

PINEVILLE PROPERTIES CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-735

Decided September 13, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller, upholding issuance of cessation order No. 81-II-69-9.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally

Under 30 CFR 722.12(d), OSMRE does not have authority to extend the abatement period in a notice of violation beyond 90 days, except in certain enumerated circumstances. Upon expiration of the 90-day period, OSMRE properly issues a CO if the permittee has taken no action to abate the violation.

2. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Abatement: Remedial Actions--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees--Surface Mining Control and Reclamation Act of 1977: Spoil and Mine Wastes: Generally

Where, during the interim regulatory program, a permittee is issued a cessation order for failing to certify a French drain as required by 30 CFR 715.15(a) and the permit conditions based thereon, and the permittee

defends the failure to do so on the basis that drainage flowing into the French drain did not emanate from its own excess spoil fill, but from spoil placed on the area by a previous operator, the cessation order will be upheld when the evidence shows that the operations had an adverse physical impact on the lands.

APPEARANCES: David O. Smith, Esq., and Marcia A. Smith, Esq., Corbin, Kentucky, for appellants; Bruce T. Hill, Esq., Office of the Field Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Pineville Properties Corporation (Pineville) has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated June 3, 1985, affirming issuance of cessation order (CO) No. 81-II-69-9. The controversy in this appeal focuses upon a French or rock core drain in Pineville's permit area, specifically French drain No. 3, which carries water beneath a previously mined area to the other side of appellant's minesite so that it drains into Turkey Creek. Without this drain, drainage would flow down the slope into Goodin Branch.

Responding to citizens reports concerning flash flooding and blasting damage, Inspector Anthony Gaw inspected Pineville's minesite on June 10, 1981, and discovered that a diversion ditch had breached above French drain No. 3. Debris and sediment had caused that drain to become blocked.

Inspector Gaw returned with OSMRE engineer Terry House on June 12, 1981. On June 17, 1981, Gaw issued notice of violation (NOV) 81-2-69-12 setting forth two violations. 1/ The second violation, which is the focus of this appeal, concerned the operator's failure "to certify that French drain (rock core) #3 has been constructed as designed in the approved method of operation." The notice scheduled the time for abatement on August 18, 1981, at 8 a.m. The abatement date for both violations was later extended until September 16, 1981.

On September 24, Inspector Gaw returned to the site, terminated violation No. 1, but discovered that violation No. 2 had not been abated. He modified the NOV and ordered corrective action for violation No. 2 as follows:

Operator needs to provide a certification on French drain #3 and resubmit a permit revision to the [regulatory authority] that will show actual design of how the rock core was constructed. French drain # 3 wasn't constructed as designed in the approved method of

1/ The first violation cited was appellant's "failure to construct diversion ditches which will accommodate the design precipitation event (100 yr.) as approved by the regulatory authority per detail and plan drawing within the subject's method of operation." This violation is not at issue in this appeal.

operation. The drain was built with a drop entrance, instead of a side entrance.

Nelson L. Mason, Pineville's engineer, told Inspector Gaw that he would prepare the documents necessary to abate the violation, and would deliver those documents to OSMRE's office by the end of the following week. Inspector Gaw noted that he would expect to receive such certification (Tr. 27). Because violation No. 2 of the NOV had not been abated by October 30, 1981, about a month and a half after the end of the original 90 day abatement period, Inspector Gaw issued CO No. 81-II-69-9. On November 4, 1981, Pineville's superintendent delivered the required certification to OSMRE, and the CO was then terminated (Tr. 108; Ex. R-11, R-12).

Pineville filed an application for review of the CO pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1275 (1982). Judge Miller convened a hearing on the matter on February 27, 1985. In his June 3, 1985, decision, Judge Miller summarized the factual background and the evidence as follows:

Evidence presented at the hearing included the testimony of witnesses and the introduction of documents and photographs. These exhibits were marked Respondent's No. 1 through No. 13 and Applicant's No. 1. Herschel A. Gaw, OSM inspector, inspected the Bell County minesite of the applicant (state permit number 007-0021) on June 10 and 12, 1981. Inspector Gaw identified Exhibit R-13, a copy of his initial inspection report. He testified that he had found that a diversion ditch had breached above a rock core drain (french drain no. 3). The resulting sedimentation had blocked the entrance to the drain (Tr. 16). He decided to return to the site with an engineer in order to determine if the drain was in compliance with the permit. There appeared to him to be drainage from an excess spoil fill into french drain no. 3 (Tr. 21). Inspector Gaw issued Notice of Violation No. 81-2-69-12 because french drain no. 3 was not constructed according to the original permit design. This drain was a drop entrance instead of a side entrance as was originally proposed (Tr. 19). The original abatement date was extended by Inspector Gaw beyond the ninety day statutory limitation. On cross-examination Inspector Gaw admitted that his modification of the notice of violation dated September 24, 1981, did not state a final abatement date (Exh. R-9). His subsequent inspection of October 29, 1981, was the basis for Cessation Order No. 81-II-69-9. He agreed that according to the permit map, french drain no. 3 is located beneath an area that has been returned to its approximate original contour. He did not know if the area designated for topsoil storage had ever been utilized.

Mr. Terry W. House, OSM engineer, testified that he had accompanied Inspector Gaw on his June 12th inspection. He determined that a drop drain had been built and not a side drain as the permit specified (Tr. 66). Mr. House identified Exhibit R-3, the topographical map of the area and Exhibit R-11, the permit revision. Mr. House testified that the topographical map showed the

drainage from the adjacent excess spoil area flowing in a northerly direction into Turkey Creek (Tr. 67). However, he testified that the permit revision shows drainage from the excess spoil fill area flowing south by west into the diversion ditches that empty into french drain no. 3 (Tr. 68, Exh. R-11). Mr. House testified that the french drain does not have to run under an excess spoil fill in order to be associated with it. Mr. House admitted on cross-examination that he did not know the original contour of the area.

Mr. Kenneth West, mine supervisor for the applicant, testified that the ridge above french drain no. 3 is not part of the excess spoil fill drainage system. The diversion ditch seen in photographic exhibit R-6 is an old eroded trail, not a diversion ditch according to Mr. West (Tr. 97). The ridge separates the Stray Seven seam mined by the applicant and the excess spoil fill area (Tr. 98). The drainage into french drain no. 3 is from the old eroded trail and the natural contour of Pine Mountain as shown in Exhibit R-6 according to Mr. West (Tr. 100). Mr. West emphatically stated that the drainage from the excess spoil fill area would have to run uphill in order to enter french drain no. 3. He testified that the drainage shown in Exhibit R-11 was from an area returned to approximate original contour. Mr. West also testified that Inspector Gaw gave him no deadline for certification (Tr. 104). Inspector Gaw allowed the applicant to backdate the certification. Mr. West had the certification in his office on October 15th and had expected Inspector Gaw to come and pick it up.

Nelson L. Mason, landscape architect, testified for the applicant. Mr. Mason is a principle of Surface Mining Engineers (SME), the firm that prepared the permit package including the topographical map, Exhibit R-3. He testified that french drain no. 3 was never designed to handle drainage from the excess spoil fill area and as far as he could tell it never did. He stated that french drain no. 3 could not drain the excess spoil fill area unless water ran uphill. He pointed out that the state did not require certification of this drain. He did not remember OSM stating a date by which certification was required. He testified that certification was complete by the middle of October. Mr. Mason testified that Mr. House had incorrectly marked bench storage area no. 4 as being on the map in Exhibit R-11. The map in Exhibit R-11 (the permit revision) does not indicate drainage from the excess spoil fill area but french drain no. 3 drains the haul road above it according to Mr. Mason. The area mistakenly marked by Mr. House was land returned to approximate original contour according to Mr. Mason.

(Decision at 2-3). Based upon this evidence, Judge Miller ruled that OSMRE established a prima facie case that Pineville had violated 30 CFR 715.15(a), that Pineville had not carried its ultimate burden of persuasion that there was no violation of that regulation, and that OSMRE properly issued the CO.

In its statement of reasons (SOR), Pineville presents four arguments as to why Judge Miller's ruling is in error. First, Pineville contends that regardless of whether or not OSMRE properly issued violation 2 of NOV No. 81-2-69-12, issuance of the CO was improper because "the Modification of Abatement dated September 24, 1981, contains no abatement date and Pineville was not otherwise verbally advised of a date, after which it would be subject to a Cessation Order \* \* \*" (SOR at 10). According to Pineville, Inspector Gaw "should have vacated violation 2 of NOV 81-2-69-12 and issued a new notice of violation setting forth the proper abatement and set whatever abatement date he believed was reasonable. Had that been done Pineville would have had notice of when a cessation order could be issued for its failure to abate" (SOR at 11).

Secondly, Pineville argues that "it carried the ultimate burden of persuasion [under 43 CFR 4.1171(b)] as to this fact issue, of whether drainage from excess spoil disposal area #4 flowed into french drain #3" (Sor at 12). According to Pineville, OSMRE "never refuted Pineville's testimony that drainage could not flow uphill over the ridge to reach french drain #3." Id.

Third, Pineville maintains that "[i]f no drainage from excess spoil disposal area #4 flowed into French drain #3, 30 CFR 715.15(a) does not require that French drain #3 be certified" (SOR at 13-14) (emphasis in original). In its post-hearing brief, filed with Judge Miller, OSMRE stated that the sloping area depicted in Photographic Exhibit R-6 was excess spoil, from which drainage "would naturally flow down to a diversion ditch that empties into french drain #3" (OSMRE's Post-Hearing Brief at 5). Pineville asserts that this "spoil pile" had been left by Shoker & Shoker, a previous operator, and that Pineville itself had not placed any of its excess spoil on this area. Pineville concludes that "the fact that the ridge area may have been abandoned spoil from a previous operation does not make it an excess spoil disposal area, within the meaning of 30 CFR 715.15(a), with regard to Pineville's operations" (SOR at 15).

Finally, Pineville argues that the certification requirement of 30 CFR 715.15(a) does not apply to French drain No. 3, since "French drain #3 was not physically a part of excess spoil disposal fill #4 nor never designed as a part thereof \* \* \*" (SOR at 15). In Pineville's view, even if drainage from excess spoil area #4 flowed into French drain No. 3, "this may indicate that the certified drainage systems for excess spoil disposal fill #4 were not working properly or that they were not constructed as designed or give rise to some other type of violation \* \* \*." Id. However, Pineville argues that this fact would not render French drain No. 3 subject to 30 CFR 715.15(a) since it was not designed to handle drainage from spoil disposal fill #4.

[1] We agree, essentially, with Judge Miller's disposition of Pineville's argument that the CO is invalid because OSMRE's modification order dated September 24, 1981, did not specify an abatement date. In his decision, Judge Miller reasoned as follows:

The applicant asserts that OSM was arbitrary in its issuance of the cessation order. OSM had already allowed the applicant

more than the statutory limit of ninety days to take remedial action. The applicant asserts that OSM was in error with respect to the type of certification required and should have issued a new notice of violation rather than a modification. If the applicant had been so confused by the original requirement of certification then it was applicant's burden to respond to the original notice of violation. OSM's leniency in dealing with the applicant cannot now be asserted as estopping OSM from enforcing the notice of violation with a cessation order. OSM has acted in good faith in allowing the applicant as much time as possible to remedy the situation. Cessation Order No. 81-II-69-9 was properly issued for applicant's failure to abate Notice of Violation No. 81-2-69-12.

(Decision at 3-4).

OSMRE correctly points out that the abatement measure spelled out in the June 12, 1981, NOV was "clear and unambiguous" (OSMRE Reply Brief at 4). As OSMRE emphasizes, "[t]here can be no doubt that Pineville Properties knew on the date of the service of the underlying NOV, June 17, that they could not certify French drain No. 3 as designed because it was constructed differently than designed" (OSMRE Reply Brief at 5). The drain was designed in the permit application to have a side entrance, when in fact it was constructed to have a drop entrance (Ex. R-9). OSMRE makes the following point which places its September 24, 1981, modification order in perspective:

Appellant had a choice; it could have reconstructed the drain to meet the original design. Or, it could have changed the design drawings to meet the actual construction. Clearly, the latter option was the simplest, yet the Appellant chose to do neither until the issuance of the cessation order four and one half months later.

