

MARION A. TAYLOR

IBLA 92-184

Decided February 19, 1993

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, affirming refusal to take action in response to citizen's complaint. Permit No. 836-0219.

Vacated.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State

When as a result of a citizen's complaint the state regulatory authority is notified by OSM in a TDN that there is a dispute regarding whether a state permittee has a legal right to mine private land subject to permit but the state refuses within 10 days of receipt thereof to suspend mining under the permit pending resolution of that dispute, OSM should direct suspension of mining.

APPEARANCES: John M. Rosenberg, Esq., Prestonsburg, Kentucky, for appellant; Billy R. Shelton, Esq., Pikeville, Kentucky, for intervenor Coal-Mac, Inc.; J. Nicklas Holt, 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 ARNESS

Marion A. Taylor has appealed from a decision of the Director, Office of Surface Mining Reclamation and Enforcement (OSM), dated August 20, 1991, refusing to take action in response to his citizen's complaint. At issue is whether the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE) properly issued a "Surface Coal Mining and Reclamation Operations Permit" (No. 836-0219) to Coal-Mac, Inc. (Coal-Mac), on July 3, 1990, over the objections of Taylor and his wife as the owners of the surface estate of part of the permitted land. The permit authorized Coal-Mac to conduct coal mining operations by surface and auger means on 179.3 acres of land in Floyd County, Kentucky.

The mineral estate in the land involved here was severed from the surface estate by a September 17, 1903, deed by which Alex and Louisa Stumbo conveyed the mineral estate to Northern Coal & Coke Company. On June 12, 1992, in Taylor v. Coal-Mac, Inc., No. 91-CA-389-MR, the Kentucky Court of Appeals held, at page 7, that this deed was a "broad form deed." As such, under longstanding State court precedent, the mineral estate was considered the dominant estate and was accorded extensive rights to so much of the surface as was "necessary or convenient for the full and free exercise and enjoyment of the minerals conveyed." Id. at 4 (quoting from Akers v. Baldwin, 736 S.W.2d 294, 298 (Ky. 1987)).

The Taylors acquired the surface estate of the land involved here from George and Johnnie Barnett, by deed dated December 20, 1971. The deed reserved to George Barnett "all mining rights * * * in and to this property." At the time of that conveyance, Barnett was operating a deep mine on the property. On October 12, 1981, Barnett entered into a lease agreement with the Triple Elkhorn Mining Company, Inc. (Triple Elkhorn), permitting the mining of the land by surface or auger methods. The Taylors then initiated an action in State court, styled Taylor v. Triple Elkhorn Mining, Inc., No. 83-CI-068, challenging Triple Elkhorn's right to engage in surface mining on the land. Triple Elkhorn assigned its rights under the October 1981 agreement with Barnett to Coal-Mac on June 20, 1989.

On November 8, 1988, Kentucky adopted an amendment to the State constitution commonly known as the "Broad Form Deed Amendment" (Ky. Const. § 19(2)). The amendment provided that for every broad form deed, whenever issued, if the method of coal extraction was not specified, the intention of the parties should be construed to be that coal would be taken "by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed." In cases where deep mining is presumed to be the authorized method of coal extraction, the surface owner or his or her successor can, however, authorize mining by the mineral owner by surface means. See Carolyn S. Bratt & Karen J. Greenwell, Kentucky's Broad Form Deed Amendment: Constitutional Considerations, 5 J. Min. L. & Pol'y 20 (1989-90).

The broad form deed here at issue did not specify any method of coal extraction and there is no evidence regarding the intention of the parties to the deed. The Court of Appeals in Taylor v. Coal-Mac, Inc., No. 91-CA-389-MR, at page 10 of its June 1992 opinion, took judicial notice of the fact that surface mining was not in common practice in Floyd County in 1903. See also Akers v. Baldwin, supra at 309 ("strip mining, as it is practiced today, was nonexistent in the early 1900's, when most, if not all, of the broad form deeds were executed"). Consequently, deep mining is presumed to be the authorized method of coal extraction under the 1903 deed.

After adoption of the Broad Form Deed Amendment, Coal-Mac filed an application for a State mining permit with DSMRE. The record does not contain that application or indicate what documents were filed with DSMRE in support of Coal-Mac's legal right to mine the subject land. But the record does indicate the assertion by Coal-Mac before DSMRE, prior to per-mit issuance, of a legal right to mine the subject land by surface and

auger means. We know that Coal-Mac asserted that it held such right under the October 1981 lease agreement whereby Barnett (who had retained "all mining * * * rights" in his December 1971 conveyance of the surface estate to the Taylors) granted the right to Triple Elkhorn, who in turn passed it to Coal-Mac. We also know that copies of these documents were submitted at some time prior to permit issuance by DSMRE.

The Kentucky surface coal mining statute requires an applicant for a surface coal mining permit to state in his application "the source of the applicant's legal right to mine the coal on the land affected by the permit." Ky. Rev. Stat. Ann. § 350.060(3) (1990). This requirement is implemented by State surface coal mining regulations that require an applicant for a permit to conduct surface mining to provide in his application "a description of the documents upon which the applicant bases his or her legal right to enter and begin surface mining activities in the permit area and whether that right is the subject of pending litigation." 405 Ky. Admin. Regs. 8:030(4)(1) (1990). In the case of severed private mineral and surface estates, the regulations require submission of a copy of the "document of conveyance that grants or reserves the right to extract the coal by surface mining methods." 405 Ky. Admin. Regs. 8:030(4)(2) (1990).

The Taylors objected to issuance of a surface mining permit to Coal-Mac in a March 6, 1990, letter to DSMRE. They stated that Coal-Mac had failed to demonstrate that it had the legal right to mine the subject land by surface means since their consent, as the owners of the surface, was necessary under the Broad Form Deed Amendment and Coal-Mac had not shown that they had consented. On May 8, 1990, DSMRE then required Coal-Mac to submit a legal opinion addressing the question whether it had a legal right to mine the subject land. That opinion appears in a May 31, 1990, letter from Coal-Mac's current counsel. The opinion concluded that Barnett had retained the right to mine the land by surface means in the December 1971 deed to the Taylors, and had subsequently conveyed that right to Triple Elkhorn who passed it to Coal-Mac. The Taylors challenged this opinion by letter to DSMRE dated June 12, 1990, contending that Barnett had, in the December 1971 deed to them, "g[iven] away all his rights to the surface."

The Taylors were notified by DSMRE in a July 3, 1990, letter that the State mining permit had been issued to Coal-Mac on that date. There is no evidence that the Taylors pursued a State administrative appeal. Instead, Taylor filed a citizen's complaint with OSM on August 27, 1990, pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1988), and 30 CFR 842.12(a). Taylor argued that DSMRE had improperly issued a mining permit to Coal-Mac although the Taylors, as the owners of the surface of the subject land, had not authorized Coal-Mac to engage in surface mining. He also indicated that the question of Coal-Mac's legal right to mine was the subject of pending litigation. The record indicates that the matter was then pending before the Floyd County Circuit Court in the case of Taylor v. Coal-Mac, Inc., No. 83-CI-068.

In response to the Taylor complaint, the Prestonsburg Area Office, pursuant to section 521(a)(1) of SMCRA and 30 CFR 842.12, issued a Ten-Day

Notice (TDN) (No. 90-83-130-015) to DSMRE on September 25, 1990. The TDN stated that, as a result of the complaint, OSM had reason to believe that Coal-Mac had been issued a mining permit by DSMRE without a "final legal finding of the company's right-to-mine," in violation of 405 Ky. Admin. Regs. 8:030(4) (1990). In a September 25, 1990, letter accompanying the TDN, the Area Office stated the complaint alleged that the permit had been issued in the absence of a "final court decision on the company's right-to-mine." The TDN required DSMRE, within 10 days of receipt of the notice, to either take appropriate action to cause the violation to be corrected or show good cause for its failure to do so.

DSMRE responded to OSM's TDN by letter dated October 2, 1990, stating that it could not determine a permit applicant's right to mine since it was forbidden to adjudicate property title disputes by 405 Ky. Admin. Regs. 8:030(4)(3) (1990) and that, in any case, a "final legal finding" regarding the right to mine was not required prior to issuing a State mining permit. If the right to mine was the subject of pending litigation, DSMRE opined that it could not withhold issuance of a permit to await resolution of the litigation since this might deny the company its legal right to mine. Should the litigation end by finding that the company had no such right, DSMRE stated that the company would have to make revisions to its permit.

The Lexington Field Office notified DSMRE by letter dated November 1, 1990, that it had failed to take appropriate action or show good cause for failure to do so and OSM would conduct a Federal inspection and undertake Federal enforcement. The Field Office stated that DSMRE improperly issued the mining permit while the question of the existence of a right to mine was subject to pending litigation. By issuing the permit, the Field Office found that DSMRE had adjudicated a property rights dispute that might be ultimately determined in favor of the surface owner. The Field Office stated that the permit should be suspended for lands the surface of which is owned by the Taylors and that only reclamation should be allowed on these lands.

By letter dated November 7, 1990, DSMRE requested an informal review of this determination pursuant to 30 CFR 842.11(b)(1)(iii)(A). DSMRE argued that it had issued the permit based on Coal-Mac's prima facie showing that it had the legal right to mine. In response to this request, by letter dated February 1, 1991, the Deputy Director, Operations and Technical Services, OSM, concluded that the question whether Coal-Mac had made the necessary prima facie showing that it had the legal right to mine the subject land at the time of permit application was made "moot" by a final decision by the Floyd County Circuit Court in Taylor v. Coal-Mac, Inc., No. 83-CI-068, on January 7, 1991. In that decision, the court held that Coal-Mac had the right to engage in surface mining as the remote assignee of Barnett, who had reserved the right in the December 1971 deed to the Taylors. On March 11, 1991, the Prestonsburg Area Office issued a decision refusing to take further action in response to Taylor's citizen's complaint.

By letter dated March 15, 1991, Taylor, pursuant to 30 CFR 842.15(a), made a request to the Lexington Field Office for an informal review of the Prestonsburg Area Office's March 1991 decision. He argued that OSM should

conclude that DSMRE had failed to take appropriate action to suspend Coal-Mac's permit pending the conclusion of the litigation in Taylor since he had appealed the January 1991 ruling by the circuit court and the question of Coal-Mac's right to mine was still unresolved. In a May 29, 1991, decision, the Lexington Field Office concluded that the Prestonsburg Area Office had properly declined to take further action in response to Taylor's complaint because DSMRE had acted properly in issuing a mining permit to Coal-Mac. The Field Office stated that issuance was proper since DSMRE had, in deciding whether to issue the permit, made a "legally sufficient good faith prima facie determination that Coal-Mac * * * [had] demonstrated the right to enter and mine the subject property by the surface mining methods." That decision was affirmed by the Director. Taylor appealed.

We are informed by Coal-Mac that, as of December 31, 1992, "all coal removal activities" and also reclamation of the subject land had been "completed" (Response to Petitioner's Statement of Reasons (SOR) at 3). Arguably then, appellant's appeal from OSM's failure to take further action, including requiring the suspension of Coal-Mac's permit and thus the cessation of mining operations, is now moot since the Board can no longer afford effective relief. Nevertheless, we conclude that the issue raised by the instant appeal, which concerns what action is required of OSM when faced with a challenge to issuance of a state mining permit because the permittee does not have a legal right to mine, is capable of repetition, and yet evading review. Therefore, we will address it. See Paul F. Kuhn, 120 IBLA 1, 23 n.9, 98 I.D. 231, 242 n.9 (1991).

On appeal, Taylor contends that OSM improperly failed to direct DSMRE to rescind Coal-Mac's mining permit pending final resolution of the State court litigation. Coal-Mac responds by arguing that OSM properly declined to take further action because DSMRE had correctly issued a permit to Coal-Mac and that Coal-Mac had submitted adequate prima facie evidence of a legal right to mine the subject land by surface means. As to whether DSMRE should have waited to issue the permit until a final resolution of State court litigation, Coal-Mac states that this is generally not required because it would "clearly place a heavy burden on the mining industry."

[1] When Coal-Mac's mining permit issued in July 1990, DSMRE had before it copies of the December 1971 conveyance from Barnett to the Taylors under which Barnett reserved "all mining rights," as well as the subsequent lease agreement authorizing Triple Elkhorn to engage in surface mining on the subject land and the assignment of that right to Coal-Mac. In addition, DSMRE had Coal-Mac's assertion that these documents showed a legal right to mine the subject land by surface means. At that time, the effect of the reservation in the December 1971 deed had not been decided by any State court or Federal court applying State law. It might be contended that Coal-Mac had complied with section 350.060(3) of the State surface coal mining law by stating the "source" of its legal right to mine. Ky. Rev. Stat. Ann. § 350.060(3) (1990). Further, it had complied with section 8:030(4)(1) of the State surface coal mining regulations by "descri[bing]" the documents from which it derived a legal right to mine and, since the situation involved severed private mineral and surface estates, that it had also complied with section 8:030(4)(2) of those regulations by providing a copy of

the "document of conveyance that * * * reserves the right to extract the coal by surface mining methods" (the December 1971 deed). Ky. Admin. Regs. 8:030(4) (1990).

Litigation was then pending in Taylor v. Triple Elkhorn Mining, Inc., No. 83-CI-068, however, to decide whether the reservation in the December 1971 deed from Barnett to the Taylors actually permitted him to authorize another to mine the subject land by surface means. Further, DSMRE was informed of this litigation by appellant prior to permit issuance. See Memorandum from Office of Field Solicitor to Director, Lexington Field Office, OSM, dated Nov. 13, 1990, at 3.

In Paul F. Kuhn, supra at 21, 98 I.D. at 241-42, we held that resolution of the question whether a State permittee has the legal right to mine private land, either at the time of permit issuance or during the permit term, is not subject to resolution by a State surface mining regulatory authority where adjudication of a private dispute is required. In Kuhn, the private landowner claimed that he had not authorized the mining company to conduct surface coal mining operations on a portion of his land. Therefore the dispute was one between the landowner and the mining company. The situation is a bit more complicated in the present case because of the severed estates. Here the case involves a dispute between private surface landowners (the Taylors), their grantor who had retained undefined "mining rights" (Barnett), and a mining company (Coal-Mac). Nonetheless, their dispute concerns whether the mining company is authorized to conduct sur-face coal mining operations on the subject land. DSMRE properly declined to resolve that dispute.

Kuhn also stands for the proposition that a State regulatory authority has the responsibility to ensure that a State mining permittee has the legal right to mine the permit area throughout the permit term. If the authority is aware that there is a private dispute concerning that right during the permit term, it must suspend mining under the permit pending final resolution of the dispute. Id. at 23-27, 98 I.D. at 242-44. This approach was endorsed by OSM. See Memorandum from Assistant Director, Reclamation and Regulatory Policy, OSM, to Assistant Deputy Director, Operations and Technical Services, dated July 12, 1991, at 2.

In Kuhn, we looked first to section 507(b)(9) of SMCRA, 30 U.S.C. § 1257(b)(9) (1988), which requires a permit applicant to provide the regulatory authority with a "statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation." Paul F. Kuhn, supra at 25, 98 I.D. at 243. In the case of severed private mineral and surface estates, section 510(b)(6) of SMCRA, 30 U.S.C. § 1260(b)(6) (1988), requires the applicant to submit to the regulatory authority a "conveyance that expressly grants or reserves the right to extract the coal by surface mining methods." Under section 510(b) of SMCRA, the applicant must demonstrate and the regulatory authority must find that the permit application is "accurate," and that the applicant in fact has the legal right to mine. 30 U.S.C. § 1260(b) (1988). As we recognized in Kuhn, Congress imposes a special duty towards surface landowners.

Paul F. Kuhn, supra at 27, 98 I.D. at 244. Section 102(b) of SMCRA, 30 U.S.C. § 1202(b) (1988), provides that one of the primary purposes of SMCRA is to "assure that the rights of surface landowners * * * are fully protected from [surface coal mining] operations." This can be fulfilled by ensuring that the surface landowner has in fact permitted the permit applicant to mine.

The responsibility for the enforcement of these statutory directives falls first on the State regulatory authority where, as here, the State has "primacy." See 30 CFR 917.10. However, under section 521(a)(1) of SMCRA, OSM is required to take action where the State fails, in response to a TDN notifying it of a possible violation of SMCRA, to take appropriate action or to show good cause for failure to do so. See, e.g., R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 147 (1991). Guided by these statutory directives, we held in Kuhn that, where a State regulatory authority refuses to suspend mining under a permit pending resolution of a dispute, OSM properly intercedes to suspend mining since the State's action is considered inappropriate under section 521(a)(1) of SMCRA. Paul F. Kuhn, supra at 23-27, 98 I.D. at 242-44.

In this case, DSMRE was aware that there was a private dispute whether Coal-Mac had the legal right to mine the subject land by surface means, which was the subject of pending litigation. As the Office of the Field Solicitor has pointed out, this ongoing dispute meant Coal-Mac was unable to demonstrate (and DSMRE was unable to find), as required by section 510(b) of SMCRA, that Coal-Mac in fact had the legal right to mine the subject land by surface means: "This was impossible because the source of [the] legal right to mine the coal by the method intended, when there is a property rights dispute, can only be a determination by an appropriate judicial authority" (Memorandum from Office of Field Solicitor to Director, Lexington Field Office, OSM, dated Nov. 13, 1990, at 9). Since the permit was issued despite this fact, DSMRE, in response to the TDN, should have suspended mining of the disputed land under the permit pending the outcome of the dispute.

Following receipt of the State's response that refused to take action to suspend mining, OSM should have directed suspension of mining on the disputed land pending resolution of the State court litigation. While this would have restricted the exercise by Coal-Mac of what might have turned out to be valid mining rights, we conclude that the balance struck by SMCRA weighs in favor of protecting private surface landowners whose interests may be jeopardized by the exercise of invalid mining rights. See Paul F. Kuhn, supra at 27, 98 I.D. at 244. Further, by doing nothing and thus allowing the permit to stand and mining to proceed, OSM effectively adjudicated the dispute between the Taylors and Coal-Mac, thereby granting Coal-Mac a right to mine. This was action taken contrary to the intent of Congress, expressed in section 510(b)(6) of SMCRA, to deny such authority to OSM.

See H.R. Conf. Rep. No. 493, 95th Cong., 1st Sess. 106 (1977) ("If there is any legal question, the body designated by State law to determine property rights will resolve the issue"); Paul F. Kuhn, supra at 21-22, 98 I.D. at 241-42. On appeal, the Office of the Field Solicitor takes the position that OSM properly declined to take action where DSMRE, when issuing the

permit, made a good faith, prima facie determination that Coal-Mac had the right to enter and mine the property and that DSMRE's response to the TDN was "appropriate action" under 30 CFR 842.11(b)(2). Clearly, knowledge by DSMRE at the time it issued the permit of the unresolved legitimate legal dispute regarding the right to mine precluded a good faith, prima facie determination. Accordingly, DSMRE's response to the TDN in this case was not "appropriate action" under 30 CFR 842.11(b)(2). Since the Director's August 1991 decision declined to direct suspension of mining under Coal-Mac's permit on the disputed land pending resolution of the dispute, we vacate that decision.

The State court of appeals in June 1992 overturned the January 1991 ruling of the State circuit court that Barnett was entitled to grant sur-face mining rights to Triple Elkhorn and thus to Coal-Mac. The court of appeals held that Barnett's reservation was without effect since the right to control the surface had passed to the owner of the mineral estate under the 1903 broad form deed. See Taylor v. Coal-Mac, Inc., No. 91-CA-389-MR (Ky. Ct. App. June 12, 1992), at 7, 9. The court found that Barnett did not retain any mining rights after the December 1971 deed given to the Taylors. Further, as construed by the court, the Broad Form Deed Amendment gave to the surface estate owners the right to prohibit mining except by the permitted method, which the court found was deep mining. The court concluded that this amendment benefited the Taylors since they were the owners of the surface estate of the subject land at the time of the 1988 constitutional amendment. It becomes clear under this ruling that Coal-Mac had no legal right to mine the subject land by surface means when DSMRE issued the permit in July 1990. We are informed, however, that the ruling by the Court of Appeals is now under review and that the question concerning Coal-Mac's right to mine remains unresolved. Consequently, suspension of the permit would still be warranted.

Now, however, any suspension of mining of the disputed land under Coal-Mac's permit will not give Taylor any effective relief since Coal-Mac has completed permitted mining operations on the land. Therefore we will not direct OSM to order the suspension of such mining. Reclamation will proceed in accordance with the State permit. Any remedy the Taylors have against Barnett or Coal-Mac must be pursued in court.

Accordingly, 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 vacated.

Franklin D. Arness
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge