

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

IBLA 85-440

Decided February 2, 1988

Appeal from decision of Administrative Law Judge Frederick A. Miller affirming issuance of notice of violation and cessation order. TU 4-7-R and TU 4-11-R (NOV No. 84-3-38-5 and CO No. 84-3-38-5).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Postmining Land Use: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

In the case of an approved State program, where OSMRE has issued a 10-day notice to the State regulatory authority that a permittee had failed to restore all disturbed areas to premining condition in a timely manner and the State's response is that it issued a cessation order for that condition more than 1 year prior to the issuance of the 10-day notice, but took no further action to specifically require restoration, such a response is not appropriate action and OSMRE may, after an inspection, issue an NOV and failure to abate CO pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1982), and 30 CFR 843.12.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant; Angela F. O'Connell, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Turner Brothers, Inc. (TBI), has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated February 15, 1985, affirming issuance of notice of violation (NOV) No. 84-3-38-5 and cessation order (CO) No. 84-3-38-5 by the Office of Surface Mining Reclamation and Enforcement (OSMRE), pursuant to section 521(a)(1) of the Surface Mining Control and

Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982), for failure to restore in a timely manner all disturbed areas at appellant's Warner No. 1 mine, situated in Muskogee County, Oklahoma, to their premining condition.

On January 11, 1984, OSMRE issued 10-day notice No. 84-3-38-4 to the State, as a result of a Federal inspection of the Warner No. 1 mine. The inspection was conducted in response to a citizen complaint. OSMRE notified the Oklahoma Department of Mines (ODOM) that it had reason to believe that there were 14 outstanding violations at the Warner No. 1 mine including, listed as Violation No. 3, the failure to restore all disturbed areas in a timely manner. 1/ In addition, OSMRE notified ODOM that appellant had failed to transport, backfill, compact, and grade all spoil materials to eliminate all highwalls, spoil piles, and depressions (Violation No. 5) and to establish a permanent vegetative cover on disturbed areas (Violation No. 13). On January 25, 1984, ODOM informed OSMRE that Violation No. 3 had been the subject of a CO issued by ODOM in December 1982, 2/ and that on January 23, 1984, it had issued NOV No. 84-3-13 to appellant in part for failure to eliminate all highwalls and spoil piles and to backfill open pits and for failure to establish a permanent vegetative cover. 3/

On February 8, 1984, OSMRE issued NOV No. 84-3-38-5 to TBI for failure to restore in a timely manner all disturbed areas at the Warner No. 1 mine, as required by 30 CFR 715.13. OSMRE stated that the NOV applied to "[a]ll pits, spoil piles, topsoil piles and other disturbances * * * which have not

1/ OSMRE stated in the 10-day notice that failure to restore all disturbed areas in a timely manner constituted a violation of 30 CFR 715.20. This citation was incorrect for a number of reasons. First, 30 CFR 715.20 relates to revegetation. The regulation governing postmining land use which requires restoration of all disturbed areas in a timely manner is 30 CFR 715-13(a). Second, at the time of issuance of the 10-day notice, and at all other relevant times, the Oklahoma permanent program was in effect. Therefore, regardless of whether ODOM or OSMRE issued the enforcement actions involved in this case they would have been enforcing the State program. See 30 CFR 843.12(a)(2). Proper citations would have been to the Oklahoma Coal Reclamation Regulations. See Turner Brothers v. OSMRE, 92 IBLA 23, 25 at n.1 (1986). Nevertheless, at no point has TBI argued that it has been prejudiced by the failure to cite the proper regulations.

2/ On Sept. 7, 1982, ODOM sent TBI NOV No. 82-03-08 citing it for "[f]ailure to restore disturbed area in a timely manner." On Dec. 23, 1982, ODOM sent TBI CO No. 83-03-1-1 for failure to comply with the above-cited NOV.

3/ NOV No. 84-3-13 incorrectly cited Federal interim program regulations 30 CFR 715.14 (highwalls) and 30 CFR 715.20(a) (vegetative cover) as the basis for the violation. As noted in note 1, supra, proper citation should have been to the relevant provisions of the Oklahoma permanent program regulations. ODOM required TBI to eliminate highwalls and spoil piles and to backfill open pits by Mar. 5, 1984, and to establish a permanent vegetative cover by Apr. 16, 1984. As an interim step to establishing permanent vegetative cover, ODOM required TBI to submit a reclamation schedule by Mar. 5, 1984. On Mar. 16, 1984, ODOM issued CO No. 84-3-13 to TBI, in part, for failure to abate these two violations.

been backfilled, regraded topsoiled and revegetated." OSMRE required appellant to eliminate all strip pits and highwalls by backfilling and regrading all spoil materials to redistribute topsoil on regraded areas and to revegetate all disturbed areas by March 15, 1984.

On March 13, 1984, OSMRE issued CO No. 84-3-38-5 to TBI for failure to abate the violation cited in NOV No. 84-3-38-5, incorporating the corrective action and time for abatement therein set forth. Effective July 17, 1984, OSMRE terminated NOV No. 84-3-38-5 and CO No. 84-3-38-5 based on its aerial inspection of the minesite.

On March 5 and April 6, 1984, TBI filed applications for review of, respectively, NOV No. 84-3-38-5 (TU 4-7-R) and CO No. 84-3-38-5 (TU 4-11-R), pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1982). By order dated June 1, 1984, Judge Miller consolidated the two proceedings for purposes of hearing and decision. On August 2, 1984, Judge Miller held a hearing in Tulsa, Oklahoma.

In his February 1985 decision, Judge Miller affirmed issuance of the NOV and CO by OSMRE, holding that OSMRE had properly asserted oversight jurisdiction pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), where appellant had admittedly failed to restore the land to its premining condition and then failed to abate the violation, and where ODOM had not taken appropriate enforcement action following its issuance of an NOV and CO in 1982. Judge Miller noted that "Federal regulations require that reclamation be conducted in a timely manner under 30 CFR § 715.13 and [appellant] admits that from September 1982 until May 1984 the Warner Mine site was unreclaimed" (Decision at 3). Judge Miller concluded that OSMRE was entitled to issue an NOV and CO where ODOM had only engaged in "paper enforcement."

In its statement of reasons for appeal, appellant contends that OSMRE lacked jurisdiction to issue its NOV and CO where the State was enforcing SMCRA under an approved State program. Appellant also argues that OSMRE did not have the jurisdiction to intervene in this matter under section 521(a)(1) of SMCRA, where the State had already taken appropriate action by issuing the NOV's and CO's in 1982 and 1984. Appellant states that these NOV's and CO's had been written "for the same alleged violation" as that cited by OSMRE and that OSMRE intervened before the conclusion of administrative and civil action by the State. Appellant also argues that OSMRE intervention was not justified by any imminent danger of environmental harm and that OSMRE, by not assuming direct Federal enforcement under 30 CFR Part 733 after State action in response to the 10-day notice, was "precluded from issuing any NOV or CO." Finally, appellant argues that, where OSMRE failed to oppose appellant's request for permit revision, 4/ OSMRE is estopped from issuing its NOV and CO.

4/ By letter dated Dec. 5, 1983, TBI formally applied to ODOM for a revision of its State mining permit (No. 305a) with respect to the Warner No. 1 mine, primarily to allow a change in the approved postmining land use from natural pasture to wildlife habitat, in accordance with the wishes of the landowner. This action by TBI was taken almost 1 year after ODOM issued the CO for failure to restore disturbed areas at the Warner No. 1 minesite.

and that OSMRE's action places appellant in double jeopardy and is, therefore unconstitutional. Appellant requests the Board to reverse Judge Miller's February 1985 decision.

Section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1982), provides that the Secretary of the Interior shall order a Federal inspection of a surface coal mining operation where the Secretary has reason to believe a violation of any requirement of SMCRA or any permit condition has occurred and the State, acting as the regulatory authority, "fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure." OSMRE is required to conduct the inspection and "if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate." 30 CFR 843.12(a)(2). A cessation order shall be issued where an operator fails to abate a violation within the time set in the NOV. 30 CFR 843-12(d)(1).

At the time OSMRE issued its NOV and CO, the State of Oklahoma was operating under an approved State program. ^{5/} See 30 CFR 936.10(a). Accordingly, OSMRE was constrained by section 521(a)(1) of SMCRA, and 30 CFR 843.12(a)(2), to issue an NOV and/or CO after a Federal inspection in the absence of an imminent danger after giving the State a 10-day notice and then only where the State had failed to take appropriate action to cause a violation to be corrected or to show good cause for such failure. *Peabody Coal Co. v. OSMRE*, 95 IBLA 204, 94 I.D. 12 (1987); *Thomas J. FitzGerald*, 88 IBLA 24 (1985).

The Office of the Solicitor, on behalf of OSMRE, submits that appellant lacks standing to challenge OSMRE's authority to intervene under section 521(a)(1) of SMCRA. We do not agree. Lack of authority for OSMRE to act is a valid defense and may properly be invoked by an operator subjected to a Federal enforcement action under that statutory provision. The Solicitor seeks to draw same support from 30 CFR 843.17 and the applicable language in the preamble which accompanied promulgation of that regulation. However, the regulation merely precludes vacation of an NOV or CO where OSMRE has failed to issue a 10-day notice or has inspected on the basis of insufficient information. The regulation does not shield an NOV or CO issued by OSMRE under section 521(a)(1) of SMCRA, from any other form of attack, including one directed to whether or not the State regulatory authority had undertaken appropriate action. We, therefore, address the question of whether the State failed to take appropriate action or to offer good cause for its failure to do so.

[1] The question presented by this appeal is whether ODOM's response to Violation No. 3 of OSMRE's 10-day notice was "appropriate action" within

^{5/} That approval was rescinded and OSMRE assumed direct responsibility for enforcement of the State program effective Apr. 30, 1984, pursuant to section 521(b) of SMCRA, *supra*, and 30 CFR Part 733. See 49 FR 14688 (Apr. 12, 1984). Effective Oct. 21 1987, full regulatory authority was returned to the State. 52 FR 36922 (Oct. 2. 1987).

the meaning of section 521(a)(1) of SMCRA, 30 U.S.CO § 1271(a)(1) (1982), and 30 CFR 842.11(b)(1)(ii)(B).

Section 521(a)(1) provides in relevant part:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists_or the State regulatory authority fails within 10 days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

30 U.S.C. § 1271(a)(1) (1982).

The pertinent provision of 30 CFR 842.11(b)(1)(ii)(B) is similar to section 521, providing that a Federal inspection shall be conducted when

[t]he authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction * * * .

30 CFR 842.11(b)(1)(ii)(B).

ODOM's response to violation No. 3 of the 10-day notice was clearly not appropriate action. It responded that it had issued a cessation order for the same violation over 2 years earlier. In *Turner Bothers Inc. v. OSMRE*, 92 IBLA 320 (1986), appeal filed, *Turner Brothers, Inc. v. OSMRE*, No. 86-380-C (E.D. Okla. July 28, 1986), we held that OSMRE had authority to issue an NOV for a violation discovered during an oversight inspection, despite the fact that ODOM had, in fact, issued an NOV in response to OSMRE's 10-day notice that a violation existed. We noted that ODOM had issued an NOV for the same violation over a year earlier, and concluded that since ODOM had been aware of the problem for an extended period of time and had been unsuccessful in securing abatement, issuance of a second State NOV did not amount to appropriate action to ensure abatement. *Id.* at 324.

In this case ODOM was well aware that appellant had failed to restore all disturbed areas in a timely manner, yet its response was that it had addressed that condition in previous enforcement actions. However, appellant had not abated the conditions, even though the State NOV issued in September

1982 required restoration of the land to its premining condition by October 3, 1982. OSMRE correctly points out that the State could have instituted a civil action for injunctive relief under State law. See Okla. State Ann. tit. 45, § 780(A) (West 1979); Oklahoma Coal Reclamation Regulation § 843-19. Such a suit may have constituted "appropriate action." 6/

We recognize that ODOM did issue an NOV and CO in response to the 10-day notice which were directed to the violations identified as Nos. 5 and 13 in the 10-day notice. The abatement requirements for those violations in the State NOV were similar to the abatement requirements outlined by OSMRE in the NOV at issue in this appeal--both required elimination of highwalls and spoil piles and to backfill open pits to achieve approximate original contour and to establish permanent vegetative cover.

Nevertheless, we note that section 515(b) of SMCRA, 30 U.S.C. § 1265(b) (1982), which sets forth the permanent program performance standards, distinguishes between, on the one hand, restoring land to its premining condition (30 U.S.C. § 1265(b)(2) (1982)) and, on the other hand, eliminating all highwalls, spoil piles, and depressions by backfilling and grading in order to achieve approximate original contour (30 U.S.C. § 1265(b)(3) (1982)), restoring topsoil (30 U.S.C. § 1265(b)(6) (1982)), and establishing a permanent vegetative cover (30 U.S.C. § 1265(b)(19) (1982)). Thus, OSMRE's NOV was not, in fact, duplicative of ODOM's 1984 NOV.

Appellant argues that OSMRE was estopped from issuing its NOV and CO where OSMRE failed to object to appellant's request for a revision of its permit. Appellant states that it "relied upon OSM's inaction * * * to [its] detriment." Despite any knowledge of or even active participation in the permit revision process on the part of OSMRE, as appellant asserts, there simply has been no demonstrated affirmative misconduct, i.e., an affirmative misrepresentation or concealment of a material fact by OSMRE, which would justify invocation of the doctrine of equitable estoppel. See *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *Frederick W. Lowey*, 76 IBLA 195 (1983). Appellant can point to no statement by OSMRE prior to February 8, 1984, that appellant's failure to restore the Warner minesite to its premining condition was not a violation of section 515(b) of SMCRA, and the State program, or that OSMRE otherwise would allow appellant to continue to not restore the site. The fact that OSMRE may have refrained from and, in any case, delayed taking any action against appellant will not itself create an estoppel. See *Charles J. Frank*, 90 IBLA 33 (1985). See also 43 CFR 1810.3(a).

Therefore, we conclude that OSMRE properly issued NOV No. 84-3-38-5 and CO No. 84-3-38-5 and that the February 1985 decision of Judge Miller should be affirmed.

6/ The record in this case, as well as that in *Turner Brothers Inc. v. OSMRE*, 92 IBLA 320 (1986), should be contrasted with the facts in *Turner Brothers, Inc. v. OSMRE*, 99 IBLA 87 (1987), where the Board reviewed on-going enforcement activities by ODOM and held that the State response was appropriate.

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.

Wm. Philip Horton
Chief Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge