

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-530

Decided November 3, 1987

Appeal of a decision of Administrative Law Judge Frederick A. Miller, affirming the validity of Notice of Violation No. 84-03-075-001. TU 4-41-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Oklahoma Permanent Regulatory Program Regulations 779.25(j) which requires a surface mining operator to submit, in its permit application, cross-section maps and plans showing the location and depth, if available, of oil and gas wells within the proposed permit area, is not satisfied by the submission of an aerial photograph which does not designate or clearly show the existence of wells within the proposed permit area.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant; Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Turner Brothers, Inc. (Turner Brothers), appeals from a decision of Administrative Law Judge Frederick A. Miller, dated March 20, 1985, affirming the issuance of Notice of Violation (NOV) No. 84-03-075-001. The NOV was issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on August 27, 1984, for "failing to submit, in their permit application, cross-section maps and plans showing location and depth, if available, of oil wells within the permit area, one of which the company has blasted and mined within 100 feet of" in violation of 30 CFR Part 936 and Oklahoma Permanent Regulatory Program Regulations (OPRR) 779.25(j), which were promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA),

30 U.S.C. §§ 1201-1328 (1982). 1/ The Oklahoma regulation, OPRPR 779.25(j), provides: "The [permit] application shall include cross-section maps and plans showing -- * * * (5) Location and depth if available, of oil and gas wells within the proposed permit area * * *." The alleged violation occurred at the Porter Mine No. 2, Wagoner County, Oklahoma. Appellant timely filed an application for review and a hearing was conducted before Judge Miller on December 12, 1984, in Tulsa, Oklahoma.

William H. Harting, an OSMRE Reclamation Specialist, testified that he happened to be on-site at the Porter Mine No. 2 for a blasting training session on August 22, 1984, when he observed a small undisturbed area in the middle of appellant's mining activities. On that same day, another OSMRE inspector, Gene Robinson, conducted an aerial overflight inspection of the mine site and informed Harting that he thought he had seen an oil well in the undisturbed area. Harting then reviewed the Turner Brothers' permit applications and found no indication of oil or gas wells being located on this permit area. Harting reinspected the site and photographed the undisturbed area. After determining that Turner Brothers had neither identified the wells on its permit application nor provided cross-sections of these wells, the subject NOV issued. It should be noted that OSMRE had assumed primary enforcement jurisdiction in Oklahoma in April 1984. 2/

Robinson testified that during his overflight inspection on August 22, 1984, he noticed what appeared to be an oil well in the middle of an area which had been bypassed in the mining operation. He further testified that, while he had been inspecting the property on a routine basis, the August 22 overflight was the first time he had been made aware of the existence of an oil or gas well within the permitted area.

OSMRE also introduced copies of various aerial photographs that Turner Brothers had submitted to the Oklahoma Department of Mines (ODOM). Harting, in his testimony, pointed out that, while the photographs contained a legend explaining symbols placed thereon which included symbols for both oil and gas wells, no such symbols appeared within the permit area even though wells did exist. 3/

Turner Brothers submitted the testimony of Gregory G. Govier, its Chief Mining Engineer, who had been employed by Turner Brothers since December 1983 (Tr. 73). He stated that the wells had been plugged the entire time he had worked for Turner Brothers. He further noted that, by letter dated January 27, 1984, Turner Brothers had sought a variance from ODOM to permit mining within 50 feet of the wells. See Exh. A-1. He averred that, by merely looking at

1/ OSMRE subsequently sought to modify this NOV to read "gas wells" instead of "oil wells." This request was granted by Judge Miller at the hearing (Tr. 5-6).

2/ 49 FR 14674 (Apr. 12, 1984).

3/ While the OSMRE inspectors were only aware of the existence of one well at the time the NOV was written, it is undisputed that two gas wells exist within the permit area. See Tr. 62.

the aerial photographs Turner Brothers had submitted in lieu of mine maps, he could determine that two oil or gas wells existed within the permit area (Tr. 64-65).

In his decision, Judge Miller first rejected Turner Brothers' challenge to OSMRE's assertion of jurisdiction to issue the NOV. Based on his review of the record, he concluded that "[t]he testimony and photographs presented clearly evidence a violation of 30 CFR 936 and OPRPR 779.25(j)," in that the maps submitted were not marked nor did Turner Brothers prepare cross-section plans and submit them with its application (Dec. at 4). Judge Miller expressly rejected appellant's assertion that the regulation did not apply to nonproducing wells, concluding that "[a]ll wells, producing or nonproducing, in Oklahoma must be identified if the natural resources are to be preserved and environmental pollution is to be prevented as the Federal and State statutes intend" (Dec. at 5). Accordingly, he affirmed the issuance of the NOV.

[1] On appeal, Turner Brothers reiterates its challenge to OSMRE's jurisdiction to issue the NOV. It argues before this Board, as it did before Judge Miller, that when OSMRE attempted to assume primary enforcement jurisdiction of surface coal mining operations in Oklahoma, OSMRE failed to provide proper notice as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982). As a result, Turner Brothers argues, OSMRE lacked jurisdiction to issue the NOV's.

Turner Brothers' arguments regarding jurisdiction and OSMRE's response thereto are identical to those addressed by this Board in Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986) (Turner Brothers I). Therein we held that "the notice OSM published in the Federal Register on April 12, 1984, constituted adequate public notice for the beginning of Federal enforcement pursuant to section 1271(b) of SMCRA." Id. at 388.

Moreover, as we noted in Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987) (Turner Brothers II), this issue was also addressed by the United States District Court in Oklahoma v. Hodel, Civ. No. CIV-84-1202-A (W.D. Okla. Dec. 3, 1985). In rejecting an identical challenge to the assumption of direct Federal enforcement by OSMRE, the court declared that the "self-contained administrative provisions in SMCRA govern this case, overriding [the] APA" and held that OSMRE had properly followed the procedures set forth in 30 U.S.C. § 1271(b) (1982). Turner Brothers' jurisdictional argument must be rejected.

Appellant next argues that, under the applicable rule, OPRPR 779.25(j), it was under no duty to identify nonproducing gas wells on its permit application. Turner Brothers contends that under the Oklahoma regulations "oil and gas wells" is a term of art meaning "producing oil and gas wells," citing the Oklahoma Oil and Gas Conservation Act, Title 52, Okla. Stat. § 139 (1971). Appellant argues that this interpretation furthers the regulatory scheme of SMCRA:

[T]he intent [of the Surface Mining Control and Reclamation Act of 1977] is to circumvent environmental harm that may be caused

by surface mining. In this case it is clear that surface mining of an area in which active oil and gas wells were present could produce line ruptures or casing ruptures that might be dangerous not only to the environment but also to the crews working on the surface mining site. This same policy does not apply to nonproducing oil and gas wells due to the fact that under Oklahoma law, nonproducing oil and gas [wells] are required to be cemented down below any coal seam. Therefore, rupture of the casing would have no effect on the escape of any of the minerals beneath the coal seam, and would pose absolutely no danger to the mining crews or any surrounding inhabitants.

(Appellant's Brief at 5).

OSMRE disputes Turner Brothers' argument:

Under the Oklahoma Statutes, two types of oil and gas wells are discussed. The first are wells drilled for exploration, development or production. 52 Okla.Stat. § 309 (1981). These wells are to be maintained in such a manner as to protect against surface and subsurface pollution. *Id.* The other type of well discussed is a plugged well. 52 Okla.Stat. § 310 (1983). Where a well is causing surface or subsurface pollution, it is to be plugged or repaired so that such pollution is eliminated. *Id.* * * *. For both types of wells currently discussed, the Oklahoma Statutes are clearly concerned with protection from surface and subsurface pollution. If this intent is held applicable to provisions of the OPRPR, all wells, exploration, development, production or plugged, should be identified so that protection from surface and subsurface pollution is accomplished.

(OSMRE Brief at 6).

The relevant regulation, OPRPR 779.25(j), is identical to and patterned after the Federal regulation, 30 CFR 779.25(j) (1983) (currently codified at 30 CFR 779.25(a)(10)). ^{4/} Therefore, it is proper to determine the meaning of OPRPR 779.25(j) by looking at its Federal counterpart.

[2] The regulation, now codified at 30 CFR 779.25(a)(10), provides that "[t]he application shall include cross sections, maps, and plans showing * * * location, and depth if available, of gas and oil wells within the proposed permit area." Analysis of this regulation in the context of the regulatory scheme of which it is a part makes it clear that the rationale

^{4/} As originally proposed, the regulation has required a showing in cross-section maps and plans of the "location and depth of water, gas or oil wells within the proposed permit area." See Proposed 30 CFR 779.25(i), 43 FR 41662, 41841 (Sept. 18, 1978). The final language modified this requirement to provide that a cross-section showing depth of an oil or gas well was not required if the information was not "available." See 44 FR 15045 (Mar. 13, 1979).

motivating 30 CFR 779.25 is protection of the environment. The information provided is used to determine whether the applicant can comply with the surface coal mining performance standards and to determine whether reclamation is feasible. 30 CFR 779.10. The objective of 30 CFR Part 779 is to ensure that each application provides the regulatory authority with a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities. 30 CFR 779.2. Each subpart of section 779.25 requires information from the permittee in order to assess the environmental impacts of surface coal mining. Surface mining activities may impact upon or affect oil or gas wells, and therefore, generate other environmental consequences, whether or not these wells are producing, though, admittedly, producing wells may result in greater potential danger to the environment. There is, however, no theoretical basis for appellant's attempted distinction between producing and nonproducing wells insofar as the possibility of adversely affecting the environment is concerned.

Furthermore, we must reject Turner Brother's argument that nonproducing oil and gas wells in Oklahoma should be exempt from the regulation because they are required to be cemented below the coal seam. This argument is, itself, flawed. First, not all nonproducing oil and gas wells will be cemented below the coal seam. As OSMRE points out, under 52 Okla. Stat. § 308 (1981), an oil and gas well that is required to be plugged must be cemented at a maximum of 25 feet above and below the "workable coal seam." A "workable coal seam," within this context, is defined by Oklahoma Statutes as a coal bed or seam 30 to 36 inches in thickness, less than 1,000 feet below the surface and all coal seams or beds more than 36 inches in thickness less than 1,500 feet below the surface. Thus, plugged gas wells which penetrate a coal seam which is not "workable" under this definition are not required to be cemented under Oklahoma law. Secondly, even where an oil or gas well is required by statute to be cemented below the coal seam, there is always a possibility that there has been a failure of or inadequate compliance.

With its permit application for Porter Mine No. 2, appellant submitted to ODOM an aerial photograph designated as a "mine map." Turner Brothers contends that the photograph, taken October 8, 1981, fulfilled the requirements of OPRPR 779.25(j). Turner Brothers argues that:

From the aerial photograph it was clear that gas well[s] existed on the premises site, and the [only] complaint that OSM can voice in opposition to this is that the map legend failed to put a star next to the oil and gas wells. This failure of TBI to place a legend symbol next to the gas wells does not negate the fact that the oil and gas wells were clearly represented on the aerial photograph. Under cross examination, the inspector from OSM admitted that legend symbols are not required on all maps submitted to ODOM. According to Inspector Harting, if the object to be represented on the aerial map is obvious, then it need not be designated by legend symbol on the map (Tr. 40). In the case at hand, the gas wells were obviously located upon the maps submitted by TBI, and the only cause for the issuance of this violation is that the OSM inspector in this case was unfamiliar with the use of photographs.

(Appellant's Brief at 8).

We have studied the aerial photograph Turner Brothers submitted with its permit application and, contrary to appellant's assertion, we do not find it clear that the white spots show the existence of oil or gas wells. 5/ In any event, even if it were clear from the photograph that oil or gas wells were present within the permit area, the applicable regulations also required the submission of cross-sections or plans which showed the depth of the wells, if that information was "available."

We note that Turner Brothers argues "there is no need of cross-section maps since TBI had no knowledge of depth of the gas wells in this case" (Appellant's Brief at 7). The obvious fallacy with this argument is that the regulation requires submission of this information if it is "available" and appellant's ignorance is, therefore, irrelevant unless it shows that the information was not available. There is absolutely no evidence that appellant made any attempt to acquire such information and, thus, there is no support in the record for a conclusion that the information was not "available." On this basis alone, the decision below must be affirmed. 6/

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

James L. Burski
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

5/ We recognize that appellant argued that the real question was whether ODOM's employees could discern the existence of oil or gas wells from an examination of the aerial photographs. This argument might have more force if it was supported by any evidence of record that ODOM employees had been made aware of the existence of the wells in question by a perusal of the photograph. Appellant provided none. Its argument in this regard is based on nothing more than naked conjecture.

6/ The perniciousness of appellant's argument is that if it was accepted as a general proposition the regulation would, in practice, reward those who willfully maintained their ignorance and possibly work to the detriment of those who took steps to remedy their lack of knowledge and thereby facilitate protection of the environment.

