the same as it was on December 11, 1986, when we issued our decision affirming OSMRE's decision ordering McWane to pay unpaid reclamation fees plus interest, and imposing an administrative offset for that amount against an overpayment of reclamation fees. McWane has provided no information to indicate that our initial decision was incorrectly decided. For the reasons stated in that decision, we again conclude that (1) OSMRE properly concluded that McWane was the "operator" responsible for the unpaid reclamation fees due on coal retrieved by Omega Fuels, Inc., from McWane's sedimentation ponds; and (2) OSMRE's decision to impose an administrative offset against the \$11,000 overpayment was procedurally correct and substantively reasonable under 31 U.S.C. §3716(b) (1982), 4 CFR 102.3, and the Departmental manual.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision, McWane Coal Company, Inc., 95 IBLA 1, 93 I.D. 460 (1986), is reinstated.

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Bruce R. Harris  
Administrative Judge

We concur.

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C. Randall Grant, Jr.  
Administrative Judge

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R.W. Mullen  
Administrative Judge

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