

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-528

Decided January 12, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of Notice of Violation No. 84-03-233-20. TU 4-33-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 the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

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

OPINION BY ADMINISTRATIVE JUDGE GRANT

Turner Brothers, Inc., has appealed the decision of Administrative Law Judge Frederick A. Miller, dated March 22, 1985, affirming the issuance of Notice of Violation (NOV) No. 84-03-233-20 by the Office of Surface Mining Reclamation and Enforcement (OSMRE) for failure to construct and maintain sediment control measures to prevent runoff from disturbed areas from leaving the permit area.

OSMRE issued the challenged NOV on July 30, 1984, pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA),

30 U.S.C. § 1271(a) (1982). The NOV cited Turner Brothers for "failure to construct and maintain sediment control measures to prevent run-off outside permit area." The NOV stated that appellant violated "30 CFR 936 OPRPR 816.45," and it required that by August 20, 1984, Turner Brothers "construct adequate diversion ditches to divert run-off from disturbed areas towards existing silt basins" and "construct sediment pond No. 1A on north end of permit sec. 14, 11 N., 17 E., or divert run-off to existing pond No. 1."

On August 20, 1984, Turner Brothers filed an application for review of the NOV, arguing that there were sufficient sediment control measures to prevent runoff outside the permit area and, hence, it was improperly cited for a violation. An evidentiary hearing was held before Judge Miller on December 5, 1984, in Tulsa, Oklahoma.

In its brief on appeal Turner Brothers argues that Judge Miller erred in finding that OSMRE had jurisdiction to issue the NOV. Turner Brothers charges that OSMRE lacked jurisdiction to issue the NOV because when OSMRE assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not provide proper notice under the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982). Appellant contends that the Secretary's publication in the Federal Register of notice of its decision to assume primary enforcement jurisdiction over Oklahoma's surface mining program on April 12, 1984, with a stated effective date of April 30, 1984, violated the APA, which requires a hiatus of 30 days between the publication date and the effective date of a "rule." Therefore, according to appellant, the Federal takeover of Oklahoma's surface mining regulatory program was void, leaving OSMRE without authority to issue the NOV under appeal.

Alternatively, Turner Brothers argues that Judge Miller erred in upholding the NOV because OSMRE failed to meet its burden of establishing a prima facie case at the administrative hearing. Appellant contends that OSMRE failed to provide any real evidence of drainage from a disturbed area leaving the permit area without passing through a sedimentation pond.

In its brief to the Board OSMRE responds, regarding the jurisdictional issue, that it had jurisdiction to inspect and to enforce Oklahoma's program beginning April 30, 1984, as a result of proceedings held pursuant to 30 CFR Part 733 to substitute Federal enforcement of the State program. See 30 CFR 936.17. OSMRE further contends that Turner Brothers failed to properly object to the institution of direct Federal enforcement of Oklahoma's surface mining program. OSMRE asserts the relevant procedure is found in section 526(a)(1) of SMCRA, 30 U.S.C. § 1276(a)(1) (1982), which provides:

Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. * * * Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review

of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

[1] With respect to the jurisdictional argument, we note that this issue has been addressed by the Board in several other appeals emanating from Federal enforcement of the Oklahoma program. In a recent case, the Board summarized our past holdings:

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. [1/]

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

1/ Sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), provides as follows:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit."

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.

Turner Brothers, Inc. v. OSMRE, 99 IBLA 349, 351 (1987).

[2] Appellant also asserts Judge Miller erred in upholding the NOV on the ground OSMRE failed to present sufficient evidence to establish a prima facie case of a violation of the applicable Oklahoma Permanent Regulatory Program Regulation (OPRPR). The appropriate OPRPR regulation, § 816.45, states:

Hydrologic Balance: Sediment control measures.

- (a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:
 - (1) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area;
 - (2) Meet the more stringent of applicable State or Federal effluent limitations;
 - (3) Minimize erosion to the extent possible.
- (b) Sediment control measures include practices carried out within and adjacent to the disturbed area. * * * Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to--
 - (1) Disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in Section 816.111(b);
 - (2) Stabilizing the backfill material to prompt a reduction in the rate and volume of runoff, in accordance with the requirements of Section 816.101;
 - (3) Retaining sediment within disturbed areas;
 - (4) Diverting runoff away from disturbed areas;
 - (5) Diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

- (6) Using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland flow velocity, reduce runoff volume, or trap sediment; and
- (7) Treating with chemicals.

OSMRE asserts in its brief on appeal that: "[T]he 'essential facts' in this case are those that show that the Appellant failed to have appropriate sediment control measures that were designed, constructed and maintained using the best available technology to prevent runoff outside the permit and to minimize erosion to the extent possible" (OSMRE Brief at 9-10). Judge Miller summarized the hearing testimony on this point as follows:

Inspector Wyatt cited four separate locations on the permit area. Inspector Wyatt testified to uncontrolled runoff around a topsoil stockpile area (Tr. 3). Inspector Wyatt testified to three other locations where diversion ditches had been breached and runoff was leaving the permit area in an uncontrolled manner. The gist of Inspector Wyatt's testimony was that the applicant had failed to construct adequate sedimentation control and that the sediment control measures present were improperly designed and were not maintained to serve their purpose. Inspector Wyatt not only gave testimony but identified for introduction into evidence photographs of the areas where the diversion ditches had been breached and runoff had become uncontrolled and he also made a diagram of the four areas where runoff was uncontrolled.

* * * * *

Under 43 CFR § 4.1171(b) the applicant has the ultimate burden of persuasion in this case. The applicant in this case has not presented any evidence. The applicant's only argument is that Inspector Wyatt merely relied on his experience and he did not actually witness runoff leaving the permit area. The applicant argues that an inspection for sedimentation control can only be made while it is raining on site. However the testimony of the inspector coupled with the photographic evidence clearly demonstrates the fact that uncontrolled runoff had occurred. The applicant has failed to rebut the notice of violation and the evidence establishing a prima facie case presented by OSM[RE]. [2/]

Decision at 4.

Appellant contends OSMRE failed to produce any evidence of surface drainage from a disturbed area bypassing sediment ponds and leaving the

2/ Apart from cross-examination of the OSMRE inspector, appellant declined to present any witnesses at the hearing to rebut the inspector's testimony.

permit area, citing Avanti Mining Co., 4 IBSMA 101, 89 I.D. 378 (1982). OSMRE argues that the elements of a prima facie case for a violation of this regulation involve the failure to construct and maintain appropriate sediment control measures using the best available technology to prevent runoff outside the permit and are distinguishable from the regulation in the Avanti case.

Contrary to appellant's contention, we find testimony of record to support a lack of drainage control from the topsoil stockpile on the permit (Tr. 13-14, 20; Exhs. R-1, R-3). Further, the inspector testified to drainage from the south end of sec. 14 on the permit bypassing sediment pond 3 and going off permit to the north without passing through a sediment pond (Tr. 28-29). Additionally, Inspector Wyatt testified to a breach in the diversion ditch between sediment ponds 1 and 2 allowing drainage off of the permit to the northwest (Tr. 22-23; Exh. R-8). Inspector Wyatt also testified to drainage in section 15 bypassing sediment pond 5 and leaving the permit area (Tr. 35-36). He also noted the existence of water tracks confirming this drainage (Tr. 44). ^{3/}

OSMRE makes a prima facie case by the submission of sufficient evidence to establish the essential facts of a violation. Turner Brothers, Inc. v. OSMRE, 92 IBLA at 389; James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). Upon review of the record, we must affirm Judge Miller's ruling that OSMRE met its burden of proof in establishing a prima facie case in support of the NOV and that appellant has failed to rebut the evidence submitted by OSMRE.

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 Miller is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Bruce R. Harris
Administrative Judge

^{3/} In view of the existence of evidence of drainage leaving the permit area, we find this case to be distinguishable from Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987).

