

ANNACO, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-187

Decided April 30, 1991

Appeal from a decision of Administrative Law Judge David Torbett, affirming issuance of six cessation orders. Nos. 86-84-061-001, 86-84-068-004, 86-84-062-012, 86-84-062-013 (Hearings Division Docket Nos. NX 6-71-R, NX 7-1-R, NX 7-5-R, NX 7-6-R, respectively), 86-84-062-016, and 86-84-062-017 (Hearings Division Docket No. NX 7-36-R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program:
Generally--Surface Mining Control and Reclamation Act of 1977:
State Regulation: Generally

Under the Surface Mining Control and Reclamation Act of 1977, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

The doctrines of collateral estoppel and res judicata will not preclude OSM from taking enforcement action in a primacy state where similar state regulatory authority enforcement actions have been resolved through settlement, since the statutory scheme of the Surface Mining Control and Reclamation Act of 1977 evidences a countervailing statutory policy against the application of those doctrines in such situations. Moreover, even if there were no countervailing statutory policy, those preclusion doctrines would not be applicable when the violations are not fully litigated before the state agency, but are resolved through a settlement agreement, and there is no privity between OSM and the state.

APPEARANCES: Shelby C. Kinkead, Jr., Esq., Lexington, Kentucky, for Annaco, Inc.; David B. Parks, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Annaco, Inc. (Annaco), has appealed from a November 2, 1988, decision of Administrative Law Judge David Torbett, affirming the issuance of three cessation orders (CO's) and three failure to abate CO's for conducting surface coal mining operations without valid surface disturbance permits from the Commonwealth of Kentucky, Department for Surface Mining Reclamation and Enforcement (DSMRE), in violation of Kentucky Revised Statutes (KRS) § 350.060 and section 502(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1252 (1988). 1/ In each of the three CO's, which were issued pursuant to section 521(a) of SMCRA, 30 U.S.C. § 1271(a) (1988), the Office of Surface Mining Reclamation and Enforcement (OSM) charged that Annaco had conducted surface coal mining operations under a separate State 2-acre or less surface disturbance permit, which actually affected an area greater than 2 acres. 2/ OSM based the charge on its conclusion that, in accordance with 30 CFR 700.11(b)(2) and 405 Kentucky Administrative Regulations (KAR) 7:030.1(2), the three permits in question were related to other surface coal mining operations. 3/

FACTUAL BACKGROUNDJack Baker Permit No. 897-0016 and Henry Begley Permit No. 897-0090

On May 23, 1983, DSMRE 4/ granted 2-acre or less surface disturbance mining permit No. 897-0016 to Jack Baker (Exh. G-79), and, on May 18, 1984, it granted a similar permit (No. 897-0090) to Henry Begley (Exh. G-73). On June 11, 1985, OSM issued Ten-Day Notice (TDN) No. X-85-81-077-10, notifying DSMRE that, as a result of a Federal inspection of five mining sites, including the Baker and the Begley sites, it had reason to believe that all

1/ Section 502 of SMCRA relates to permitting during the initial regulatory program. This case arises under the Kentucky permanent regulatory program, approved effective May 18, 1982. See 30 CFR 917.10. Accordingly, the CO's should have cited section 506, 30 U.S.C. § 1256(a) (1988), as the statutory basis for holding that Annaco was mining without a valid permit from the State. See S & S Coal Co. v. OSM, 87 IBLA 350, 351 n.2 (1985).

2/ Under section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1982), Congress originally exempted from the coverage of SMCRA "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." The 2-acre exemption "turned out to be the most misused and abused provision of SMCRA" (H.R. Rep. No. 59, 100th Cong. 1st Sess. 3 (1987)), and was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

3/ Under both 30 CFR 700.11(b)(2) and 405 KAR 7:030.1(2), surface coal mining operations are considered related if they occur within 12 months of each other, are physically related, and are under common ownership or control. After Congress eliminated the 2-acre exemption, OSM suspended 30 CFR 700.11(b) insofar as it exempts any surface coal mining operations commencing on or after June 6, 1987, and any surface coal mining operations conducted on or after Nov. 8, 1987. 52 FR 21229 (June 4, 1987).

4/ In 1983 the DSMRE was called the Bureau of Surface Mining Reclamation and Enforcement.

five sites were related, and that Annaco, as the operator of the sites, was violating Kentucky regulations by exceeding 2 acres of affected area without a valid surface disturbance permit (Annaco Brief, Exh. B).

DSMRE responded to the TDN by, *inter alia*, citing Baker and Begley, each d.b.a. Annaco, for mining on invalid permits (Annaco Brief, Exhs. C and N). DSMRE informed OSM by letter dated June 25, 1985, that it considered all five of the sites to be related (Annaco Brief, Exh. D). Thereafter, DSMRE issued orders for cessation and immediate compliance for the Baker and Begley sites (Annaco Brief, Exhs. E, F, and O).

On February 5, 1986, the Commonwealth of Kentucky, through its Natural Resources and Environmental Protection Cabinet (Cabinet), and Annaco entered into a settlement agreement designed to resolve various enforcement actions, including those concerning the Baker and Begley permits (Exh. G-77). As part of the settlement, Annaco admitted, as to the Baker permit, that it violated KRS § 350.060; that it controlled the operations on that permit, as well as on others; and that those operations were related (Exh. G-77, Paragraph 1.b. at 5). Annaco agreed to pay a civil penalty for this violation, but the settlement agreement did not require Annaco to perform any remedial measures on the permit (Exh. G-77, Paragraph 2.b. at 6-7, 9-14). While neither admitting nor denying violating KRS § 350.060 with respect to its operations on the Begley permit, Annaco agreed to pay a civil penalty for this permit as well (Exh. G-77, Paragraph 1.f.). The agreement did not direct any remedial measures on the Begley permit.

As part of a special study to determine compliance with the 2-acre exemption criteria, OSM again inspected both the Baker and Begley permits in September 1986. On September 26, 1986, OSM issued CO No. 86-84-062-012 (Exh. G-79) to Annaco (and Baker) and CO No. 86-84-062-013 (Exh. G-61) to Annaco (and Begley). Each CO cited one violation: "[m]ining without a valid surface disturbance permit from the Kentucky Regulatory Authority-- exceeding 2 acres of disturbed area." Annaco's applications for review of, and for temporary relief from, these CO's were docketed as NX 7-5-R and NX 7-6-R, respectively.

After follow-up inspections revealed that the abatement measures required on both the Baker and the Begley permits had not been performed, OSM, on November 14, 1986, served Annaco with failure to abate CO No. 86-84-062-016 for the Baker permit (Exh. G-79) and failure to abate CO No. 86-84-062-017 (Exh. G-57) for the Begley permit. Annaco's application for review of, and for temporary relief from, both these failure to abate CO's was docketed as NX 7-36-R.

James E. Johnson Permit No. 897-0019

DSMRE issued 2-acre or less surface disturbance mining permit No. 897-0019 to James E. Johnson on June 28, 1983 (Exh. G-35). On February 13, 1986, OSM issued TDN No. X-86-84-061-005, notifying DSMRE that OSM had reason to believe that Annaco was mining the Johnson permit and two adjacent permits, as well as a non-permitted area, without a valid surface disturbance permit from the Kentucky regulatory authority because

the operations on the designated areas were related (Exh. G-3). Although DSMRE issued a notice of non-compliance to Annaco and others for relatedness violations on the Johnson permit, the Cabinet and Annaco agreed, in April 1986, to dismiss, without prejudice, Annaco as a party defendant to that enforcement action (Annaco Brief, Exhs. Q and T).

After informing DSMRE that the response to the TDN was inadequate (Exh. G-7), OSM conducted an inspection of the Johnson permit and, on April 22, 1986, OSM issued CO No. 86-84-061-001 to Annaco (and Wayne Engle Trucking) for "[m]ining without a valid surface disturbance permit from the Kentucky Regulatory Authority (exceeding 2 acres of disturbed area due to relatedness)" (Exh. G-10). Annaco's application for review and for temporary relief from the CO was docketed as NX 6-71-R. On September 22, 1986, OSM served Annaco with failure to abate CO No. 86-84-068-004 (Exh. G-42). Annaco filed an application for review of, and for temporary relief from, this CO, which was docketed as NX 7-1-R.

PROCEDURAL BACKGROUND

All of Annaco's above-cited applications for review and for temporary relief were originally assigned to Administrative Law Judge Frederick A. Miller, who, on January 29, 1987, ordered the consolidation of the cases and denied temporary relief. In accordance with section 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1988), Annaco sought judicial review of Judge Miller's denial of temporary relief.

On December 22, 1987, in Annaco, Inc. v. Hodel, 675 F. Supp. 1052 (E.D. Ky. 1987), the U.S. District Court denied Annaco's request for temporary relief and remanded the matter to the Administrative Law Judge. Annaco had raised two substantive issues before the court: (1) OSM did not have jurisdiction to issue the CO's because Kentucky has primacy, and (2) OSM was precluded from acting because of the doctrines of res judicata and collateral estoppel. After carefully analyzing Annaco's arguments, Chief Judge Siler held that Annaco was not likely to prevail on the merits on either of these issues, and, thus, had failed to satisfy the criteria for temporary relief.

A hearing on the merits of OSM's issuance of the CO's was held in Lexington, Kentucky, on July 26, 1988, before Judge Torbett, to whom the cases had been reassigned on November 18, 1987. ^{5/} OSM presented the testimony of three inspectors who had examined the permit sites and numerous exhibits in support of the charges that Annaco's mining operations on each of the 2-acre or less permits exceeded 2 acres because it was related to other coal mining operations, and that, therefore, Annaco had violated SMCRA and KRS § 350.060 by mining without a valid surface disturbance permit. Annaco did not appear, nor was it represented by counsel, at the hearing.

^{5/} Two other cases, Hearings Division Docket Nos. NX 6-55-R and NX 6-59-R, were also consolidated with the cases now on appeal. These actions were dismissed by Judge Torbett by order dated June 15, 1988.

In his decision, Judge Torbett sustained the validity of each of the CO's. He also rejected Annaco's contention that OSM lacked jurisdiction to issue the CO's because Kentucky, as a primacy state, has exclusive jurisdiction to enforce SMCRA. He concluded, relying on the rationale espoused by the district court in Annaco, Inc. v. Hodel, *supra*, that the statutory language and the legislative history of SMCRA supported OSM's authority to enforce the Act on a mine-by-mine basis in a primacy state, as part of its oversight responsibilities. He noted that the Federal regulations promulgated to enforce SMCRA provided for oversight jurisdiction, and that case law clearly established OSM's authority to enforce SMCRA's provisions concurrently with a primacy state.

Judge Torbett also rejected Annaco's argument that the doctrines of res judicata and collateral estoppel barred OSM's enforcement action against Annaco because the Cabinet had already settled with Annaco concerning relatedness violations on these permits. He determined that neither res judicata nor collateral estoppel applied because the settlement agreement relating to the Baker and Begley permits was an administrative action rather than a final judgment by a court of law, and resulted from negotiation, not full and fair adversarial litigation. He further found that res judicata did not apply because Kentucky and OSM were not in privity because their legal interests were not the same in that they espoused different positions as to the proper means for abating the relatedness violations. Judge Torbett noted that OSM had ordered Annaco to reclaim the sites to permanent program standards, while DSMRE had only assessed civil penalties, and indicated that it was DSMRE's decision not to require reclamation that had prompted OSM's enforcement action. Accordingly, he concluded that the lack of identity of issues and privity between OSM and DSMRE in the prior State action prevented the settlement agreement from barring OSM's issuance of the contested CO's. ^{6/} Annaco filed a timely appeal.

DISCUSSION

On appeal Annaco does not challenge Judge Torbett's conclusion that the evidence demonstrates that it violated SMCRA and KRS § 350.060 by conducting surface mining operations without valid surface disturbance permits on all three sites at issue, and we find this conclusion to be amply supported by the record. Instead, Annaco reiterates the arguments it made to both the district court and Judge Torbett that OSM lacks enforcement jurisdiction in a primacy state such as Kentucky, and that collateral estoppel and res judicata bar these OSM enforcement actions.

OSM's Enforcement Authority in a Primacy State

[1] Both the plain language of SMCRA and its legislative history clearly indicate that OSM has jurisdiction to enforce any part of a state's program not being enforced by that state. Section 503(a) of SMCRA, 30 U.S.C. § 1253(a) (1988), authorizes the Secretary to grant a

^{6/} Annaco filed a motion to reconsider this decision on Nov. 14, 1988. Judge Torbett denied the motion by order dated Nov. 23, 1988.

state exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-Federal lands, "except as provided in section[] 1271." Section 504(b) of SMCRA, 30 U.S.C. § 1254(b) (1988), provides for "Federal enforcement, under the provisions of section 1271 of this title, of that part of a State program not being enforced by the State."

The referenced section, section 521 of SMCRA, 30 U.S.C. § 1271 (1988), authorizes, inter alia: Federal inspection of surface coal mining operations if a state fails to take appropriate action or to show good cause for such failure after receiving a TDN (section 521(a)(1)); issuance by the Secretary of a CO if any Federal inspection reveals a condition, practice, or violation which "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" (section 521(a)(2)); issuance by the Secretary of a notice of violation if a Federal inspection, including one carried out pursuant to section 504(b), 30 U.S.C. § 1254(b) (1988), uncovers a violation which does not create imminent danger to health, safety, or significant, imminent environmental harm to land, air, or water resources, followed by a CO if the violation is not abated in a timely manner (section 521(a)(3)); and Federal enforcement of all or part of a state's approved program if the state has failed to enforce its program (section 521(b)).

As the district court succinctly stated in holding that Annaco was not entitled to temporary relief from these CO's: "The plain language of these sections gives [OSM] jurisdiction to issue a CO to an operator in Kentucky, a state which has achieved primacy. Therefore, [OSM] had authority, pursuant to [30 U.S.C. §§] 1253, 1254, and 1271, [SMCRA sections] 503, 504, and 521, to issue CO's to Annaco." Annaco, Inc. v. Hodel, supra at 1058.

The legislative history further supports OSM's authority to enforce SMCRA's standards on a mine-by-mine basis in a primacy state. Congress apparently anticipated that the Secretary would need to take enforcement action, short of taking over all or part of a state program, to guarantee compliance with SMCRA. As the final Senate report on SMCRA states:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal back-up to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong. 1st Sess. 88 (1977); H.R. Rep. No. 896, 94th Cong. 2d Sess. 119 (1976). See also Turner Brothers, Inc. v. OSM, 92 IBLA 320, 324-25 (1986).

Thus, we conclude that while a primacy state has primary jurisdiction for enforcement of an approved state program, that jurisdiction is not

exclusive, and OSM has the authority to enforce the state program on a mine-by-mine basis under proper circumstances. See, e.g., W. E. Carter, 116 IBLA 262, 266-67 (1990); Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989) and cases cited therein. ^{7/}

Res Judicata and Collateral Estoppel

[2] Annaco argues that the prior DSMRE proceedings, which resulted in the settlement agreement's resolution of the Baker and Begley permit violations and the dismissal without prejudice of Annaco as a party defendant to the relatedness violation on the Johnson permit, preclude OSM's enforcement actions due to the doctrines of res judicata and collateral estoppel. We reject this argument.

In Bernos Coal Co. v. OSM, 97 IBLA 285, 297, 94 I.D. 181, 188-89 (1987), rev'd, Bernos Coal Co. v. Lujan, Civ. No. 3-87-437 (E.D. Tenn. June 6, 1989), the Board concluded:

Our analysis of the applicability of res judicata/collateral estoppel principles in this case leads to the conclusion * * * that the unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders those doctrines inapplicable to issues arising in the Federal/State context. That policy is placed into focus by examining OSM's responsibilities, as defined in key provisions of SMCRA and its legislative history, as well as the regulations promulgated to implement SMCRA. OSM, on behalf of the Secretary, is required to ensure compliance with the law regardless of the actions or inactions of the State regulatory authority. [Footnote omitted.]

^{7/} We further find that OSM properly issued the CO's at issue here. Under 30 CFR 843.11(a)(1), OSM must immediately issue a CO if it finds "on the basis of any Federal inspection, any condition or practice, or any violation * * * which: * * * (ii) is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Subject to exceptions not relevant here, 30 CFR 823.11(a)(2) provides that "[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." OSM determined, after inspecting the permitted areas at issue here, that Annaco was mining those sites without a valid surface mining permit: therefore, OSM correctly issued the disputed CO's as required by 30 CFR 843.11(a)(1). See, e.g., Fresa Construction Co. v. OSM, 106 IBLA 179, 189-90, 95 I.D. 293, 299-300 (1988); S & S Coal Co. v. OSM, 87 IBLA 350, 354-55 (1985). Under the circumstances, although OSM issued TDN's to the state, that procedure was not necessary before issuing the CO's. M & J Coal Co. v. OSM, 115 IBLA 8, 17 (1990); Fresa Construction Co. v. OSM, *supra* at 190-91, 95 I.D. at 300, and cases cited therein.

Although Bernos has been reversed by the district court, we continue to hold to the rationale set forth in that decision. See Slone v. OSM, 114 IBLA 353, 356 (1990). 8/

In any event, even if there were no countervailing statutory policy in SMCRA, res judicata and collateral estoppel would not apply here because the prerequisites for their application do not exist. The Supreme Court discussed these preclusion doctrines in Montana v. United States, 440 U.S. 147, 153 (1979):

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. [Citations omitted.]

See United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

In this case neither res judicata nor collateral estoppel applies because the State proceedings did not culminate in a final judgment on the merits nor did they "actually and necessarily" determine the issues raised by OSM in these enforcement actions. Clearly, the dismissal without prejudice of Annaco as a party defendant to the violation on the Johnson permit

8/ In Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984), in expressly declining to follow the decision of the U.S. District Court for Alaska in Oregon Portland Cement Co. v. United States Department of the Interior, 590 F. Supp. 52 (D. Alaska 1984), the Board stated:

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain." We believe that rationale is applicable in this case, especially given the well-reasoned opinion of Chief Judge Siler in Annaco. We note also that in Conoco, Inc., 114 IBLA 28, 32 (1990), we declined to follow the decision of the United States Claims Court in Chevron, U.S.A., Inc., 17 Cl. Ct. (1989). The Chevron decision was subsequently overruled by the United States Court of Appeals for the Federal Circuit in Chevron, U.S.A., Inc. v. United States, 923 F.2d 830 (1991).

did not constitute a final judgment on the merits or a determination of any issue raised by the violation. ^{9/}

Additionally, the settlement agreement resolving the violations on the Baker and Begley permits

was not achieved through a decision by an impartial judge after hearing arguments by Annaco on the one hand, and the Cabinet on the other hand. Rather the settlement agreement was achieved through discussions between Annaco and the Cabinet. Such a procedure, while not impairing the validity of the settlement agreement, does necessitate negotiation, so that neither side would have pursued its position as vigorously as in an adversarial proceeding. Therefore the issues did not receive a full and fair litigation. The absence of a full and fair litigation of the issues precludes the application of the doctrines of res judicata and collateral estoppel.

Annaco v. Hodel, *supra* at 1058.

Furthermore, there is no privity between the State and OSM. Under the doctrine of privity, one who was not a party of record may be bound by a judgment if it had sufficient interest and participated in the prior action, or if its interests were represented by one with authority to do so. United States v. ITT Rayonier, Inc., *supra* at 1003.

In this case DSMRE was not OSM's "delegated enforcement arm," as claimed by Annaco, nor its virtual representative during the State proceeding. OSM did not control the conduct of DSMRE in the State proceeding; thus, OSM did not have the sufficient "laboring oar" in the conduct of the earlier proceeding found to actuate the doctrine of collateral estoppel in Montana v. United States, *supra* at 155. See also United States v. Mendoza, 464 U.S. 154, 164 n.9 (1984); Bernos Coal Co., *supra* at 302, 94 I.D. at 191-92.

Similarly, in contrast to the situation in United States v. ITT Rayonier, Inc., *supra*, where the Environmental Protection Agency's interests were identical to those of the state agency, OSM's interests were not represented by DSMRE in the State administrative proceedings. OSM has ordered Annaco to reclaim the sites to permanent program standards; the Cabinet did not order reclamation of the Baker and Begley sites, but only required Annaco to pay civil penalties for its violations of those permits. As the district court in Annaco, Inc. v. Hodel, *supra* at 1059, observed, "[i]t was the Cabinet's decision not to require reclamation that prompted [OSM] to issue CO's to Annaco requiring reclamation." We

^{9/} Specifically, the dismissal stated at paragraph 5 on page 4, "[t]his Agreement to Dismiss shall not be construed in any way as being a determination that Annaco, Inc. has not violated the provisions of KRS 350.060 and KAR 7:040" (Annaco Brief, Exh. Q).

conclude that res judicata and collateral estoppel do not bar OSM's enforcement actions 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, Judge Torbett's decision is affirmed.

Bruce R. Harris
Administrative Judge

I concur:
Wm. Philip Horton
Chief Administrative Judge

