

Editor's note: Reconsideration denied -- 124 IBLA 72 (Sept. 2, 1992); Appealed -- sub nom. Exchange Insurance Co. v. DOI, Civ.No. 3-92-683 (E.D. Tenn. Oct. 2, 1992); aff'd (April 11, 1993), 820 F.Supp. 357;

EXCHANGE MUTUAL INSURANCE CO.

IBLA 89-75

Decided June 11, 1991

Appeal from a decision of the Knoxville, Tennessee, Field Office, Office of Surface Mining Reclamation and Enforcement, to pursue bond forfeiture for failure to reclaim land mined under permit No. 82-213.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Generally

A performance bond issued in 1981, during the interim program when a bond was required by the State but was not required by SMCRA, and evidently used again as the bond required by the State's surface mining act and by SMCRA for granting of a permanent program permit, is a statutory bond pursuant to SMCRA. Such a bond remains enforceable by OSM despite repeal of the State's surface mining act.

APPEARANCES: Gary S. Rubenstein, Esq., Nashville, Tennessee, for Exchange Mutual Insurance Company; Charles P. Gault, Esq., Office of the Field Solicitor, Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Exchange Mutual Insurance Company (EMI) has appealed an October 27, 1988, decision by the Director, Knoxville Field Office, Office of Surface Mining Reclamation and Enforcement (OSM), relating to performance bond No. EM139025. In its decision, OSM notified San Jose Minerals, Inc. (SJM), holder of surface mining permit No. 82-213, of its intent to collect the performance bond 30 days from the date of the decision absent substantial progress toward reclamation of SJM's minesite. The decision indicates that EMI was sent a copy of the decision by certified mail. ^{1/}

^{1/} There is no evidence that such "substantial progress" was made during the 30-day compliance period. Thus, it appears that OSM regards the bond as due for collection.

EMI is the surety under bond No. EM139025, dated August 7, 1981, which was originally issued in the penal sum of \$45,000. 2/ By notice dated September 28, 1983, the Tennessee State Department of Conservation, Division of Surface Mining and Reclamation, reduced SJM's bond requirement to \$36,000. 3/

In 1980, the State of Tennessee (the State) enacted the Tennessee Coal Surface Mining Law of 1980 (TCSML), Tenn. Code Ann. §§ 59-8-301 through 59-8-339. Effective August 10, 1982, Tennessee's State program was granted conditional approval (47 FR 34724) pursuant to section 503 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1253 (1988).

The record forwarded by OSM includes very little information concerning the circumstances surrounding the issuance of permit No. 82-213. We can determine, however, that in 1982 SJM submitted an application for a "repermit of 81-158" and that permit No. 82-213 was issued November 22, 1982. The subject bond, dated on August 7, 1981, was apparently issued as the statutory bond required for permit No. 81-158, and was then used again as the bond supporting permit No. 82-213 in 1982.

2/ The subject bond reads:

"KNOW ALL MEN BY THESE PRESENTS, That the undersigned San Jose Minerals & Development Company, Inc., 102 Miller St. of Lake City, Tenn., principal, and Exchange Mutual Insurance Company of Nashville, Tenn., as surety, are held and firmly bound unto the State of Tennessee (and its successors and assigns) in the penal sum of Forty-five Thousand and 00/100 Dollars (\$45,000.00) for payment of which well and truly to be paid to the said State of Tennessee, we hereby jointly and severally bind ourselves, our heirs, administrators, executors, successors, and assigns.

"THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That, whereas, the above named principal did on the 26 day of March, 1981, file with the Division of Surface Mining an application to secure a permit to engage in surface mining in the State of Tennessee; and that in said application the principal estimates that 15 acres of land will be affected by surface mining during the period of one year following the date of beginning of the permit issued pursuant to the aforesaid application requiring this bond.

"NOW, if the said San Jose Mineral & Development Company shall faithfully perform all the requirements of Section 58-1540 et seq., Tennessee Code Annotated, and all requirements of all rules and regulations lawfully promulgated and adopted by the Commissioner, Department of Conservation, State of Tennessee, then this obligation shall be void; otherwise, it shall remain in full force and effect."
(Emphasis in original.)

3/ The record as originally forwarded by OSM did not contain a copy of the subject bond or the notice of bond reduction. In an order dated Dec. 27, 1990, we requested copies of these documents. EMI responded on Jan. 14, 1991, with copies of the bond and the bond reduction notice. The bond reduction notice, issued for permit No. 82-213, indicates it was received by EMI on Oct. 31, 1983.

Effective April 30, 1984, pursuant to 30 CFR 733.12(f), OSM instituted Federal enforcement of certain portions of the State program that OSM had determined the State was not adequately enforcing. 49 FR 15496 (Apr. 18, 1984). Effective October 1, 1984, the State repealed TCSML. OSM withdrew approval of the State program in full, effective October 1, 1984, and promulgated a Federal program for lands in the State. 49 FR 38874.

No appearance has been made in this appeal by SJM, and EMI does not dispute that violations occurred or that reclamation has not been completed at SJM's minesite. The notice of bond forfeiture lists a total of six notices of violation and cessation orders, issued from August 1985 through August 1987, and there is no evidence they were appealed. Moreover, the record contains photographic and other evidence demonstrating the failure of SJM to comply with statutory and regulatory requirements.

In its statement of reasons, EMI argues that bond No. EM139025 has been voided by legislative enactment of the State legislature, referring to a January 4, 1985, advisory opinion by the State's Attorney General (Advisory Opinion) in support of its position. The Advisory Opinion discusses the repeal of TCSML and offers the following analysis:

The federal office of surface mining has announced that it will not seek to assume responsibility over interim program bonds. 49 F.R. 38877 (October 1, 1984). Therefore, those bonds issued during the interim state regulatory program (May 3, 1978 to August 10, 1982) which have not had forfeiture proceedings commenced upon them prior to October 1, 1984 are now claimed by neither the State nor federal government. These interim program bonds are no longer statutory bonds. See State v. Tutt, 175 Tenn. 412, 415, 135 S.W. 2d 449, 450 (1940); United States v. Simpkins, 313 F.Supp. 1045, 1047 (1970). * * * Bonds given solely because of a statutory duty clearly do not survive repeal of the Statute. * * * For the foregoing reasons, it is the conclusion of this office that the bonds in question are no longer valid obligations of the operators and sureties which have submitted them. * * *

(Advisory Opinion at 2-3).

The OSM statement to which the Advisory Opinion refers indicates that "OSM is not asserting jurisdiction over interim program bonds in Tennessee." 49 FR 38876 (Oct. 1, 1984). OSM provided the following explanation when it made this statement:

OSM has considered whether it can assume any responsibility over those interim program bonds for which the Tennessee Department of Health and Environment has not commenced forfeiture. There is no express requirement under the Act for a reclamation bond until a permanent program permit is to be issued (SMCRA section 509(a)). Although OSM may have authority under Section 201(c) of the Act to require interim program bonds,

requiring assignment of existing interim program bonds now made payable to Tennessee could unreasonably interfere with existing contractual relationships. OSM therefore will not seek to assume responsibility over interim program bonds.

49 FR 38877 (Oct. 1, 1984).

[1] The analysis set forth in the Advisory Opinion and adopted by EMI erroneously looks at the date a bond was issued, rather than the date a permit was issued in reliance on the bond, in deciding whether a bond is statutory. Bond No. EM139025 was issued during the initial program period, and at that time it was required only by State law. In part on the strength of the bond, initial program permit No. 81-158 was issued. In 1982, bond No. EM139025 was evidently again used as the statutory bond required for a permit. At the time of issuance of the second permit, No. 82-213, however, bonding was required by both TCSML and SMCRA. Thus, bond No. EM139025 became a statutory bond pursuant to both statutes. Repeal of TCSML, therefore, did not have the same effect as repeal of the statutes involved in State v. Tutt, 175 Tenn. 412, 135 S.W. 2d 449 (1940), and United States v. Simpkins, 313 F. Supp. 1045 (1970), cited by appellant.

The SMCRA bonding provision provides:

After a surface coal mining and reclamation permit application has been approved but before such a permit is issued, the applicant shall file with the regulatory authority, on a form prescribed and furnished by the regulatory authority, a bond for performance payable, as appropriate, to the United States or to the State, and conditional upon faithful performance of all the requirements of this chapter and the permit. [Emphasis supplied.]

30 U.S.C. § 1259(a) (1988). The subject bond, by which EMI was "held and firmly bound unto the State of Tennessee (and its successors and assigns)" satisfied this provision and allowed SJM to receive permanent program permit No. 82-213.

Further, we note that the copy of the bond submitted by OSM reveals a "Charge" stamp for each year from 1981 through 1988, thus evidently denoting that EMI regarded the bond as in effect even after the repeal of the State's surface mining laws in 1984 and the issuance of the 1985 advisory opinion on which it now relies. This fact is inconsistent with its assertion that the bond was voided by the State's repeal of its surface mining laws.

The system of dual Federal and state jurisdiction was not established with the intent of creating jurisdictional technicalities which could be used to evade statutory or regulatory requirements. See 30 U.S.C. § 1271 (1988); Turner Brothers, Inc. v. OSMRE, 112 IBLA 166, 172-73 (1989); see, generally, Josephine Coal Co. v. OSMRE, 111 IBLA 316 (1989). Rather, the purpose of granting states primary enforcement responsibilities with

Federal oversight was to ensure adequate, efficient enforcement. H.R. Rep. No. 218, 95th Cong., 1st Sess. 129-30, reprinted in 1977 U.S. Code Cong. & Ad. News 661-62. To reverse OSM here would be inconsistent with the intent of SMCRA and its implementing regulations.

EMI agreed to be bound to the State and its successors and assigns pursuant to section 509 of SMCRA. OSM is the successor to the State's responsibilities as the primary regulatory authority under SMCRA and may therefore pursue forfeiture of bond No. EM139025.

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.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge