

INNOVATIVE DEVELOPMENT OF ENERGY, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-55

Decided August 8, 1989

Appeal from a decision of Administrative Law Judge David Torbett (Docket No. NX 6-44-R) denying an application for review of Notice of Violation No. 86-92-179-01, filed by Innovative Development of Energy, Inc.

Affirmed.

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

In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the notice rests with OSMRE. A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. If OSMRE meets its burden, the ultimate burden of persuasion rests with the applicant for review.

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the surface water leaves the permit area, a prima facie case for an alleged violation of 30 CFR 715.17(a) is established. Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered.

3. Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Discharges from Disturbed Areas

Allegations that contamination of the water discharged from a sediment pond constructed pursuant to a surface mining permit to collect waters from the disturbed area was from other than the disturbed area are of no benefit to appellant without a showing that the other area was the sole source of the contamination. Water quality limitations apply to all discharges flowing from a disturbed area into a sedimentation pond constructed to achieve compliance with SMCRA.

4. Surface Mining Control and Reclamation Act of 1977: Bonds: Forfeiture of

Neither SMCRA nor Departmental regulations implementing SMCRA contains provisions which operate to release a minesite from regulatory enforcement when a reclamation bond is forfeited. Under the provisions of 30 U.S.C. | 1259(b) (1982), an operator is liable for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation. The Act contains no provision suggesting that the forfeiture of a performance bond creates a limitation upon the Federal regulation of a minesite subject to the Act.

5. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

One of the principles of res judicata and collateral estoppel is that the question expressly and definitely presented in the current litigation must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation. Accordingly, the doctrines of res judicata and collateral estoppel cannot preclude OSMRE from issuing a notice of violation, enforcing a cessation order, or assessing penalties therefor if the previous violation cited by the State differs from the violation cited by OSMRE and the violation cited by OSMRE was not adjudicated before the State agency.

APPEARANCES: Dorothy B. Stulberg, Esq., Oak Ridge, Tennessee, for appellant; Judith M. Stolfo, Esq., Office of the Field Solicitor, United States Department of the Interior, for the Office of the Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Innovative Development of Energy, Inc. (IDE), has appealed from a September 25, 1987, decision of Administrative Law Judge David Torbett denying its application for review and sustaining Notice of Violation (NOV) No. 86-92-179-01.

On January 14, 1986, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued NOV No. 86-92-179-01, pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982). This NOV was issued upon a finding that IDE had violated 30 CFR 715.17(a), by allowing water having a pH lower than 6 to be discharged from areas disturbed by mining operations. 1/ IDE filed a timely application for review, and a hearing was held in Knoxville, Tennessee, on April 24, 1987.

The following facts were established at the hearing. IDE was issued National Pollutant Discharge Elimination System (NPDES) permit No. TN 0047007 by the State of Tennessee, for deep coal mining on December 11, 1979 (Coll. Exh. R-4). 2/ The State revoked this permit on February 15, 1980, after finding that IDE had submitted incorrect information in its initial NPDES application. IDE appealed, and on July 14, 1980, the Tennessee Water Quality Control Board (TWQCB) heard the appeal. On August 20, 1980, TWQCB upheld the permit revocation, but indicated that submission of revised mining plans and specifications would be considered and a new NPDES permit could be issued. On October 20, 1980, a second NPDES permit was issued, and Surface Mining Permit No. 82-45 was subsequently issued (Exh. R-1, Tr. 20). A \$10,000 cash bond was posted as security for reclamation of the site (Exh. R-1, Tr. 20, 23).

On September 8, 1983, the Tennessee Division of Surface Mining (TDSM) issued State NOV No. 036-12-83 citing IDE with three violations of the State's surface mining act: "(1) failure to pass all surface drainage through a sedimentation pond before leaving the permit; (2) failure to maintain diversion [structures]; and (3) failure to keep reclamation current" (Exh. A-7, Tr. 30). After some difficulty gaining service, State NOV No. 036-12-83 was served on October 1, 1983 (Coll. Exh. R-4), and on October 18, 1983, Cessation Order (CO) No. 018-121-83 was issued for fail-ure to abate NOV No. 036-12-83 (Coll. Exh. R-4).

1/ 30 CFR 715.17(a) provides:

"Water quality standards and effluent limitations. All surface drainage from the disturbed area * * * shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. * * * Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations and, at a minimum, the following numerical effluent limitations * * *."

2/ Respondent's collective exhibit 4 (Coll. Exh. R-4) was added to the record by motion of respondent, unopposed by applicant.

No action was taken to abate the violations, and on January 9, 1984, TDSM notified IDE that it was recommending that the surface mining permit be revoked for IDE's failure to abate the NOV and CO (Coll. Exh. R-4). On March 7, 1984, IDE was notified that surface mining permit No. 82-45 was revoked for refusal and failure to correct the violations set out in the NOV & CO, and that IDE's performance bond was forfeited (Coll. Exh. R-4, Tr. 29). IDE initiated an appeal and requested an informal conference (Exh. A-9). The informal conference was held on October 1, 1985, and a Notice of Revocation and Order of Forfeiture was issued on October 24, 1985 (Coll. Exh. R-4).

A series of events having direct bearing on the outcome of this case took place about the same time that the State was taking action against IDE. On May 16, 1984, the State legislature repealed the Tennessee surface mining laws and implementing regulations, effective October 1, 1984. As a result, on September 25, 1984, the Department withdrew approval of the State's permanent regulatory program in full, effective October 1, 1984. See 49 FR 38874 (Oct. 1, 1984). The impact of this action is more fully discussed below.

On January 14, 1986, OSMRE Reclamation Specialist Edzel Pugh conducted a routine inspection of Area No. 1 of IDE's surface mining operation. During his inspection he performed a Hach test at a point where water was discharged from Pond No. 1, which was near the edge of the permitted area. This test indicated that the pH of the water was below 6.0. Pugh also took a water sample at the same spot and submitted this sample for laboratory analysis. The laboratory analysis indicated that the pH of the effluent was 3.2 (Exh. R-2, Tr. 10-11). Following his inspection, Pugh issued OSMRE NOV No. 86-92-179-01, citing IDE for discharging water from areas disturbed by mining operations with a pH below 6.0, a violation of 30 CFR 715.17(a) (Exh. R-1, Tr. 9-10).

At the hearing, OSMRE presented the testimony of Inspector Pugh, the NOV (Exh. R-1), laboratory analysis of the water sample (Exh. R-2), and a photograph of the site taken by Pugh (Exh. R-3). From Pugh's testimony, the degree of violation, and the maps in evidence, it is evident that the discharge would also be in violation when flowing off the permit area.

IDE presented the testimony of Jimmie Brubaker, who testified that the property was a site of previous mining, and that IDE had lost its lease (Tr. 18). Brubaker claimed that IDE did not mine the site between November 17, 1980, and November 18, 1981. However, he admitted that IDE did remove 2 to 3 feet of material in face-up operations (Tr. 21-22). Brubaker testified that, subsequent to 1981, other parties had constructed roads in the area which had a deleterious effect on the water entering Pond No. 1. He also testified that it was his opinion that effluent discharge from an old minesite intermingled with the water discharge from the IDE minesite. Additionally, Brubaker stated that effluent discharge from old spoil piles also intermingled with the stream from its pond (Tr. 28).

On September 25, 1987, Judge Torbett issued his decision that OSMRE met its burden of going forward to establish a prima facie case as to the

validity of the NOV and IDE had not met its burden of showing by a preponderance of the evidence that the NOV had been improperly issued. He also found that an affirmative defense was not established. IDE filed a timely notice of appeal to the Board.

In its statement of reasons, appellant argues that its bond was forfeited by the State of Tennessee, on October 24, 1985, as a result of the State's NOV No. 036-12-83. IDE further contends that, as a result of the forfeiture, the State had the funds to correct any problem existing on the site. Appellant argues that the State assumed the responsibility for correcting any problem by forfeiting the bond and therefore the Federal Government should look to the State for correction of any problems which may exist. Appellant also contends that a subdivision development near the mining site has "caused a number of problems existing on the site." Finally, appellant contends that the NOV issued by OSMRE has been adjudicated. Citing Excello Coal Corp. v. Clark, No. Civ. 3-84-902 (E.D. Tenn., Dec. 28, 1984), IDE contends that the principle of res judicata and collateral estoppel apply to OSMRE's enforcement action, because TDSM revoked its permit based upon the same violation.

[1] In a proceeding upon an application for review of an NOV, the burden of going forward to establish a prima facie case as to the validity of the NOV rests with OSMRE. 43 CFR 4.1171(a); see Dean Trucking Co., 1 IBSMA 229, 237, 86 I.D. 437, 441 (1979). A prima facie case is presented if OSMRE presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. S & M Coal Co. v. OSMRE, 79 IBLA 350, 354; 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982). If OSMRE meets its burden of establishing a prima facie case, the ultimate burden of persuasion rests with the applicant for review, and if OSMRE's evidence is not rebutted, the NOV will be affirmed. See Coal Energy, Inc. v. OSMRE, 105 IBLA 85 (1988); Turner Brothers, Inc. v. OSMRE, 95 IBLA 182, 191 (1987). As discussed below, OSMRE presented sufficient evidence to establish a prima facie case for the existence of the violation.

[2] When OSMRE submits evidence that water flowing from an area disturbed by surface mining operations has pH levels outside the regulatory standards at a point where the water leaves the permit area, a prima facie case that there has been a violation of 30 CFR 715.17(a) is established. See Jeffco Sales & Mining Co., 4 IBSMA 140, 89 I.D. 467 (1982). Such evidence may be in the form of analytical tests of the water, and the results of such a test are presumptively valid in the absence of rebuttal evidence that the test was not properly administered. Darmac Coal Co., 74 IBLA 100 (1983); D & D Mining Co., 4 IBSMA 113, 89 I.D. 409 (1982). Appellant submitted no evidence to support a finding that the tests conducted by OSMRE were invalid. Therefore, the evidence provided by the Hach test and laboratory test were sufficient to sustain a finding that a violation existed.

[3] Appellant contends that a subdivision development near the mining area has caused a number of the problems existing at the site. Appellant also has argued that water discharge from stockpiles and an abandoned underground mine, both located on or near its site, are the cause of the low pH

emanating from Pond No. 1. The source of the contamination of the water discharged from Pond No. 1 has no bearing on the standards imposed, and allegations that the IDE operations were not the source are of no benefit to appellant in the instant case. The sediment pond was constructed pursuant to the permit and placed in a manner to achieve compliance with the requirement that discharges from a disturbed area meet the effluent limitations. ^{3/} These limitations apply to the discharges flowing through the pond, irrespective of the fact that the low pH water may have originated at stockpiles and an abandoned underground mine located on or near its site. Cravat Coal Co., Inc., 2 IBSMA 249, 255, 87 I.D. 416, 419 (1980). Appellant's allegation that the low pH water originated at a nearby subdivision development was not supported by the evidence. In order to prevail in such case, the operator must prove that the violation relates solely to drainage from an area which has not been disturbed by the permitted operations. National Mines Corp. v. OSMRE, 104 IBLA 331, 351, 95 I.D. 181, 193 (1988). Appellant clearly failed to establish this fact.

The discharge from this pond did not meet the requirements of section 715.17(a) when it left the permit area. Accordingly, we affirm the Administrative Law Judge's decision on this point. See Cravat Coal Co., supra.

[4] Appellant contends that it was relieved of its reclamation responsibility because the State had forfeited its bond after its failure to abate the State NOV and CO. We find appellant's argument without merit. Neither SMCRA nor Departmental regulations implementing SMCRA contains provisions which operate to release a minesite from regulation because a reclamation bond is forfeited. To the contrary, SMCRA provides that the miner shall be liable under the performance bond "for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation." 30 U.S.C. | 1259(b) (1982). Nowhere in the Act is there any provision suggesting that the forfeiture of a reclamation performance bond creates a limitation upon Federal regulation of a minesite subject to the Act. IDE has cited no provision of the Act or any rule implementing the Act which establishes that bond forfeiture is an event which may lead to the termination of Federal regulation of a surface mining site. The regulation of a given site ends upon successful completion of the reclamation in accordance with the standards established by the Act and relevant rules. OSMRE v. Calvert & Marsh Coal Co., 95 IBLA 182 (1987); see 30 U.S.C. | 1265(b)(10)(A)(ii) (1982). In the instant case the bond forfeiture was a result of appellant's failure to abate the NOV's and CO issued by the State of Tennessee. Clearly OSMRE's duty to regulate appellant's site has not ended.

In any event, we find that when the State of Tennessee issued its decision to revoke IDE's surface mining permit on October 23, 1985, it lacked authority to do so, and that its action has no bearing upon the subsequent enforcement action taken by OSMRE. On October 1, 1984, the date of repeal

^{3/} IDE initially treated the water to achieve compliance, but subsequently stopped treating the water flowing through the pond.

of the applicable provisions of the Tennessee Coal Surface Mining Law of 1980, TCA §§ 59-8-301 through 59-8-339, OSMRE assumed primary authority for enforcement of SMCRA. The OSMRE notice of withdrawal of approval of the Tennessee program (49 FR 38874 (Oct. 1, 1984)) granted the State certain limited authority, which included authority to continue bond revocation action commenced prior to October 1, 1984. However, this authority did not extend to the suspension or revocation of surface mining permits for failure to conform ongoing mining and reclamation operations to the Federal requirements. 30 CFR 942.773 specifically placed that authority with OSMRE. ^{4/} On October 24, 1985, the State no longer had the authority to revoke IDE's permit.

[5] Finally, appellant argues that collateral estoppel and/or res judicata bar efforts by OSMRE to enforce the corrective action required by the NOV. Appellant states:

[I]t is our belief that even if section 1271 [of SMCRA] gives the OSM[RE] authority to step in and take over the enforcement of a State program, it does not give it the authority to reopen enforcement decisions of the State agency which had already become final. In this case, Section 1271, does not give the OSM[RE] authority to require IDE to reclaim or correct violations for which the State holds the money. Such an interpretation would allow the State to benefit from the bond without having to assume any responsibility to correct the very conditions for which the bond was forfeited

(Statement of Reasons at 3-4).

Appellant finds support for this argument in the holding of a case styled Excello Coal Corp. v. Clark, *supra*. In Excello OSMRE had issued a 10-day notice alleging certain reclamation violations. The permittee appealed the violations to the Tennessee Board of Reclamation and received a favorable decision from that Board. Later, OSMRE cited permittee for the same violations. The Excello court held that the principles of res judicata and collateral estoppel applied to SMCRA, stating:

Under the doctrine of res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Montana v. United States, 440 U.S. 147,

^{4/} The applicable regulation, 30 CFR 942.773(d)(3), provides:

"(3) If the permittee fails to resubmit the permit application to conform the ongoing surface coal mining reclamation operations to the requirements of this part within the time specified, [OSMRE] may suspend or revoke the permit."

See also comments in the preamble to final rulemaking at 49 FR 38877 (Oct. 1, 1984). "[T]he decision to suspend or revoke a permit is more appropriately made by OSM[RE]."

153, 99 S.Ct. 970, 973 (1979). Under collateral estoppel principles, once an issue is actually litigated and necessarily determined, the determination is conclusive in subsequent suits based on a different cause of action but involving a party or privy to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5 (1979). It is now accepted that both res judicata and collateral estoppel can be applicable to decisions of administrative agencies acting in a judicial capacity. United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545 (1966). In the absence of "countervailing statutory policy," collateral estoppel applies and bars reinvestigation of factual questions or mixed questions of law and fact. See Brown v. Felsen, 442 U.S. 127, 139 n.10, 99 S.Ct. 2205, 2213 n.10 (1979); United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

(Memorandum Opinion at 5-6).

The facts in the instant appeal are distinguishable from the facts in Excello. The same violations were not involved. TDSM issued State NOV No. 036-12-083 for failure to pass all surface drainage through a sedimentation pond, for failure to maintain a diversion ditch, and finally, for failure to keep reclamation current. The NOV issued by OSMRE was for effluent discharge in violation of 30 CFR 715.17(a). One of the principles of res judicata and collateral estoppel is that the "question expressly and definitely presented in this suit must be the same as that definitely and actually litigated and adjudged adversely to the Government in the previous litigation." Montana v. United States, 440 U.S. 147, 157 (1979); United States v. Moser, 266 U.S. 236, 242 (1924). Accordingly, the doctrines of res judicata and collateral estoppel did not apply to preclude OSMRE from issuing the NOV in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

R. W. Mullen
Administrative Judge

I concur:

David L. Hughes
Administrative Judge