(OSMRE Reply Brief at 5). In our view, Inspector Gaw's modification order does not reflect a meaningful change from the abatement measure set forth in the June 20, 1981, NOV. Rather, in OSMRE's words, he "issued a modification after the end of the 90 day abatement period that clarified the options available to the Appellant to abate the violation and avoid the issuance of a cessation order." *Id.*

In Universal Coal Co., 3 IBSMA 218, 88 I.D. 672 (1981), the Board considered the propriety of OSMRE's modification of an NOV which had been written 189 days before. In the modification, OSMRE noted that the abatement work specified in the NOV had been completed, and then ordered abatement work not previously specified. The Board construed section 521(a)(3) of SMCRA, 30 U.S.C. | 1271(a)(3) (1982), and 30 CFR 722.12(d) as "providing no authority to extend an abatement period beyond 90 days \* \* \*." 3 IBSMA at 224, 88 I.D. at 675. Thus, the Board ruled that since Universal had already completed the abatement work specified in the original NOV, OSMRE should have issued a new NOV requiring the abatement set out in the modification. However, OSMRE was without authority to extend the period for abatement of the violation cited in the NOV beyond 90 days.

In the instant case, Inspector Gaw issued the original NOV on June 17, 1981, and 90 days expired without Pineville having taken any action to abate the violation. Under section 521(a)(3) of SMCRA and 30 CFR 722.12(d), Inspector Gaw lacked authority to extend the abatement period beyond September 16, 1981, in the absence of circumstances warranting an extension as set forth in 30 CFR 722.12(e). 2/ Even if we were to rule that Inspector Gaw's modification was of no effect under Universal, on the basis that it imposed new and different corrective measures after the 90-day period for abatement had expired, we would nevertheless have to uphold the CO, since Pineville had taken no action to abate the violation cited in the June 17, NOV. The fallacy in Pineville's argument that the modification should have contained an abatement date is obvious: any abatement date stated in the modification order would have been of no effect, whether or not the modification imposed new abatement conditions, since OSMRE was without authority to further extend the abatement period. Since Pineville had taken no action to abate the violation by September 16, 1981, Inspector Gaw should have issued the CO pursuant to 30 CFR 722.13, rather than issuing the modification order. 3/

[2] Pineville contends that Judge Miller erred in concluding that Pineville failed to carry its ultimate burden of persuasion that there was no violation of 30 CFR 715.15(a). Under that regulation, Pineville must meet the following standards in disposing of excess spoil:

Spoil not required to achieve the approximate original contour within the area where overburden has been removed shall be hauled or conveyed to and placed in designated disposal areas within a permit area, if the disposal areas are authorized for such purposes in the approved permit application in accordance with paragraphs (a) through (d) of this section.

30 CFR 715.15(a). Subsection (a)(2) of 30 CFR 715.15 provides that "[t]he fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the regulatory authority

2/ The regulations in effect at the time of the NOV precluded any extension of the 90-day period. 30 CFR 722.12(d) (1981). During the abatement period, the regulations were amended to allow some extension, but not under the circumstances of this case. 30 CFR 722.12(d) (1982).

3/ Regulation 30 CFR 722.13 provides as follows:

"An authorized representative of the Secretary shall order cessation of surface coal mining and reclamation operations, or the portion relevant to the violation, when a notice of violation has been issued under | 722.12 of this part and the permittee fails to abate the violation within the time originally fixed or subsequently extended. In a cessation order issued under this section, the authorized representative shall impose affirmative obligations to abate the violation in the manner provided in | 722.11 of this part. Reclamation operations not directly the subject of the order or affirmative obligation shall continue during any cessation order. A cessation order issued under this section shall be terminated as provided in | 722.11 of this part."

(Emphasis added.)

\* \* \*." Subsection (a)(10) of 30 CFR 715.15 imposes the following inspection and certification standards:

The fill shall be inspected for stability by a registered engineer or other qualified professional specialist experienced in the construction of earth and rock fill embankments at least quarterly throughout construction and during the following critical construction periods: \* \* \* (ii) Placement of under drainage systems \* \* \*. The registered engineer or other qualified professional specialists shall provide to the regulatory authority a certified report within two weeks after each inspection that the fill has been constructed as specified in the design approved by the regulatory authority.

We agree with Judge Miller, based upon the evidence summarized in his decision, that OSMRE presented a prima facie case that Pineville was in violation of 30 CFR 715.15(a) by having failed to certify that it had constructed French drain No. 3 as designed in its permit application. Judge Miller further concluded that Pineville failed to carry its ultimate burden of persuasion that there was no violation of 30 CFR 715.15(a). His evaluation of the evidence is set forth below:

The applicant has attempted to carry its burden of persuasion through the testimony of its witnesses, Mr. West, mine supervisor and Mr. Nelson, permit architect. Both witnesses stated that drainage from the excess spoil fill area could not physically enter french drain no. 3 unless "water runs uphill." They testified that french drain no. 3 is not designed to handle drainage from the excess spoil fill area and never did in their opinion. They stated that it is their belief that the sedimentation blocking the entrance to french drain no. 3 from the excess spoil fill area was an unutilized topsoil storage area as marked on the topographical map.

The applicant asserts that even if drainage from the excess spoil fill area had entered french drain no. 3 it was not by design and therefore the applicant had not violated these regulations. This argument does not overcome the ultimate burden of persuasion that must be sustained by the applicant. The testimony of the witnesses from OSM and the applicant has been divergent. However, the topographical map, Exhibit R-3 and the photographs, Exh. R-4 through R-7 demonstrate that this area surrounding french drain no. 3 is a runoff collection point. The photographs also clearly show that this drain had a drop entrance contrary to the permit plan. The applicant has not overcome OSM's prima facie case by a preponderance of the evidence as required by 43 C.F.R. | 4.1171(b). The applicant has failed to present evidence of a more substantial nature or higher probative value with which the court could rely on to ascertain the facts. The applicant has not carried its ultimate burden of persuasion therefore the cessation order must be sustained as validly issued.

(Decision at 4-5).

Pineville argues that "the preponderance of the evidence establishes that drainage from excess spoil disposal area #4 did not, indeed could not, flow into french drain #3" (SOR at 11-12). Pineville states that "French drain #3 was located on an area that had been previously mined, that was redisturbed and remined by Pineville, that was returned to approximate original contour, and that was located at a distance of approximately 130 feet from the nearest part of excess spoil disposal area #4." Id. at 5 (emphasis added). In its SOR, Pineville describes the location of excess spoil disposal No. 4 in relation to French drain No. 3 as follows:

In Pineville's case-in-chief Kenneth West, mine superintendent, and Leroy Mason, engineer, both testified unequivocally not only that no drainage from excess spoil disposal area #4 was diverted into French drain #3 by the subject ditch but that it would be physically impossible for any drainage from excess spoil disposal area #4 to reach French drain #3 because between excess spoil disposal area #4 and French drain #3 there was a ridge on the top of which had been located a road utilized by Pineville for access to the excess spoil disposal area #4. Messrs. West and Mason testified that it would be impossible for drainage from excess spoil disposal area #4 to go up the ridge, over the road, and back down the other side via the ditch into French drain #3. \* \* \*

Pineville also presented testimony that the subject area had been mined previously by Shoker & Shoker Coal Company, which had left the land unreclaimed, and that French drain #3 was located at the edge of a pit that had been remined and then backfilled and graded by Pineville and that excess spoil disposal area #4 was located in another pit that Pineville had filled with excess spoil generated by its mining operations. (Tr., West, p. 93; Tr., Mason, p. 147). Pineville further presented testimony that in the area in between the two pits Shoker & Shoker had left piles of spoil, which Pineville graded and contoured into a ridge and had used as an access road. (Tr., West, pp. 115, 119, 124; Tr., Mason, pp. 131-132). [Emphasis added.]

(SOR at 7-8).

Pineville argues that because drainage from excess spoil disposal area No. 4 could not reach French drain No. 3 it was not required to certify the drain in accordance with 30 CFR 715.15(a). This argument reflects Pineville's assumption that it was not required to certify French drain No. 3 because the drainage which actually flowed into the drain emanated from the excess spoil pile left behind by Shoker & Shoker, even though Pineville states that it "redisturbed and remined" the area. Pineville's assumption is erroneous.

The Department's initial program regulations "apply to operations \* \* \* on lands from which the coal has not yet been removed and to any other lands used, disturbed or redisturbed in connection with or to facilitate mining or to comply with the requirements of the Act or these regulations." 30 CFR 710.11(d)(1) (emphasis added). The initial regulations do not define

"disturbed," but the term "disturbed area" is defined at 30 CFR 710.5 to mean "those lands that have been affected by surface coal mining and reclamation operations." In Cedar Coal Co., 1 IBSMA 145, 86 I.D. 250 (1979), the Board ruled, inter alia, that to be subject to SMCRA and the regulations during the initial program, the area in question must have been "disturbed," i.e., the operator has to engage in activities which have an "adverse physical impact" on that area. In Bernos Coal Co. v. OSMRE, 97 IBLA 285, 94 I.D. 181 (1987), the Board noted that the term "adverse physical impact" is not defined in the interim program regulations. In Bernos, the appellants argued that they were excused from the backfilling and grading requirements of 30 CFR 715.14, since their remaining operations did not result in an adverse physical impact upon the permit area. The Board disagreed, noting that appellants' operations had resulted in erosion of the remined area, and concluded that "areas cited by OSM in issuing the NOV and CO were 'disturbed' by petitioners in conducting their operations within the rationale of Cedar Coal, since their operations resulted in an 'adverse physical impact.'" 97 IBLA at 309, 94 I.D. at 195. Cf. Darmac Coal Co., 74 IBLA 100 (1983) (OSMRE did not show that Darmac's operations caused an adverse physical impact).

Pineville's mine superintendent, Kenneth West, testified that Pineville remined the area. (Tr. at 93-94). Shoker & Shoker left piles of spoil which Pineville "graded and contoured into a ridge and \* \* \* used as an access road" (SOR at 7-8). Pineville asserts that it had returned the spoil piles left by Shoker & Shoker to approximate original contour, so that the spoil piles were not "excess spoil piles" subject to 30 CFR 715.15(a) (Pineville's Reply Brief at 3-4). However, Nelson Mason, Pineville's landscape architect, testified that the ridge area was "maybe 10-15 feet above what would be, probably original contour" (Tr. 146). Moreover, Mason testified that "this haul road [was not] to be left as part of the return of the approximate original contour \* \* \*" (Tr. 132). Photographic Exhibit R-6 shows the ridge area in relation to French drain No. 3, and beyond, excess spoil disposal area No. 4. The ridge area has not been vegetated and erosion is apparent from the picture. By Pineville's own admission, drainage flowed down the side of the ridge composed of excess spoil left by Shoker & Shoker and into French drain No. 3. (Tr. 100, 113).

Unquestionably, Pineville's operations had an "adverse physical impact" upon the area previously mined by Shoker & Shoker, under the standards of Cedar Coal Co., supra, Darmac Coal Co., supra, and Bernos Coal Co. v. OSMRE, supra. Thus, Pineville's operations on this area were subject to the general performance standards set forth in 30 CFR Part 715. Pineville used excess spoil left by Shoker & Shoker to create a haul road, and drainage from that "ridge" or haul road blocked French drain No. 3, which had not been certified as required by 30 CFR 715.15(a). We conclude that, given these facts, Pineville was required to comply with 30 CFR 715.15(a), whether or not drainage from excess spoil disposal area No. 4 reached the French drain.

We conclude that Judge Miller properly ruled that Pineville failed to carry its ultimate burden of persuasion that there was no violation of 30 CFR 715.15(a), and accordingly, we uphold OSMRE's issuance of CO No. 81-II-69-9.

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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.

Gail M. Frazier  
Administrative Judge

I concur:

C. Randall Grant, Jr.  
Administrative Judge

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