

WILDER COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-576

Decided November 30, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire affirming the issuance of Cessation Order No. 85-13-285-3. Hearings Division Docket No. NX-5-86-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Extraction of coal as an incidental part." For the purposes of 30 U.S.C. § 1278(3) (1982) and 30 CFR 700.11(a)(3), which exclude the "extraction of coal as an incidental part of Federal, State, or local government-financed highway or other construction" from the coverage of Federal performance standards otherwise applicable to surface coal mining operations, the phrase "extraction of coal as an incidental part" means, in accordance with 30 CFR 707.5, the extraction of coal which is necessary, from an engineering standpoint, to enable the construction to be accomplished and does not mean the extraction of coal for the purpose of financing the construction.

APPEARANCES: J. Jack Kennedy, Jr., Esq., Norton, Virginia, for Wilder Coal Company; Paul A. Molinar, Esq., Office of the Solicitor, United States Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Wilder Coal Company (Wilder) has appealed from the May 29, 1987, decision by Administrative Law Judge Joseph E. McGuire that found Cessation Order (CO) No. 85-13-285-3 had been properly issued for mining without a permit on land adjacent to its permitted minesite in Wise County, Virginia.

During inspections of the site covered by Wilder's permit No. 2477 in 1982 and 1983, Office of Surface Mining Reclamation and Enforcement (OSMRE) personnel had observed that surface disturbance extended beyond the permitted area, onto the adjacent property of Lonesome Pine Airport. On March 29, 1985, OSMRE reclamation specialist David E. Beam again inspected the adjacent property and issued Wilder the CO for conducting surface coal mining operations without a permit in violation of section 506(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(a) (1982); 30 CFR 843.11(a)(1) and 843.11(a)(2); 30 CFR 707.11(b); and V 770.11 of the Commonwealth of Virginia permanent surface mining regulations. The CO required Wilder to cease all operations immediately and submit a permit application to the Virginia Division of Mined Land Reclamation (DMLR) by April 29, 1985 (Exh. R-6).

On April 12, 1985, Wilder filed a timely application for review of the CO along with a request for temporary relief from compliance with the corrective action it specified; an amended application was filed on June 28, 1985. Administrative Law Judge McGuire viewed the premises, accompanied by the parties, on August 16, 1985, and conducted a hearing in Abingdon, Virginia, on November 19, 1985.

After summarizing the evidence, Administrative Law Judge McGuire's decision concluded that OSMRE had established a prima facie case that Wilder had violated section 506(a) of SMCRA by conducting mining and reclamation operations without a valid permit and that the CO was properly issued. <sup>1/</sup> Relying on Concord Coal Corp., 3 IBSMA 92, 98, 88 I.D. 456, 459 (1981), Administrative Law Judge McGuire also found that the coal extraction was not an "engineering necessity" for construction of the airport and was therefore not exempt under section 528(3), 30 U.S.C. § 1278(3) (1982), from the permitting requirements of SMCRA and the regulations:

The first criterion [for this exemption] requires that the extraction of coal be necessary in order that the construction be

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<sup>1/</sup> Section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2) (1982), states in part:

"(2) 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 Act or any permit condition required by this Act, which condition, practice, or violation \* \* \* 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." (Emphasis added.)

By the terms of 30 CFR 843.11(a)(2), surface coal mining operations conducted 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. Mid-Mountain Mining, Inc. v. Office of Surface Mining Reclamation & Enforcement, 92 IBLA 4 (1986).

accomplished. In order to be necessary is meant to be that of an engineering necessity, not an economic necessity. Concord Coal Corp., 3 IBSMA 92, 98 (1981). Applicant has not presented any evidence which demonstrates that its use of auger mining was an engineering necessity, per se. On the contrary, a number of its witnesses, including Shelcy Mullins, operator of applicant mining company, testified that the sole benefit which ensued from its extensive augering mining of coal was that of raising additional revenues from the sale of that coal, on which CAC [the Cumberland Airport Commission, owner of the Lonesome Pine Airport] received a royalty. Given the character of the evidence, the applicant has obviously failed to meet its burden of persuasion that the citation at issue was improperly issued by OSM[RE].

(Decision at 7).

Section 528(3), 30 U.S.C. § 1278(3) (1982), provides that the provisions of SMCRA "shall not apply to \* \* \* the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority." See 30 CFR 700.11(a)(3), 707.5, and 707.11. This exemption is contained in sections 480-03-19.700.11(a)(3) and 19.707(a) of the Virginia Coal Surface Mining Reclamation Regulations, effective December 15, 1981. Under section 19.700.5 Definitions of those regulations (formerly V707.5), the extraction of coal as an incidental part of Government-financed construction means "the extraction of coal which is necessary to enable the construction to be accomplished." A project is "government-financed" if it is funded 50 percent or more by funds from a Government financing agency's budget or general revenue bonds. Having determined that Wilder had failed to demonstrate that extraction of coal was necessary to enable airport construction to be accomplished, however, Administrative Law Judge McGuire found it unnecessary to examine the funding criterion (Decision at 7).

Wilder graded one area and excavated another on the property of the Lonesome Pine Airport south of the runway (Exhs. R-1, R-2, R-3, and R-4). Of 462.28 acres comprising airport property, 200 acres were surface mined, 50 by Wilder (Tr. 215, 217; Exh. Q). The excavated area resulted in a pit with an 85- to 100-foot highwall; at the bottom of the pit is the Blair seam, approximately 4 feet thick, from which 3,000 tons of coal were removed by horizontal augering in 1982 and 1983 (Tr. 61, 66-67, 252, 294, 310; Exh. R-5).

On October 12, 1979, Shelcy Mullins, Wilder's owner, entered into a "Surface Lease and Grading Agreement" (Exh. D) with the Cumberland Airport Commission (CAC), the Virginia agency having jurisdiction over Lonesome Pine Airport (Tr. 78-79). Under the agreement, executed "primarily in consideration of the need for the [CAC] to obtain necessary grade work for both immediate and future airport projects and expansion," CAC leased to Wilder a portion of airport property "for the purpose of removing coal by [the] strip mining method and grading." The agreement stated that Wilder understood CAC wished the land "to be left in a flat and level plane whenever possible, as long as the final level does not exceed an elevation of above the runway centerline elevation." Mullins acknowledged that he had no permit to mine

airport property (Tr. 291). He testified that when work began in 1979 he was told by Danny Brown, Commissioner for the DMLR, that the property was exempt (Tr. 285).

On November 15, 1984, Brown wrote CAC on behalf of DMLR noting that as a result of meetings with OSMRE the DMLR had "become aware of potential problems" concerning the exemption. One of the problems, in light of the requirement in the definition of "extraction of coal as an incidental part" that the extraction be "necessary to enable the construction to be accomplished," was "the justification from an engineering or construction point for coal extraction 80 feet below the surface and 1,200 feet from the proposed runway" (Exh. K). On March 26, 1985, Brown advised CAC that the necessary requirements had been met and that DMLR considered the project exempt from surface mining regulations (Exh. M): "Finally, the Division has determined from an engineering standpoint that the coal extraction occurring within the project area is incidental to the project and is necessary to accomplish the construction," Brown wrote. <sup>2/</sup>

This conclusion was presumably based on CAC's March 15, 1985, response to Brown:

The incidental nature of coal extraction occurring at the airport is required to enable construction and development of the airport to be accomplished. This is a conclusion of the attached report prepared by Thompson & Litton, Inc. The report recommends that the areas of future development be excavated to the level of unknown mine conditions and backfilled to finish grade with compacted fill. This greatly decreases the chance of future settlement and will allow building construction to begin as soon as the earthwork is complete. [<sup>3/</sup>]

(Exh. L).

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<sup>2/</sup> At the hearing Brown also testified that DMLR, after discussion with CAC, "determined that it was an exempt project" based on State regulations (Tr. 242).

<sup>3/</sup> The report, Exhibit C to Exhibit L, reads in part:

"The area to be developed after the knob has been removed has been deep mined in the past, and the extent of this mining activity is unknown. This is due to the unavailability of any mine mapping of the area. The unknown extent of mining underneath the development area creates a potential subsidence problem. To prevent this damaging occurrence, and to have known conditions on which to construct, it is recommended that the area be excavated to the level of the unknown mine conditions, backfilled to finish grade in lifts, and compacted by heavy equipment leveling off each lift. This will result in a stable area for the future construction of airport facilities, and eliminate the probability of structural damage by mining subsidence. The compacted fill will also allow for building construction to begin immediately after final gradework is completed, minimizing delays in future development."

The report notes in conclusion: "We have also investigated the augering that has taken place at the airport, and have found that there has been

At the hearing, witnesses for Wilder testified that excavating down to the level of the Blair seam was done in part in order to find and test old mine workings (Tr. 158-59, 193, 225, 248-49). The witnesses acknowledged, however, that the extent of augering performed by Wilder in the Blair seam was not necessary for either testing or for the development of the airport (Tr. 193-94, 227, 235, 255-56, 270).

Indeed, the bulk of the testimony by Wilder's witnesses, including Shely Mullins, Wilder's owner, was quite candid in stating that excavating down to and augering the Blair seam was necessary chiefly so that the proceeds from sale of the coal would cover the expenses of moving the earth and doing the grading CAC desired. Darrell Freddie Dean, former president of CAC, testified that there was a shortage of funds for airport construction and that coal extraction, with attendant earth moving and grading, was the means to defray the costs of improvements (Tr. 85-86, 98, 104, 107, 122-23, 125-26, 139). Jerry Wharton, a member of CAC, testified that the augering done was necessary to the development of the airport "from the standpoint of revenues derived from it" (Tr. 192). He also testified that the commission encouraged Wilder "to derive all the revenues that they could by mining, by whatever method was at their hands, whether it was strip mining, deep mining, augering, whatever, because we needed revenues to build an airport" (Tr. 193). Jerry Hamilton, member of an engineering consulting firm that advised Wilder about the proposed project, urged the company that it could not break even if it did not excavate below the Blair seam (Tr. 247-48). Shely Mullins said the reason for mining down to the Blair seam was because "[y]ou had to have somewhere to go to get the coal to make it profitable, or at least break even" (Tr. 280). He indicated that the only way the earth moving and grading could have been paid for was to recover the coal under airport property (Tr. 304-05).

Both OSMRE Program Specialist Michael Superfesky and James Jones of Paramount Mining Company, successor to Wilder's permit No. 2477, testified that augering was not necessary for airport construction but was done to maximize coal production (Tr. 270, 311, 315).

Thus, our review of the record convinces us that the augering of coal from the Blair seam was performed in order to finance the grading CAC wished done and not because it was necessary to the construction of the airport. Although the excavation down to the level of that seam may have been advisable as a means of assuring the stability of the surface, the extraction of the coal was not necessary to enable the construction of the airport facilities. At best, the evidence presented by witnesses for Wilder indicates a plausible post-hoc engineering rationale to justify DMLR's original assurance to Mullins that his operation was exempt under SMCRA.

Wilder does not contest this conclusion on appeal. Rather, Wilder contends that the coal extraction was necessary to finance airport construction

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fn. 3 (continued)

no augering underneath the runway. It is our opinion that the augering that has been done will have no adverse affect [sic] on future airport construction."

and was therefore exempt from SMCRA. Wilder argues that Concord Coal Corp., *supra*, misconstrues the intent of section 528(3) and incorrectly limits the scope of the exemption:

Congress did not intend an interpretation of section 528(3) to grant statutory exemption from the Act to those b[a]sed solely on engineering judgments and forever preclude exemption based on cost necessity of completing a government financed project. \* \* \* The Concord (*supra*.) ruling incorrectly limited the p[er]ceived scope and intent of Congress in providing the statutory exemption. The intent of Congress can not be limited strictly to a mere function of engineering in a government financed construction project. Wilder contends that the Act and the regulatory scheme would permit the exempt[ion] rational[e] to be applied to the removal of coal to further the advancement of a government financed construction project such as Lonesome Pine Airport. There would never be a necessity to market coal under the Concord rational[e]. [Emphasis in original.]

(Statement of Reasons at 5, 7).

[1] As IBSMA observed in Concord, extraction of coal as an incidental part means extraction of coal which is necessary to enable the construction to be accomplished, and "[n]ecessity, under this definition, is meant to be a function of engineering--not cost--constraints." Concord Coal Corp., 3 IBSMA at 98, 88 I.D. at 459. As the Board pointed out, the proposed definition of the phrase "extraction of coal as an incidental part" was "extraction of coal the market value of which is less than 50 percent of the cost of the government-financed construction." 43 FR 41808 (Sept. 18, 1978). The definition "was changed in recognition of perceived congressional intent that the exemption provision in section 528(3) of SMCRA be applied on the basis of engineering judgments. 44 FR 14949, Comment 4 (Mar. 13, 1979)." Concord Coal Corp., *supra* at 98 n.7, 88 I.D. at 495 n.7.

Comment 4 provides the following explanation for the change:

Comments were made that proposed Section 707.5 should be changed to redefine the phrase "extraction of coal as an incidental part." Suggestions were made to allow for a value either lower or higher than the 50 percent of the cost of the project as proposed.

In light of these comments OSM[RE] considered possible changes to the definition. Alternatives based on the percentage approach were rejected because OSM believes the percentage of coal value to cost of the project is not sufficiently closely related to the congressional intent. The extraction would be incidental to the construction if the removal was necessary to the comple-tion of the construction, even if the value of the coal was greater than 50 percent of the cost of the project. To retain the percentage approach, at the 50 percent level or at a higher or lower level, seems undesirable.

The approach adopted is that any extraction of coal which is necessary to enable the construction to be accomplished is an incidental part of the construction. The adopted approach may lead to some difficult engineering judgments for the State regulatory authorities. If a negative determination is made in a particular instance, some coal reserves might be left in place that could be removed under the percentage test. However, OSM[RE] believes that there will be few, if any, actual instances of this and that the engineering judgments can be made by the regulatory authority with the help of the public funding agency.

Coal mining may be incidental to the construction if its removal is necessary and if it is within the right-of-way, in the case of a road, railroad, utility line, or other such corridor or within the boundaries of the area directly affected by other government-financed construction. This limitation will prevent claims that what is essentially independent coal mining is somehow necessary to the actual construction.

44 FR 14949 (Mar. 13, 1979).

The general statement in the preamble to this regulation that precedes the specific comments says in part:

The regulations limit the scope of the exemption in a manner believed to be consistent with the congressional intent of Section 528 of the Act \* \* \*. The legislative history is clear that Congress intended the Section 528(3) exemption to be a narrow one, as established by the regulations. The third exemption was not added to Section 528 until the 95th Congress. Committee reports from earlier Congresses stated that exemptions in Section 528(1) and (2) were provided because these classes of surface mining covered by the exemptions caused very little environmental damage and regulation of them would be burdensome for the regulatory authority and the industry (reference No. 3). <sup>4/</sup> When the third exemption was added in the Senate during the 95th Congress, the Committee continued to use the same language to describe all three exemptions (reference No. 4 [sic]). <sup>5/</sup> However, the third exemption as added by the Senate was not limited to coal extraction incidental to government-financed construction (reference No. 4 [sic]). <sup>6/</sup> The Conference modified the Senate language

<sup>4/</sup> Reference No. 3 is S. Rep. No. 402, 93rd Cong., 1st Sess. 50 (1973).

<sup>5/</sup> This reference to "reference No. 4" is incorrect. The correct reference is to Reference No. 6, which is S. Rep. No. 128, 95th Cong., 1st Sess. 98 (1977).

<sup>6/</sup> This reference to "reference No. 4" is also incorrect. The correct reference is to Reference No. 5, which refers to section 428(3) of S. 7, which provided: "(3) the extraction of coal when done solely in the process of Federal and State highway construction, and such other construction under regulations established by the regulatory authority." S. Rep. No. 128, 95th Cong., 1st Sess. 42.

to "limit(s) the exemption to extraction of coal as an incidental part of government-funded construction only, rather than all construction as originally provided in the Senate language. (7)" [7/]

44 FR 14948-49 (Mar. 13, 1979).

The legislative history referred to above contains no support for Wilder's contention that Congress did not intend to preclude an exemption "based on cost necessity of completing a government financed project," and Wilder has not referred us to any other support for its position. The Department has not revised its interpretation of the scope of the exemption since 1979 and we are not persuaded to depart from that interpretation. Considering the evidence, the decision in Concord Coal Corp. is controlling. A party claiming an exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. S&S Coal Co. v. OSMRE, 87 IBLA 350, 354 (1985). We conclude that Wilder has not demonstrated it was entitled to an exemption under section 528(3).

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.

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Will A. Irwin  
Administrative Judge

I concur:

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James L. Byrnes  
Administrative Judge

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7/ Reference No. 7 is to H.R. Rep. No. 493, 95th Cong., 1st Sess. 112 (1977). The full statement in the report reads:

"Section 528. The House bill and the Senate amendment exempted certain small noncommercial coal mining operations from the provisions of this act.

"The Senate amendment also included an exemption for all construction. The conferees agreed to a modified version of the Senate amendment which limits the exemption to extraction of coal as an incidental part of government-funded construction only, rather than all construction as originally provided in the Senate language."