

OLD BEN COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-8

Decided Jun 23, 1989

Appeal from a decision of Administrative Law Judge Frederick A. Miller upholding certain findings and conditions included in the approval by the Office of Surface Mining Reclamation and Enforcement of Old Ben Coal Company's underground coal mining permit application No. OSM-IL-001. CH 6-1-PR.

Affirmed.

1. Board of Land Appeals--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

Where at the time of permit approval under a Federal lands program in a State without a cooperative agreement, OSMRE conditions permit approval on a State regulatory program regulation regarding subsidence control, such a condition is proper and this Board has no jurisdiction to entertain an argument that the regulation is more stringent than standards required by the Surface Mining Control and Reclamation Act of 1977 and, therefore, unenforceable under State law.

2. Statutory Construction: Implied Repeals--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

The requirement that OSMRE condition approval of an underground coal mining permit on compliance with State regulatory provisions that are part of a State program necessitates that, to the extent those State standards may be inconsistent with the common law doctrine of subsidence damage mitigation, the State regulations are controlling.

3. National Historic Preservation Act: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

OSMRE is authorized, pursuant to the National Historic Preservation Act, to impose upon an applicant for an underground coal mining permit a cultural resources condition requiring submission of a cultural resources plan including the archaeological testing of 11 sites to evaluate their eligibility for listing in the National Register of Historic Places; a cultural resource survey of areas affected by planned subsidence; and measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register of Historic Places.

APPEARANCES: Jeffrey C. Conrad, Esq., and Edmund J. Moriarty, Esq., Cleveland, Ohio, for appellant; Mary Dee Martoche, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; John C. Henriksen, Esq., State of Illinois, Department of Mines and Minerals, Springfield, Illinois, for amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Old Ben Coal Company (Old Ben) has appealed from a September 2, 1987, decision by Administrative Law Judge Frederick A. Miller which upheld various findings and conditions included in the approval of Old Ben's under-ground coal mining permit application No. OSM-IL-001 by the Office of Surface Mining Reclamation and Enforcement (OSMRE) and challenged by Old Ben in an application for permit review. In his decision, Judge Miller found he also lacked jurisdiction over certain issues raised by Old Ben. ^{1/}

^{1/} Old Ben had argued to Judge Miller that the condition of its approved permit requiring it to comply with 30 CFR 817.121(c)(1) and (2) amounted to an unconstitutional taking of its property, and it had moved to supplement the record in order to provide further support for that argument. In his decision, Judge Miller concluded that he was without authority to address the constitutional challenge, and he denied the motion. Old Ben does not appeal Judge Miller's ruling on the constitutional challenge, but it does renew its motion to supplement and requests that this matter be remanded to an Administrative Law Judge with instructions to allow supplementation of the record, so that the administrative record will be complete should the matter be further appealed to a court with jurisdiction over the constitutional issue. Appellant's argument is based upon the assumption that it would be unable to supplement the record before a court of competent jurisdiction. While we recognize that judicial review of agency action is generally limited to review on the record (South Dakota v. Volpe, 353 F. Supp. 335, 338-39 (D.S.D. 1973)), we nonetheless deny appellant's request. As

On January 17, 1986, OSMRE approved Old Ben's permit application No. OSM-IL-001, with certain conditions, thereby allowing Old Ben to extend the mining area covered by its existing underground mines Nos. 21, 24, and 26. The permit area is located in Franklin County, Illinois, on Federal lands which are managed by the U.S. Army Corps of Engineers (Corps). A portion of the permit area is leased by the Corps to the State of Illinois, which maintains thereon the Wayne Fitzgerald State Park.

Old Ben filed a timely application for review, challenging certain findings and conditions included in the permit approval. The parties filed a joint stipulation of facts in the case negating the necessity for a hearing. Judge Miller issued his decision following extensive briefing by the parties, including the State of Illinois, Department of Mines and Minerals (IDMM), which was granted amicus curiae status on July 17, 1986.

Old Ben filed a timely appeal of Judge Miller's decision. Thereafter, it filed a motion to remand the case to Judge Miller. By order dated February 12, 1988, the Board denied that motion to remand and granted a motion by IDMM for amicus curiae status.

On appeal Old Ben challenges the following conclusions by Judge Miller:

The findings and conditions in Old Ben's approved permit application which require it to comply with the Illinois Administrative Code Sections 1817.124(b) and (c) are valid. [2/]

* * * * *

fn. 1 (continued)

there is no agency action here on the taking issue, we see no reason that review by a court of competent jurisdiction would be limited to the record on that issue. See Robinson v. United States, 718 F.2d 336, 338 (10th Cir. 1983); Engineers Public Service Co. v. SEC, 138 F.2d 936, 953 (D.C. Cir. 1943).

2/ Those provisions, found at 62 Ill. Admin. Code 1817.124(b) and (c), read, as quoted in Judge Miller's decision, as follows:

"(b) Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall, with respect to each surface area affected by subsidence:

"(1) Restore, rehabilitate, or remove and replace each damaged structure, feature or value, promptly after the damage is suffered, to the condition it would be in if no subsidence has occurred and restore the land to a condition capable of supporting reasonably foreseeable uses it was capable of supporting before subsidence; or

"(2) Purchase the damaged structure or feature for its fair market, pre-subsidence value and shall promptly after subsidence occurs, to the extent technologically and economically feasible, restore the land surface

Old Ben is required to comply with Condition 5 of the approved permit application. [3/]

* * * * *

The Illinois common law doctrine of damage mitigation, to the extent it conflicts with SMCRA [the Surface Mining Control and Reclamation Act of 1977] and the State Act [Illinois Surface Coal Mining Land Conservation and Reclamation Act], does not preclude the findings and conditions in the approved permit application requiring repair and/or compensation for subsidence damage to structures.

(Decision at 15).

[1] We will first address the issue of whether OSMRE properly conditioned the permit on Old Ben's compliance with the subsidence control requirements of section 1817.124 of the Illinois Permanent Coal Mining and Reclamation Program Regulations, specifically the mandate to repair and compensate landowners for damage to structures. Old Ben alleges that such provisions are not authorized by the Illinois Surface Coal Mining Land Conservation and Reclamation Act, Ill. Rev. Stat. ch. 96-1/2,

fn. 2 (continued)

to a condition capable and appropriate of supporting the purchased structure, and other foreseeable uses it was capable of supporting before mining. Nothing in this paragraph shall be deemed to grant or authorize an exercise of the power of condemnation or the right of eminent domain by any person engaged in underground mining activities.

"(c) Each person who conducts underground mining activities will compensate the owner of any surface structure in the full amount of the diminution in value resulting from subsidence, by purchase prior to mining of noncancellable, premium prepaid insurance policy or other means approved by the Department as assuring before mining begins that payment will occur; indemnify every person with an interest in the surface for all damages suffered as a result of the subsidence; and, to the extent technologically and economically feasible, fully restore the land to a condition capable of maintaining reasonably foreseeable uses which it could support before subsidence."

62 Ill. Admin. Code 1817.124 (b) and (c). These provisions were in effect at the time appellant's application was approved; however, effective Oct. 25, 1988, OSMRE approved a modification of these provisions (53 FR 43112, 43134, 43137 (Oct. 25, 1988)). Currently, similarly worded provisions are found at 62 Ill. Admin. Code 1817.121(c).

3/ Condition 5 required Old Ben to submit a plan, within 60 days of the approval of its permit, including:

"(1) the archaeological testing of 11 shoreline sites to evaluate their eligibility for listing in the National Register of Historic Places; (2) a cultural resource survey of areas affected by planned subsidence; and (3) measures to be taken to mitigate disturbance of any site or sites listed in or eligible for listing in the National Register."

(Permit Approval Document at II-5).

` 7901.01-7909 (1985)). Section 1.02(c) of that Act, Ill. Rev. Stat. ch. 96-1/2, ` 7901.02(c) (1985), states: "It is also the purpose of this Act to establish requirements that are no more stringent than those required to meet the Federal Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87)." Old Ben's position is that the requirement of section 1817.124 of the Illinois regulations to repair and compensate landowners for damage to structures, is more stringent than 30 CFR 817.121(c)(2), ^{4/} and consequently is not authorized by the Illinois legis-lation. In support of its position, Old Ben cites Consolidation Coal Co. v. Illinois Department of Mines & Minerals, 160 Ill. App. 677, 514 N.E.2d 9 (5th Dist. 1987), which found State effluent regulations which imposed more stringent limitations than the Federal regulations were not enforceable under the Illinois surface mining act.

Both IDMM and OSMRE assert that this Board lacks subject matter juris-diction to review the validity of the State's regulatory requirement to mitigate and compensate for subsidence damage to structures. IDMM states that the Board's review is limited to whether or not the State's subsidence damage control regulations are, in fact, part of the State's approved regu-latory program. It asserts that if those regulations are not part of the program, the Board should rule that such requirements are not part of the permit; but if they are, the Board must rule, as a matter of law, that Old Ben's permit is subject thereto. It contends that because Old Ben admits the subsidence damage control regulations are part of the State program, the regulations apply and no further review of the issue is necessary or appropriate.

OSMRE states that in accordance with section 526(a)(1) of SMCRA, 30 U.S.C. § 1276(a)(1) (1982), any action challenging approval of a State program may only be brought in the United States District Court for the District which includes the capital of the State whose program is at issue. OSMRE asserts that because Old Ben is seeking review of the State's regu-lation, it constitutes a challenge to the State program and the exclusive avenue of review is section 526(a)(1). Moreover, OSMRE contends that such an attack had to have been brought within 60 days of the Secretary's approval thereof, and in this case the Secretary conditionally approved the State program on June 1, 1982. Therefore, OSMRE claims that the Board is without subject matter jurisdiction over Old Ben's objections to the applicability of the Illinois regulations.

^{4/} The provision at 30 CFR 817.121(c)(2) now provides:

"(c) The operator shall--

"* * * * *

"(2) To the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence."

As Old Ben points out, OSMRE's argument makes little sense in the context of this case. At the time the Secretary approved the Illinois State program in 1982, the applicable Federal regulations at 30 CFR 817.124 (1982) 5/ contained subsidence damage control provisions, which Illinois included virtually verbatim in its regulations at section 1817.124. Old Ben's position is, therefore, that in 1982 the State regulations were not more stringent than the Federal requirements and no basis for its present contest existed. We must agree with Old Ben. OSMRE's contention that Old Ben's only avenue for relief was a suit in Federal court in 1982 must be rejected. Nevertheless, we are not convinced that this Board may entertain Old Ben's challenge to the State regulations as being more stringent than comparable Federal requirements.

At the time of permit approval in this case, the regulations governing surface coal mining and reclamation operations on Federal lands, 30 CFR Part 740, provided that upon approval of a State program, that program and the Federal lands program were applicable to surface coal mining and reclamation operations on lands where either the coal to be mined or the surface is owned by the United States. 30 CFR 740.11(a)(3). In addition, the regulations specifically stated that the regulatory authority would not approve a permit application "unless the application is in accordance with the requirements of the applicable regulatory program and this Part or a cooperative agreement, as applicable." 30 CFR 740.13(c)(2). 6/ Since the State subsidence damage control requirements were part of the State program at the time of permit approval, OSMRE was required to assure Old Ben's compliance therewith. Whether those regulations are more stringent than the Federal subsidence requirements, and thus, under the court's rationale in Consolidation Coal Co. v. Illinois Department of Mines & Minerals, supra,

5/ Thereafter, effective July 1, 1983, OSMRE deleted 30 CFR 817.124 and transferred the subsidence control requirements to 30 CFR 817.121(c).

48 FR 24638 (June 1, 1983). New 30 CFR 817.121(c)(2) provided as set forth in note 4 above, except the first clause read: "To the extent required under State law." Subsequently, OSMRE suspended that rule. 50 FR 7274 (Feb. 21, 1985). It later repropose the rule and in final rulemaking effective Mar. 19, 1987, it revised 30 CFR 817.121(c)(2) only by changing that first clause to read: "To the extent required under applicable provisions of State law." 52 FR 4860, 4868 (Feb. 17, 1987).

6/ We note that on Oct. 22, 1987, the Secretary of the Interior approved a cooperative agreement with the State of Illinois, which became effective 30 days following its publication in the Federal Register on Nov. 27, 1987 (52 FR 45329 (Nov. 27, 1987)). 30 CFR 913.30. Under Article VI B.2. of that agreement, the State has assumed the primary responsibility for analysis, review, and approval or disapproval of the permit application component of the permit application package. Also in accordance with Article XIV of the agreement, where the Secretary or the Governor has promulgated new or revised performance or reclamation requirements, "[e]ach party will, if it determines it to be necessary to keep this Agreement in force, change or revise its regulations or request necessary legislative action."

not enforceable, is not properly before this Board. ^{7/} Therefore, we must conclude OSMRE properly conditioned appellant's permit approval upon compliance with the State regulations governing subsidence damage control.

[2] Appellant argues, in the alternative, that even if the challenged Illinois subsidence regulation is found to be applicable, its implementation is still subject to the common-law doctrine of damage mitigation. Old Ben explains that the doctrine provides that one party has a duty to reduce the damage caused by another. It charges that "it is not required under SMCRA or the Ill. Permanent Act or Regulation to repair or compensate land-owners for all subsidence damage caused to surface structures when the owner refuses to allow Old Ben to prevent or minimize subsidence damage thereto" (Statement of Reasons (SOR) at 17, emphasis in original). Appellant's argument is based on its beliefs that the Federal regulation at 30 CFR 817.121(c)(2) requires subsidence damage to structures to be restored in accordance with State law and that the common law doctrine of damage mitigation is part of State law.

Judge Miller found no provision in the applicable statutes or regulations requiring a surface owner to mitigate damages and he determined "it is not the role of OSMRE to adjudicate the degree of cooperation between Old Ben and property owners" (Decision at 14). He also indicated that "taken to its logical extreme, [Old Ben's position] could result in private agreements between landowners and coal operators which would circumvent SMCRA and the State Act" (Decision at 14).

In response to Old Ben's contention, IDMM refers us to Melvin v. Old Ben Coal Co., 610 F. Supp. 131 (S.D. Ill. 1985), wherein the court determined that the common-law doctrine of subsidence waivers is inapplicable where it conflicts with the State surface mining act. The court specifically stated: "[T]he Illinois legislature, by enacting the Illinois Permanent Act, has 'disturbed' prior Illinois case law on the subject of subsidence control." Melvin v. Old Ben Coal Co., *supra* at 137. The court concluded that to the extent the law related to subsidence waivers conflicted with the State's policy on subsidence damage, "the waiver shall be unenforceable." *Id.*

^{7/} We note that in the Oct. 25, 1988, rulemaking (see note 1, *supra*) in which the Director, OSMRE, issued his decision on proposed amendments to the Illinois State program, OSMRE stated:

"122. Old Ben Coal Company ("Old Ben") provided extensive legal arguments objecting to resubmitted Illinois regulation 1817.121(c)(2), which provides for the repair of and/or compensation for subsidence damage to structures. In response, the Director notes that 30 CFR 817.121(c) requires that subsidence damage to structures be covered to the extent required under State law. Illinois has determined that structures are protected in Illinois and resubmitted Illinois regulation 1817.121(c)(2) reflects this determination. This requirement is consistent with the Federal regulations. 53 FR 43134 (Oct. 25, 1988)."

By adopting legislation inconsistent with the common law, a legislative body effectively repeals the inconsistent portion of the common law. 15A C.J.S. Common Law | 12 (1967). The same must hold true for regulations promulgated by a State. The State expressed its policy by promulgating the subsidence damage control regulations at section 1817.124. Consequently, to the extent those regulations conflict with the common-law doctrine of subsidence damage mitigation, the former are controlling.

Appellant also challenges Judge Miller's conclusion that 30 CFR 773.15, 773.12, 779.12(b), and 783.12(b)(1) and (2) provided authority for OSMRE's imposition of the cultural resources condition (Condition 5) on appellant's permit. That condition, set forth at note 3, called for Old Ben to submit to OSMRE an acceptable cultural resources plan within 60 days of permit approval. Old Ben argues that OSMRE is without authorization to include the requirements of Condition 5 in its permit. It states, in accordance with 30 CFR 740.13(b)(3)(iii)(D) that "OSM[RE] is not authorized to require Old Ben to submit information concerning properties eligible for listing on the National Register, except where such properties are located within the so-called 'disturbed area' as that term is defined in 30 CFR Section 701.5" (SOR at 22, emphasis in original).

In response, OSMRE argues that authorization to impose the cultural resources condition is found in SMCRA § and the National Historic Preservation Act (NHPA), 16 U.S.C. | 470-470w-6 (1982). OSMRE points to 30 CFR 740.13(b)(3)(iii)(C), 740.13(b)(3)(iii)(D), 773.11, 773.15(c)(11), 783.12(b)(2), and 784.17(b) to further support its authorization. OSMRE alleges that 30 CFR 773.15(c)(11) authorizes "precisely the action that OSMRE took with regard to Old Ben's permit application." 9/

OSMRE alleges that it consulted with the Corps, the Illinois Department of Conservation, and the State Historic Preservation Officer (SHPO) and, as a result of a cultural resources study conducted by Southern Illinois University, 46 prehistoric sites were identified as being located

8/ OSMRE refers to 30 U.S.C. | 1257(b)(13) (1982), which requires permit applicants to submit maps depicting "known archeological sites"; 30 U.S.C. | 1272(a)(3)(B) (1982), allowing land to be designated unsuitable for surface coal mining due to historic resources; and 30 U.S.C. | 1272(e)(3) (1982), which prohibits surface coal mining operations which will adversely affect places included in the National Register of Historic Places (National Register), with certain exceptions.

9/ The regulation at 30 CFR 773.15(c)(11) provides that for permit approval, the regulatory authority must take "into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places. This finding may be supported in part by inclusion of appropriate permit conditions * * *."

above the underground workings of the mines, a few of which were determined eligible for listing in the National Register. As OSMRE explained in its January 1986 Technical Analysis, which accompanied the Permit Approval Document:

Because the remaining 43 sites have yet to be evaluated for their possible National Register significance, they have been recommended for testing. Accordingly, the Corps and the SHPO have requested that the previously located sites be tested and that the subsidence areas be surveyed in advance of further mining.

(Technical Analysis at VI-22).

Condition 5 emerged as a result of these consultations.

Old Ben maintains certain of the regulations cited as authority by OSMRE were not effective until March 12, 1987 (52 FR 4244 (Feb. 10, 1987)), after the January 1986 decision to add Condition 5 to its permit; the regulations codified at 30 CFR Part 773 are not applicable when a State program has been approved; and neither of the relevant acts authorizes the imposition of the condition. OSMRE responds that although certain changes in the relevant regulations were effective March 12, 1987, OSMRE was authorized to impose the condition even prior to those changes; the provisions of 30 CFR Part 773 are applicable where a State program has been approved; and, OSMRE is authorized by NHPA and SMCRA to impose the condition.

[3] We conclude that OSMRE properly included Condition 5 in its approval of Old Ben's permit. Pursuant to 16 U.S.C. § 470f (1982), the head of any Federal department "having authority to license any undertaking shall * * * prior to the issuance of any license * * * take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." The regulation in effect at the time of permit approval defined "eligible property" as "any district, site, building, structure, or object that meets the National Register [c]riteria." 36 CFR 800.2(f) (1986). ^{10/}

Courts have construed what is "eligible property" for purposes of NHPA to include not only sites which have been formally declared eligible, but all other eligible sites as well. Boyd v. Roland, 789 F.2d 347, 349 (5th Cir. 1986); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1437 (1985). In Hough v. Marsh, 557 F. Supp. 74, 88 (1982), the court held that eligible property, pursuant to 16 U.S.C. § 470f (1982), is not limited

^{10/} The current 36 CFR Part 800 regulations no longer include a definition for "eligible property." Instead, 36 CFR 800.2(e), defines "eligible for inclusion in the National Register" as "both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria." 51 FR 31119 (Sept. 2, 1986).

to those sites formally declared eligible by the Secretary. Rather, "[w]hat is an eligible property for purposes of NHPA turns upon the inherent historical and cultural significance of the property * * *." Colorado River Indian Tribes v. Marsh, *supra* at 1437. ^{11/}

The regulations implementing NHPA, codified at 36 CFR Part 800, were applicable to OSMRE at the time of issuance of the permit. ^{12/} The precise steps to be taken by the agency official were laid out in detail at 36 CFR 800.4 (1986). These steps closely parallel those followed by OSMRE in the case before us.

Appellant maintains that OSMRE is only authorized to require cultural resources information for sites eligible for listing which are located within the "disturbed area" as defined in 30 CFR 701.5. However, 36 CFR 800.4(a) (1986) required identification of National Register or eligible property within the "area of the undertaking's potential environmental impact and that may be affected by the undertaking." The regulations defined "[a]rea of the undertaking's potential environmental impact" as "that geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archeological, or cultural qualities possessed by a National Register or eligible property." 36 CFR 800.2(o) (1986). ^{13/} The cultural resource condition imposed by OSMRE clearly does not require Old Ben to perform any cultural resource activities outside the "area of the undertaking's potential environmental impact." Thus, even though 30 CFR 740.13(b)(iii)(D) places a limit on the information which the permit applicant is required to file as part of the permit application package, it does not preclude the necessity for compliance with the regulations in 36 CFR Part 800.

^{11/} In the past, there was some disagreement among courts on the question of whether the phrase "eligible property" referred only to sites which had been formally declared eligible or also includes those sites which were eligible but had not yet been so declared. Compare Committee to Save the Fox Building v. Birmingham Branch of the Federal Reserve Bank of Atlanta, 497 F. Supp. 504 (1980), and Birmingham Realty Co. v. General Services Administration, 497 F. Supp. 1377 (1980), with cases cited in the text. Given the regulatory definition at 36 CFR 800.2(e) for "eligible for inclusion in the National Register," there may no longer be cause for disagreement.

^{12/} See 52 FR 4244, 4249-50 (Feb. 10, 1987), which discusses when 36 CFR Part 800 is directly applicable and when it is indirectly applicable. In the case before us, as the State of Illinois and OSMRE had not entered

into a cooperative agreement at the time of permit approval, OSMRE was the permitting authority on the relevant Federal lands, and, therefore, 36 CFR Part 800 was directly applicable.

^{13/} The present regulations no longer include this term. The area is now identified as the "area of potential effects," which is defined at 36 CFR 800.2(c) as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." 51 FR 31119 (Sept. 2, 1986).

Appellant asserts that because certain regulations in 30 CFR, namely 30 CFR 783.12(b)(2) and 30 CFR 784.17(b), were not effective until after the decision imposing the cultural resources condition, OSMRE acted without authorization. In addition, Old Ben argues that regulations 30 CFR 773.11 and 30 CFR 773.15 do not apply because they are not applicable to Federal lands.

We find no such limitation on the applicability of the regulations in 30 CFR Part 773. The scope and purpose section of those regulations, 30 CFR 773.1, places no restrictions on their application, stating: "This part provides minimum requirements for permits and permit processing and covers obtaining and reviewing permits; coordinating with other laws; public participation; permit decision and notification; permit conditions; and permit term and right of renewal." Therefore, permitting requirements in 30 CFR Part 773, as well as those in 30 CFR Part 740, are relevant.

However, 30 CFR 773.15(c)(11), cited by OSMRE as specifically authorizing its action in this case, was not promulgated until February 1987, after permit approval. Nevertheless, the preamble to that rulemaking makes clear that OSMRE's authority to condition a permit did not arise as a result of that rulemaking: "OSMRE agrees that a regulatory authority has the authority to fulfill this requirement [to take into account the effect of a proposed permitting action on properties listed on and eligible for listing on the National Register] by inclusion of appropriate permit conditions, and has added language to clarify that authority in the final rule." 52 FR 4244, 4257 (Feb. 10, 1987) (emphasis added).

Thus, we need not address the applicability of 30 CFR 783.12(b)(2) and 30 CFR 784.17(b) because, as shown, OSMRE had sufficient authorization to include the cultural resource condition as a part of permit approval in this case.

Appellant argues that OSMRE cannot require Old Ben to bear the economic burden of cultural resource studies, and that it cannot be held responsible for OSMRE's duties under the NHPA. In support of this latter argument, appellant refers to 44 FR 6068, 6069 (Jan. 30, 1979), wherein the Advisory Council on Historic Preservation (Council) states, "The ultimate responsibility for compliance with the regulations rests with the Federal agency and cannot be delegated."

The fact that the "ultimate responsibility" for compliance with NHPA lies with the Federal agency does not suggest that the Federal agency is without authority to delegate any of the required duties. In an analogous situation involving offshore oil and gas leasing, the Department has specifically concluded that it is authorized by NHPA to require lessees to "make cultural resource studies where evidence indicates that such resources may be affected by operations." Clarification of Authorities & Responsibilities for Identifying and Protecting Cultural Resources on the Outer Continental Shelf, 87 I.D. 593, 599 (1980). Likewise, the same authority allows OSMRE to require applicants for permits to mine coal to conduct cultural resource studies at their own expense.

Finally, Old Ben argues it may not be required to submit a cultural resources plan including mitigation measures before certain steps required by 36 CFR 800.4(b) and (d) (1986) have been taken. Specifically, Old Ben argues that OSMRE must determine if any property listed or eligible for listing will be adversely affected by the mining; the SHPO, the Council, OSMRE, and Old Ben must be consulted concerning mitigation measures; and only then may Old Ben be required to submit a plan including mitigation measures. Old Ben suggests that the cultural resources condition is invalid and unenforceable because it requires that the steps described in the regulation be taken out of the proper order.

OSMRE's Technical Analysis explains in greater detail what the cultural resources condition actually demands. It provides:

[F]or sites discovered previously and as a result of the cultural resource survey, the applicant shall consult with the OSMRE, Corps and the SHPO to determine how significant sites are to be protected from planned subsidence or how, if they will be disturbed, their disturbance will be mitigated. * * * Specific mitigation measures shall be the decision of the applicant with approval of the OSMRE, Corps and SHPO.

(Technical Analysis at VI-22). It is clearly not the intent of OSMRE that Old Ben be required to submit a plan with mitigation measures prior to consultation with the appropriate parties. Old Ben's objections provide no basis for declaring the cultural resources condition invalid or unenforceable.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Miller's decision is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge