

FRESA CONSTRUCTION CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-590

Decided December 20, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying appellant's application for review of and temporary relief from a cessation order. CO No. 87-11-018-01.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A person challenging OSMRE's jurisdiction to issue a cessation order on the grounds that its mining activities fall within the 2-acre exemption under the Surface Mining Control and Reclamation Act of 1977, bears the burden of affirmatively demonstrating entitlement to the exemption.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State

OSMRE has jurisdiction to issue a cessation order without giving the state regulatory authority 10 days notice when a person is conducting surface mining operations under a notice of intent to prospect.

3. Surface Mining Control and Reclamation Act of 1977: Coal Exploration Permits: Generally

Coal may not be extracted for commercial sale under a notice of intent to prospect, unless the sale is to test for coal properties necessary for development of a mine, for which a surface mining permit application will later be submitted.

4. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally

Because conducting surface mining operations without a surface mining permit is specifically defined at 30 CFR 843.11(a)(2) to constitute a condition or practice that causes or can reasonably be expected to cause significant, imminent environmental harm, OSMRE may issue a cessation order solely on the grounds that surface mining operations are being conducted under a notice of intent to prospect.

APPEARANCES: James N. Riley, Esq., and David J. Romano, Esq., Clarksburg, West Virginia, for Fresa Construction Company, Inc.; Wayne A. Babcock, Esq., U.S. Department of the Interior, Office of the Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Steve Barclay, Assistant Attorney General, Environment and Energy Division, for the West Virginia Department of Energy, intervenor.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Fresa Construction Company, Inc. (appellant), appeals from a June 1, 1987, decision issued by Administrative Law Judge Joseph E. McGuire, rejecting its application for review of and temporary relief from Cessation Order (CO) No. 87-11-018-01. The CO was issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on April 17, 1987, pursuant to

the provisions of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). ^{1/} The West Virginia Department of Energy (WVDOE) has intervened in the appeal, opposing the issuance of the CO.

The facts in this matter were developed during an administrative hearing held by Judge McGuire on May 28, 1987, in Morgantown, West Virginia. At the hearing, Michael R. Fresa (Fresa), president and owner of appellant, testified that WVDOE issued a prospecting permit to appellant in 1983 and a surface mining permit in 1984 covering a 37-acre tract of land. The area encompassed by this tract had previously been deep mined by Consolidation Coal Company, from whom appellant acquired the mineral rights. Beginning in 1984 and continuing through the time of the hearing, appellant conducted a surface mining operation on the 37-acre tract. It holds the mineral rights, however, to a much more extensive area.

On December 30, 1986, a representative of Jno. McCall (McCall), a coal broker located in Baltimore, Maryland, sent a telex message to appellant stating: "Confirming near-term requirement for unit train of 10 A, 2.5 S, 3,000 BTU for export to consumers in Belgium and Portugal. Phil Lehr from Jno. McCall Coal Export Corp" (Exh. C). ^{2/} According to testimony at the hearing, the telex set forth a request for shipment of a unit train of coal, i.e., 7,000 tons of coal, with 10 percent or less ash, 2.5 percent or less sulphur, and, after correcting an obvious error, 13,000 Btu.

^{1/} All further citations to the United States Code are to the 1982 edition.

^{2/} All exhibits referred to in this decision are exhibits admitted into evidence at the hearing before Judge McGuire.

On January 2, 1987, appellant filed with WVDOE a Notice of Intent to Prospect covering 1.3 acres of land adjacent to its 37-acre permitted site (Exh. 6). The notice indicated that approximately 7,000 tons of coal would be removed from the site "for a coal test order." Operations were scheduled to begin on January 17, 1987, with the area regraded by April 17, 1987. Because of the amount of coal appellant proposed to remove, it was required to describe why an amount in excess of 250 tons was necessary to assess the coal resources or make feasibility studies, and to state how the coal would be used. Appellant stated: "As further detailed on the attached letter, a market for this coal might be established, if a shipment of 7,000 tons can be mined and delivered quickly. It is for this reason that we need to prospect and produce more than the normal 250 ton limit" (Exh. G at item 13). The attached letter was the telex described above.

WVDOE approved the Notice of Intent to Prospect on January 21, 1987 (Exh. 6). A copy of appellant's approved Notice of Intent to Prospect was sent to OSMRE in the regular course of business. Because of an OSMRE study which indicated abuse of prospecting approvals, OSMRE had begun to closely monitor all prospecting approvals. In particular, OSMRE was concerned that applicants were not being required to describe how they would control run-off and sedimentation or show why they needed amounts of coal in excess of 250 tons for test purposes, and that prospecting approvals were in fact being used to circumvent the requirements of SMCRA (Tr. 60).

OSMRE inspector C. Donald Summers testified that after receiving a copy of appellant's prospecting approval, he inspected the site on March 24, 1987. No operations had begun. On April 14, 1987, he returned to the site

and observed that coal was being removed, the operation had created a 50 to 60-foot highwall, operations were being conducted within 300 feet of an estimated 33 homes and 4 other buildings and within 100 feet of a public road, and the existence of boreholes indicated blasting had occurred (Tr. 84, 89-91). ^{3/} He testified that there were no drainage controls and spoil was being stored on the adjacent 37-acre permitted site (Tr. 90).

Summers attempted to determine whether the coal was being removed for a test burn as stated in the prospecting approval. The site supervisor indicated the coal would be sold to the P.H. Gladfelter Paper Company (Tr. 97). ^{4/} Summers contacted McCall, who had sent appellant the telex, and spoke to an unidentified person who, according to Summers, did not give a "straight answer" with regard to the intended use of the coal, except to say that McCall purchased coal or made contracts to purchase coal for buyers (Tr. 118). Summers also contacted Gladfelter, and was informed that it purchased coal through McCall and did not purchase coal for test burns (Tr. 97).

OSMRE officials determined that appellant should be issued a CO for mining without a valid surface mining permit. OSMRE contacted WVDOE, informed officials there of its position, and asked them if they would issue a CO. WVDOE apparently declined to issue a CO. ^{5/} OSMRE then determined to

^{3/} Summers further indicated that an individual present at the site stated he was there to monitor blasting activities (Tr. 91).

^{4/} Other testimony showed that coal from the 37-acre permitted site had been sold to Gladfelter.

^{5/} OSMRE did not call as a witness its official who contacted WVDOE. Instead, testimony concerning the telephone call to WVDOE was presented through other witnesses.

issue its own CO. Summers, accompanied by another OSMRE official, served the CO on April 17, 1987.

The CO, citing section 22A-3-8 of the West Virginia Surface Mining and Reclamation Act, section 521(a)(2) of SMCRA (30 U.S.C. | 1271(a)(2)), 30 CFR 773.11(a), and 30 CFR 843.11(a)(2), provided: "The operator is conducting surface coal mining operations on a Notice of Intent to Prospect approval, without first obtaining a valid surface coal mining permit from the state regulatory authority. The area is adjacent to surface mining permit S-2-84 in the same coal seam. Coal is being sold commercially" (Exh. G). The CO required the operator to "[i]mmediately cease all surface coal mining operations. Reclaim all disturbed area by 8:00 a.m. April 30, 1987; or obtain a valid surface coal mining permit from the State Regulatory Authority by 8:00 AM May 17, 1987" (id.).

Appellant requested and was granted an informal minesite hearing, which was held on April 24, 1987. Appellant informed OSMRE that McCall had refused to accept delivery of the coal, which it had instead stockpiled at its nearby tipple. OSMRE amended the CO to delete the statement that the coal was being sold commercially, and to give appellant an extension of time to reclaim the land. No other relief was granted.

On May 18, 1987, appellant filed with the Hearings Division, Office of Hearings and Appeals, a Motion to Dismiss, Application for Review, and Motion for Temporary Relief from enforcement provisions of the CO. The administrative hearing discussed above was scheduled and held by Judge McGuire. Prior to taking evidence on the Motion for Temporary Relief and

Application for Review, Judge McGuire denied appellant's Motion to Dismiss. At the conclusion of the hearing, Judge McGuire denied appellant's Motion for Temporary Relief. Appellant immediately sought temporary relief through the United States District Court for the Northern District of West Virginia. On June 19, 1987, the district court approved a consent order which essentially granted appellant temporary relief and permitted it to remove a block of 250-400 tons of coal, which constituted the only coal remaining on the 1.3-acre site (Exh. I).

In his June 1, 1987, decision, Judge McGuire identified the issue in the case as whether OSMRE properly issued CO No. 87-11-018-01. He concluded that OSMRE established a prima facie case that appellant violated 30 U.S.C. | 1271(a)(2) by having conducted surface coal mining operations without first obtaining a surface coal mining permit from WVDOE, and that appellant failed to carry the ultimate burden of persuasion of showing that the order was not properly issued. Judge McGuire determined that appellant, in responding to an order for coal in which time was of the essence, made a business decision to obtain the coal under a Notice of Intent to Prospect rather than pursuant to a surface mining permit, the processing time and expense of which were considerably greater.

The respective burdens placed on the parties in proceedings reviewing the issuance of a notice of violation or CO under SMCRA were set forth in Race Fork Coal Corp. v. OSMRE, 84 IBLA 383, 388-89, 92 I.D. 68, 71 (1985):

In administrative review proceedings under the Act, this Department has held consistently that one who contests OSM[RE] jurisdiction must state and prove as an affirmative defense the

grounds upon which the claim is based. Sam Blankenship, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); Jewell Smokeless Coal Corp., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); Daniel Brothers Coal Co., 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). OSM[RE] carries the initial burden of establishing a prima facie case as to the validity of the notice or order. 43 CFR 4.1171(a). OSM[RE] has established a prima facie case where evidence sufficient to establish essential facts will remain sufficient if uncontradicted. Sufficient evidence justifies but does not compel a finding in favor of the one presenting it. Belva Coal Co., 3 IBSMA 83, 88 I.D. 448 (1981); James Moore, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979). [6/] OSM[RE]'s initial burden is limited to a prima facie showing that the one named in the [notice of violation] or cessation order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Such a showing would establish an activity that falls within the definition of surface coal mining operations in 30 U.S.C. | 1291(28) [1982], which caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM[RE] as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the applicant for review, under 43 CFR 4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether this activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM[RE] jurisdiction.

Thus, whether appellant challenges either OSMRE jurisdiction on the basis of a claimed exemption, or the merits of OSMRE's case against it, OSMRE bears the burden of establishing a prima facie case and appellant bears the ultimate burden of persuasion.

Appellant and WVDOE initially raise two arguments against OSMRE's jurisdiction over appellant's 1.3-acre site. First, they contend that because the tract subject to the prospecting approval was only 1.3 acres,

^{6/} OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. The violation will be sustained on appeal when OSMRE's evidence is not rebutted. Turner Brothers Inc. v. OSMRE, 103 IBLA 10 (1988); Mullins Coal Co. v. OSMRE, 96 IBLA 333, 335 (1987).

OSMRE had no enforcement authority based on a statutory 2-acre jurisdictional limitation set forth in section 528(2) of SMCRA, 30 U.S.C. | 1278(2). ^{7/}

[1] Contrary to appellant's arguments, the 2-acre exemption has consistently been held to constitute an affirmative defense. Consequently, the exemption must be pleaded and proved by the person claiming it. Cumberland Reclamation Co., 102 IBLA 100 (1988); OSMRE v. C-Ann Coal Co., 94 IBLA 14 (1986); S & S Coal Co. v. OSMRE, 87 IBLA 350 (1985). Accordingly, appellant bears the burden of proving entitlement to the 2-acre exemption.

Section 528(2) previously provided that SMCRA would not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." Departmental regulations at 30 CFR 700.11(b) implemented the statutory exemption and provided that SMCRA applied to all surface mining and reclamation activities except "the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." S & S Coal Co., *supra*. As a general rule, surface coal mining operations shall be deemed "related" if they occur within 12 months of each other, are physically related, and are under common ownership or control. 30 CFR 700.11(b)(2). "Affected area" is defined in 30 CFR 701.5 as:

^{7/} This 2-acre exemption was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

[A]ny land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes * * * any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; * * * any area covered by surface excavations, workings, * * * refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, * * *.

There is no dispute that the 37-acre permitted tract and the 1.3-acre site at issue here are "related operations" within the meaning of 30 CFR 700.11(b). Evidence was presented that the tracts were contiguous, mining was still ongoing on the 37-acre permitted tract (Tr. 44), spoil from the 1.3-acre site was stored on the 37-acre tract (Tr. 90, 140), and the same coal seam was being mined on both tracts (Tr. 94). The evidence presented by OSMRE was sufficient to establish a prima facie showing that appellant's operations on the 1.3-acre site actually affected more area than just that tract and that appellant was not entitled to a 2-acre exemption. Accordingly, the burden shifted to appellant to show that its operations were limited to the 1.3-acre tract covered by the prospecting approval. Appellant failed to present any evidence showing that only the 1.3-acre tract was affected. Instead, it argued that there was no proof that any area beyond the 2 acres it had bonded had been affected. 8/ Because it offered no evidence on this issue, appellant failed to carry its burden of proving that the total affected area was less than 2 acres, and failed to show its entitlement to the 2-acre exemption.

WVDOE contends that any activities related to the 1.3-acre site taking place on the 37-acre site may not be considered in calculating the affected _____
8/ Testimony indicated that the bonding costs were the same for a fraction of an acre as for an entire acre, and that appellant had, therefore, bonded 2 full acres.

acreage because the 37-acre site is covered by a surface mining permit. The definition of "affected area" includes any adjacent lands, the use of which is incidental to surface coal mining and reclamation operations. 30 CFR 701.5. No exception is made for adjacent permitted lands. Under the construction of the 2-acre exemption WVDOE advances, surface mining operators would be free to mine innumerable 1.99-acre tracts of land adjacent to a permitted area and use the permitted area for ancillary activities. There is no basis for such an interpretation of the 2-acre exemption, and we accordingly reject this argument.

[2] Appellant and WVDOE next contend OSMRE lacks jurisdiction because it failed to give the State the 10-day notice (TDN) they argue was required by SMCRA and applicable regulations. Section 521(a)(1) of SMCRA, 30 U.S.C. | 1271(a)(1), sets out the requirement for a TDN:

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 ten 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. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. [Emphasis added.]

Section 521(a)(2) of SMCRA, 30 U.S.C. | 1271(a)(2), further provides:

When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

Departmental regulations provide that, with certain exceptions not applicable in this case, "[s]urface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." 30 CFR 843.11(a)(2).

If appellant was conducting surface mining operations without a valid surface mining permit, that fact would, by definition, constitute a condition or practice causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources. Because OSMRE is required by statute to issue a CO immediately upon determining that a person is engaging in surface coal mining operations causing or reasonably expected to cause significant, imminent environmental harm to land, air, and water resources, it would not be required to issue a TDN to the State. 30 U.S.C. | 1271(a)(2); 30 CFR 843.11(a)(1). Firchau Mining, Inc. v. OSMRE, 101 IBLA 144, 148 (1988); Mid-Mountain Mining, Inc. v. OSMRE, 92 IBLA 4,

6-7 (1986); S & S Coal Co., *supra* at 253; Virginia Citizens for Better Reclamation, 82 IBLA 37, 44-45; 91 I.D. 247, 251-252 (1984). Because of our holding, *infra*, that appellant has failed to show it was not conducting surface coal mining operations without a valid surface mining permit, we hold that OSMRE was not required to issue a TDN to the State.

Concerning the merits of this case, as previously discussed, OSMRE bears the burden of establishing a prima facie case. 43 CFR 4.1171(a). Appellant bears the ultimate burden of persuasion. 43 CFR 4.1171(b); Miami Springs Properties, 2 IBSMA 399, 404, 87 I.D. 645, 647 (1980); Burgess Mining & Construction Corp., 1 IBSMA 293, 298, 86 I.D. 656, 658 (1979); James Moore, 1 IBSMA 216, 223-24, 86 I.D. 369, 373 (1979). The decision as to whether appellant's operations on the 1.3-acre site, conducted pursuant to a prospecting approval, were in fact surface mining operations, ultimately turns on the question of whether the coal was mined for testing purposes.

Surface coal mining operations are clearly distinguished from coal exploration operations under SMCRA. Under section 701(28)(A) of SMCRA, 30 U.S.C. | 1291(28)(A), coal exploration activities subject to section 512 of SMCRA, 30 U.S.C. | 1262, are excluded from the definition of surface coal mining operations. Coal exploration is defined at 30 CFR 701.5:

Coal exploration means the field gathering of: (a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or (b) the gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter.

[3] Section 512 of SMCRA, 30 U.S.C. | 1262, requires any person undertaking coal exploration operations to file a notice of intent to explore. The rights acquired under an approved notice of intent to explore are restricted. Specifically, no more than 250 tons of coal may be removed during exploratory operations except with written approval of the regulatory authority, granted after the submission of a statement of why the extraction of more than 250 tons is necessary for exploration purposes. Section 512(d) of SMCRA, 30 U.S.C. | 1262(d); 30 CFR 772.12(a). Also, a person operating under an exploratory authorization may not extract coal for commercial purposes without first obtaining a surface mining permit, except when the regulatory authority "makes a prior determination that the sale is to test for coal properties necessary for the development of surface coal mining and reclamation operations for which a permit application is to be submitted at a later time." 30 CFR 772.14.

The potential for abuse of the exploration provisions to circumvent the more stringent provisions of SMCRA was apparent to both Congress in considering passage of SMCRA and to the Department when it promulgated the regulations implementing SMCRA. In analyzing section 512 of SMCRA, the Committee on Interior and Insular Affairs stated:

This section prescribes the procedures and standards to apply to coal exploration. No permit is required, but exploration is to be performed subject to regulations designed to provide notice to the regulatory authority and compliance with environmental standards set out for surface mine operations. In order to limit the size of such operations, no more than 250 tons can be produced under such an operation.

H.R. Rep. No. 218, 95th Cong., 1st Sess. 173, reprinted in 1977 U.S. Code Cong. & Admin. News 593, 704.

The preamble to the final Departmental regulations explained why written approval to mine more than 250 tons of coal was required:

Section 512(d) of the Act requires specific written approval of the regulatory authority to remove more than 250 tons. It is important in the regulatory process to know exactly why it is necessary to remove more than 250 tons of coal, in order to prevent mining under the guise of exploration. This is particularly pertinent because of the abbreviated permit approval requirements and the lack of a requirement for a performance bond associated with exploration operations.

48 FR 40621, 40627 (Sept. 8, 1983). With regard to 30 CFR 772.14, the regulation governing the commercial sale of coal mined under an exploration permit, OSMRE stated:

The substance of the previous section [815.17] was unchanged in the proposed rule except to clarify that a "surface coal mining and reclamation operations" permit will be needed for the commercial sale of coal extracted during exploration operations and that no such permit is needed if, prior to exploration, the regulatory authority determines the sale is to test coal properties for development of a mining operation for which a permit is to be submitted at a later time.

Id. at 40630. Finally, in responding to public concerns over possible abuse of the exploration permit, OSMRE stated:

One commenter was confused as to why coal would be sold if it was to be used for testing purposes. Users, the commenter asserted, generally do not pay for "test burns." The commenter said if the sample load is so large it is paid for, then a permit should be required anyway. The commenter feared the provision

would be abused by operators who negotiate purchase agreements with buyers of coal providing in those agreements for testing of the coal in order to fit within the exception.

OSM[RE] agrees that it is common for larger operators to provide test loads to users rather than to charge for such tests. However, this is not necessarily always the case and thus the language of final | 772.14 allows a regulatory authority to distinguish between those situations where coal is sold in interstate commerce as part of a surface coal mining and reclamation operation, and those situations where, although the coal is sold, the objective is testing of the coal as part of coal exploration. OSM[RE] agrees that care should be taken so that this provision is not abused. [Emphasis added.]

Id.

The record in this case clearly establishes that appellant removed the coal on the 1.3-acre site in response to the telex from McCall. As OSMRE argues, no requirement for a test burn is apparent on the face of that telex. OSMRE presented further testimony that upon inquiry McCall did not confirm that a test burn was required. Appellant's only evidence on this issue was Fresa's testimony that a test burn was required, and its argument that Summers may have spoken with a McCall employee unfamiliar with the sale.

Although Fresa testified he was also exploring the feasibility of opening a deep mine adjacent to the 37-acre permitted site, this reason was not listed on the notice of intent to prospect (Exh. 6), and Fresa neither gave any information indicating that removal of all of the coal on the 1.3-acre site was necessary for this purpose nor explained how tests conducted at this site could assist in a determination of mining possibilities in an area quite far removed from it, as evidenced by his own

testimony. Because this alleged exploratory purpose was not part of the original notice of intent to prospect, it will not be considered in determining whether that notice showed the coal from the site was being removed for exploratory and/or test purposes.

OSMRE's evidence was sufficient to establish a prima facie case. Standing alone, Fresa's statement concerning McCall's requirement for a test burn is insufficient to overcome OSMRE's prima facie case. Therefore, appellant has failed to carry its burden of proving that it was not conducting surface mining operations without a valid surface mining permit. 9/

[4] Appellant and WVDOE both argue that issuance of a CO was improper without a specific finding that significant, imminent environmental harm would result from the operation. In this regard, they note that OSMRE did not charge appellant with any of the alleged problems discovered at the site, but merely raised the issue of mining without a permit. 10/

The CO was issued pursuant to section 521(a)(2) of SMCRA, 30 U.S.C. | 1271(a)(2), quoted supra. This section requires OSMRE to issue a CO when it determines that a condition or practice exists that is causing or can

9/ Appellant argues that it had a valid permit in the form of its prospecting approval. As was noted in the text, supra, SMCRA clearly distinguishes between coal prospecting and coal mining. The fact that appellant had been given permission to explore an area for possible future mining does not insulate it from the requirement that it obtain a valid mining permit before it actually begins mining. We decline to equate a prospecting approval with a surface mining permit.

10/ Much time was spent at the hearing discussing the fact that, in a similar case involving alleged surface mining under a prospecting approval which occurred 2\ weeks before the present CO was issued to appellant, the other coal company was cited with numerous specific violations in addition to the allegation of mining without a valid permit.

reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. Under 30 CFR 843.11(a)(2), conducting surface mining operations without a surface mining permit is defined as constituting a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. Therefore, OSMRE properly issued a CO pursuant to section 521(a)(2) of SMCRA when it determined that appellant was conducting surface mining operations because it was extracting coal for a commercial purpose without a surface mining permit or a proper determination that the sale was to test coal properties necessary to the development of surface coal mining and reclamation operations. Firchau Mining, Inc., supra. 11/

Finally, appellant contends it was denied a fair hearing because Judge McGuire was biased against it. There is no indication from the transcript, nor does appellant assert, that Judge McGuire denied it the opportunity to submit any evidence into the record. Instead, appellant argues that Judge McGuire took an adversarial stance in questioning its witnesses. 12/ In view of the facts that appellant was not precluded from building a complete _____

11/ Appellant argues essentially that WVDOE's determination that the coal was being removed for a test burn cannot be challenged by OSMRE. The Federal oversight role under SMCRA allows and requires OSMRE to challenge any state enforcement decision it believes is erroneous.

12/ Appellant also contends that Judge McGuire's dismissal of its subsequently filed appeal of the civil penalty assessed in connection with this matter demonstrates his bias. The civil penalty issue was considered in Fresa Construction Co. v. OSMRE, 101 IBLA 229 (1988), and is not part of this appeal. We decline to address this issue further in the context of the present appeal.

record, and that the Board has reviewed this matter de novo, we find that appellant has been afforded a fair hearing. 13/

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.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

C. Randall Grant, Jr.
Administrative Judge

13/ WVDOE argues that Judge McGuire erred in relying upon a consent order in Humphreys v. Faerber, Civ. No. 86-P-134 (Monongalia County Cir. Ct. Apr. 21, 1987). The consent order, which requires WVDOE to obtain detailed information from persons seeking to extract more than 250 tons of coal pursuant to a prospecting approval, took effect subsequent to the issuance of the CO at issue here. Because we have reached our decision without reliance upon the Humphreys consent order, we need not determine whether Judge McGuire erred in considering it.