

GABRIEL ENERGY CORP.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 91-222

Decided March 11, 1992

Appeal from a decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 89-81-224-001. NX 89-68-R.

Affirmed.

1. Administrative Procedure: Administrative Review--Estoppel--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

When OSM and a coal miner agree that OSM will suspend enforcement of the Surface Mining Control Reclamation Act of 1977 while the miner pursues litigation in Federal court to determine whether a Federal coal mining permit is needed, enforcement may proceed when the Federal court litigation is ended.

2. Board of Land Appeals--Rules of Practice: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

The Board does not make initial adjudication of the existence of valid existing rights to mine that has not first been submitted to and decided by OSM, the agency with jurisdiction of the subject matter involved, nor does the Board render advisory opinions.

APPEARANCES: Dr. Doug Arnett, President, Gabriel Energy Corporation, Oneida, Kentucky; Charles P. Gault, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Gabriel Energy Corporation (Gabriel) appeals from a decision of Administrative Law Judge David Torbett, dated January 7, 1991. The decision sustained Notice of Violation No. (NOV) 89-81-224-001, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to Gabriel on June 26,

1989, pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1988).

Judge Torbett's decision provided the following summary of this case, the accuracy of which is not challenged by appellant:

On March 21, 1989, OSMRE Inspector Patrick Angel conducted a complete federal inspection of Applicant's deep mine site, located in the Daniel Boone National Forest in Owsley County, Kentucky, and holding state permit No. 095-5003. On June 26, 1989, Inspector Angel returned to the site for another inspection and issued Notice of Violation No. 89-81-224-001, citing Applicant for four violations of the Act and regulations. Violation (1) was for failure to backfill and grade to eliminate all highwalls and return the area to the approximate original contour in violation of 405 KAR 3:100 of the Kentucky Interim Regulations and Section 717.12 of the Federal Interim Regulations. Violation (2) was for failure to construct and maintain the access road in violation of 405 KAR 3:090 of the Kentucky Interim Regulations and Section 717.17(J) of the Federal Interim Regulations. Violation (3) was for failure to monitor surface and ground water in violation of 405 KAR 3:140, 3:150 of the Kentucky Interim Regulations and 717.17(b) and (h) of the Federal Interim Regulations. Violation (4) was for failure to maintain mine identification signs in violations of 405 KAR 3:070 of the Kentucky Interim Regulations and 717.12 of the Federal Interim Regulations.

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The case involved a mine site disturbed during the fall of 1980 which remains unreclaimed today. The site located in the Daniel Boone National Forest in Kentucky, was operated by Gabriel Energy Corporation pursuant to a coal mining permit issued by the State of Kentucky. An access road was constructed and a face-up area was excavated. In November 1980, the U.S. Forest Service and OSM became aware that Gabriel was conducting its operations within the boundaries of the National Forest.

The parties met on January 23, 1981, and came to an agreement, the contents of which are disputed. As a result of the agreement, Gabriel brought suit in the United States Court for the Eastern District of Kentucky seeking a determination of whether § 522(e) [of SMCRA], 30 U.S.C. § 1272(e), was applicable to its deep mine located in the Daniel Boone National Forest, and whether it must exhaust its administrative remedies in determining whether it had valid existing rights under § 522(e)(2).

The condition of the site in 1982-83, including the access road, the pond, and the highwall were documented in a series of photographs. The site was inspected on a regular schedule during 1982-83, each inspection report noting that no enforcement action would be taken due to Applicant's pending litigation in district court.

On April 27, 1984, following an adverse district court decision on whether Gabriel must obtain a federal permit, Respondent took enforcement action citing Gabriel for violations on the site. The five violations cited would have required Applicant to reclaim the site by June 18, 1984. On May 8, 1984, Respondent extended the time for abatement ". . . until the Gabriel Energy case is decided by the 6th District Circuit Court of Appeals." On January 29, 1985, the United States Court of Appeals for the Sixth Circuit rejected Gabriel's claim for relief, affirming the District Court. On May 1, 1985, Respondent cited Gabriel in FATCO 85-81-225-01 for the outstanding violations in the Notice of Violation No. 84-81-40-05.

Applicant appealed the Cessation Order and in due course it was vacated in an opinion by Judge Arness in Gabriel Energy Corp. v. OSM, 105 IBLA 53 (1988).

On May 9, 1989, Respondent wrote Applicant as follows:

On October 17, 1988, the Interior Board of Land Appeals ordered the vacation of Cessation Order (CO) No. 85-81-225-001 . . . . In their decision the Board referenced a January 23, 1981, correspondence from OSM Regional Director to Gabriel Energy.

This correspondence was in reference to a prior meeting between Gabriel and OSM. The meeting concerned stabilization of this minesite until Gabriel resolved its 'right to mine.' Since Gabriel did not prevail, any relief from enforcement afforded by the then Director's January 1981 correspondence no longer applies.

My inspectors inform me that the subject minesite is without reclamation. By this letter I am formally advising you that you must complete the reclamation within 30 days of receipt of this correspondence.

Following this letter, OSM Inspector Patrick Angel cited Applicant in Notice of Violation No. 89-81-224-001, the subject of this litigation. [Citations omitted.]

(Decision at 1-3).

Gabriel filed a timely application for review from the subject NOV. See 43 CFR 4.1161, 4.1162. A hearing on the matter was conducted in London, Kentucky, on June 12, 1990, and the parties were allowed to file post-hearing briefs. Judge Torbett reported: "At the hearing, Applicant did not contest the validity of the facts of the violation but claimed that Respondent was estopped from the present enforcement action by Judge Arness's decision in Gabriel Energy Corp. v. OSMRE" (Decision at 2). In a posthearing brief, Gabriel agreed with the Judge's analysis of the case, stating: "[T]he mine site \* \* \* was left unreclaimed. It was left in a condition so that Gabriel 'could return to work more or less without interruption of the work in progress'" (Applicant's Brief at 17). Accordingly, Judge Torbett's decision did not examine the underlying circumstances leading to the NOV. Rather, the issues were, as Judge Torbett found: "1) Does Judge Arness's decision of October 17, 1988, vacating on estoppel grounds NOV No. 84-81-40-5, act as a continuing bar to OSM enforcement action against Applicant? 2) Is Applicant's request for a determination of its valid existing rights, if any, ripe?" (Decision at 3).

Reviewing the estoppel question, Judge Torbett held that OSM was not estopped by the prior Board decision in Gabriel from issuing the four violations. Judge Torbett concluded, referring to statements made by the Board in Gabriel, that OSM was estopped from citing Gabriel only during the pendency of the Federal court litigation which concluded with the denial of certiorari in Gabriel Energy Corp. v. Hodel, 474 U.S. 900 (1985) (Decision at 4-5). As to the valid existing rights issue, Judge Torbett ruled that Gabriel had not used the available administrative process to obtain a determination of its claim of valid existing rights and therefore the issue was not yet ripe for adjudication (Decision at 5-6).

Referring to the negotiations with OSM as the "Knoxville Agreement," Gabriel asserts that

Judge Torbett made an error when he agreed with [OSM] as to the terms and duration of the Knoxville Agreement, especially in light of the denial by [OSM] of the agreement in the first place. Judge Torbett should have accepted the terms and duration of the Knoxville Agreement as set forth by Gabriel Energy and as affirmed by Judge Arness

(Statement of Reasons (SOR) at 7). Gabriel contends the duration of the agreement will continue until "the 'federal lands' issue is finally resolved; that is, until Gabriel's valid existing rights to mine the coal has been determined" (SOR at 8). Arguing that the time is not ripe to seek a determination whether Gabriel has valid existing rights because the Department has not yet promulgated a rule in this matter, the Board is asked to order a deadline for OSM to promulgate such a rule. Id.

[1] The focus of this appeal is the agreement between OSM and Gabriel that was reviewed by the Board in Gabriel Energy Corp. v. OSM, 105 IBLA 53 (1988). The Board found an agreement was

memorialized by a letter from Short [of OSM] to Arnett [representing Gabriel] dated January 23, 1981, which stated, in part:

Your discontinuing the operation and stabilizing the mine site pending the determination of the issues involved and your all-around candor and good faith are both commendable and very much appreciated. You may rest assured that I and my staff look forward to providing you with whatever assistance you require as you work toward resolving these matters.

105 IBLA at 54. The Board concluded from the record that

Gabriel immediately ceased mining operations and commenced a declaratory judgment action in the United States District Court for the Eastern District of Kentucky seeking determination that the company was entitled to mine the privately-owned coal lying beneath the Federal lands covered by its state permit without a Federal permit.

Id. Thereafter, on May 8, 1984, NOV 84-81-40-5 was issued to Gabriel charging five violations. 1/ This led to the issuance of Cessation Order No. 85-81-225-01 on May 1, 1985, when Gabriel failed to abate the five violations charged. Concluding that the parties had agreed Gabriel would refrain from operations and OSM would not seek enforcement pending completion of the Federal litigation, the Board then ruled it was therefore inequitable and unjust for OSM to enforce by cessation order the NOV that was issued before the pending litigation had been concluded. 2/

Judge Torbett ruled, at the June 12, 1990, hearing, that:

Now, one of the problems in this case is arguing about what the agreement was. I mean there's no question, Judge Arness has

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1/ These five violations, alleged to have occurred on Gabriel's mining operation on National Forest lands, consisted of failure to backfill and grade to eliminate all highwalls, spoil piles, and depressions (Violation No. 1), failure to properly construct hollow fill No. 1 (Violation No. 2), failure to construct and maintain a road pursuant to the State permit (Violation No. 3), failure to monitor surface and ground water (Violation No. 4), and failure to maintain a mine identification sign (Violation No. 5). Gabriel was not charged with failure to obtain a Federal permit before commencing mining. 105 IBLA at 54.

2/ Arguing that OSM recognized there was an agreement to suspend enforcement, Gabriel stated that the NOV was modified on May 21, 1984, extending the time for abatement of the NOV "until a decision could be reached on the Federal permit issue raised before the Sixth Circuit Court." 105 IBLA at 55.

already found that there's an agreement. I mean we're bound by that.

\* \* \* \* \*

That's the issue you're going to argue.

[Dr. Arnett] All right.

[The Court] But you're going to have to do it on the basis of---

[Dr. Arnett] On the basis of the documentation already presented.

[The Court] Yeah, what we've got to this point, because that's all that Judge Arness said. I do feel like that -- that the transcripts that were -- if they were before Judge Arness, you could argue from them, and we ought to put those in the record, if you want to.

(June 12, 1990, Tr. at 35, 38). 3/

As noted above, Gabriel contends in its present appeal that the agreement to defer enforcement of SMCRA was to continue until such time as any possible question regarding Gabriel's alleged valid existing rights had been decided. Gabriel's current construction of the agreement's terms and conditions, however, does not square with testimony given on January 21, 1986, before Administrative Law Judge Frederick Miller reviewing Cessation Order No. 85-81-225-01 (the decision reviewed by Gabriel).

[Mr. Arnett] So we stopped. Stopped action. We went to -- I went, personally, down and met with J.T. Begley and David Short, and said I do not want to do anything illegal, and if there is a disagreement, let's gentlemanly let that disagreement be determined by the Federal Courts.

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3/ The controversy over the scope of the "Knoxville Agreement" arose at the hearing when Gabriel asserted that the agreement constituted a continuing defense to the NOV in question:

"[Dr. Arnett] \* \* \* [a]nd we arrived at an agreement whereby Gabriel Energy would cease all mining operations on-site, would stabilize the mine site, and that OSM or the state -- and the state was party to the agreement -- would not cite the site during the course of litigation. \* \* \* [t]hat litigation is continuing in a different form at the present time. The state, in addition to the Office of Surface Mining, at this point is also disputing the agreement, and the case is before the Kentucky Court of Appeals (June 12, 1990, Tr. at 10)."

I call your attention that there was no action in the Federal Court about any violation that Gabriel Energy made or any wrong doings. It was simply a jurisdictional question of whether or not we need a federal permit or a state permit.

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Your Honor, it's a question of law, here, I think. It's a question of when is that litigation process completed - at the district level, at the circuit level, or the Sixth Circuit.

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Plain English is what I'm talking about. If Gabriel Energy had been granted Cert, if I understand law, the Supreme Court of the United States would have heard the case, they would then [have] ordered the Sixth Circuit--they would have ordered the Sixth Circuit to issue an order that only a trial court has that authority. Now, if I'm wrong, then the abatement period ended in May. If I'm right, the abatement period ended October 15th.

(Jan. 21, 1986, Tr. II at 62, 65).

It is apparent that Gabriel's own view of the agreement was that OSM was to refrain from enforcement pending the "Federal litigation" on the "question of whether or not we need a federal permit." As Gabriel's president explained, such conditions ceased when the Supreme Court denied certiorari. Gabriel now solicits the Board to expand that interpretation to provide a continuing defense against SMCRA enforcement pending resolution of all issues concerning its right to mine, but has not produced evidence to suggest this was the intent of the parties resulting from their January 23, 1981, Knoxville meeting. Gabriel seems to rely on the Board's statements construing the agreement in Gabriel. Nonetheless, no language in the Gabriel decision suggests SMCRA enforcement could be delayed past the date certiorari was denied. See 105 IBLA at 57-60. Nor has any evidence been offered by Gabriel to show that OSM ever agreed to suspend enforcement in the manner now suggested by Gabriel.

Judge Torbett concluded, correctly, that:

In interpreting the parties' agreement Judge Arness stated that OSMRE was estopped from issuing citations on Gabriel until Gabriel's federal litigation on the necessity of a federal permit had been carried to its conclusion. Judge Arness did not state, as Applicant argues, that OSM was estopped from enforcement action against Gabriel until all conceivable issues, including a determination on Gabriel's claim to valid existing rights, were resolved.

(Decision at 4). In administrative proceedings before the Department, the general rule is that there must be proof by a preponderance of the evidence

that a challenged decision is in error if an appellant is to prevail. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Galand Haas, 114 IBLA 198 (1990). Gabriel has failed to show that there is now any reason why enforcement of NOV 89-81-224-001 should not proceed, as Judge Torbett found.

[2] As concerns the valid existing right issue, the argument that SMCRA enforcement should be suspended out of fairness until the Department promulgates valid existing rights regulations is misplaced. Gabriel contends that it has a right to mine based on valid existing rights that entitle it to do so. This Board has consistently held that an applicant seeking to take advantage of the valid existing rights exception to SMCRA provision bears the burden of proving the existence of the rights giving rise to such entitlement. Gateway Coal Co. v. OSM, 118 IBLA 129, 98 I.D. 70 (1991), appeal filed, Civ. No. 91-592 (W.D. Penn. April 8, 1991); Valley Camp Coal Co. v. OSM, 112 IBLA 19, 41, 96 I.D. 455, 467 (1989), appeal filed, Civ. No. 90-0006-W (N.D. W. Va.). However, Gabriel has not yet applied for a permit so that it may present proof of the existence of such rights as it claims to have.

In an amendment to the posthearing brief filed November 5, 1990, Gabriel submitted a summary of facts that assertedly show the existence of valid existing rights. It now asks the Board to review that information and render an opinion. This is the same situation faced by the United States Court of Appeals for the Sixth Circuit when it rejected as premature Gabriel's request for a determination of its claim to valid existing rights in Ramex Mining Corp. v. Watt, 753 F.2d 521, 524 (1985):

The Office of Surface Mining has not yet ruled on the questions of plaintiffs' "valid existing right" to engage in underground coal mining under section 1272(e)(2). Until an administrative disposition is made of this question, we will not know the nature of the restraint imposed by the government on plaintiffs' mining operations. Thus, the District Court correctly ruled that plaintiffs' takings claim was not ripe for adjudication, and deferred to the agency's jurisdiction.

While the Board exercises review authority delegated by the Secretary, it does not make initial adjudications of matters that are required to be submitted to and decided by the agency with jurisdiction of the subject matter under consideration, nor does the Board render advisory opinions. See Tennessee Consolidated Coal Co. v. OSM, 99 IBLA 274 (1987); Edgar W. White, 85 IBLA 161 (1985). As Judge Torbett recognized: "Until Applicant has exhausted the available administrative remedies, it would be inappropriate \* \* \* to pretermitt the administrative process by reaching the merits on Applicant's claim to valid existing rights" (Decision at 6). Judge Torbett found that the Interim Procedures for Determination of Valid Existing Rights, Temporary Directive 90-03 (Decision at 5) provides a process by which Gabriel may obtain a determination by OSM regarding its valid existing rights: Gabriel has not taken this opportunity to obtain

the ruling it claims to desire, because it has not applied for a Federal permit.

It appears that Gabriel is asking the Board to review the valid existing rights issue so that it may obtain a favorable opinion before it approaches OSM about a permit. Such a procedure stands the regular administration of the surface mining program on its head. This question must be first presented to OSM by making an application for permit.

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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Franklin D. Arness  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge