

TRIPLE R COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 90-496

Decided June 16, 1993

Appeal from a decision of Administrative Law Judge David L. Torbett sustaining cessation orders.  
Nos. 89-084-062-009 and 89-084-062-011.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

The fact that the primary regulatory responsibility for enforcement of surface coal mining and reclamation operations has been assumed by a state under sec. 503 of SMCRA does not oust OSM of jurisdiction to issue a CO where an oversight inspection discloses the existence of a violation which can be expected to create significant, imminent environmental harm.

2. Res Judicata--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 issuing its own CO in situations where the violation which is the basis of the CO was cited and litigated by a state regulatory authority because the statutory scheme of sec. 521(a)(2) of SMCRA mandates issuance of a CO in such a situation where the Federal oversight inspection discloses an unabated violation which is causing or can be expected to cause imminent environmental harm.

3. Res Judicata--Rules of Practice: Appeals: Generally--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 res judicata or collateral estoppel do not ordinarily preclude review of a CO issued by OSM

for operations conducted without a valid permit where the state regulatory agency agreed to a settlement of the same violation which did not require performance of the reclamation mandated by law. OSM is neither a party to the case nor in privity with the state regulatory agency where the latter adopts a position inconsistent with that required by OSM.

APPEARANCES: Gary H. Gregory, Esq., Manchester, Kentucky, for appellant; Margaret H. Poindexter, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

Triple R Coal Company (Triple R) has appealed from a July 5, 1990, decision of Administrative Law Judge David L. Torbett sustaining Cessation Orders (CO) Nos. 89-084-062-009 and 89-084-062-011. The CO's were issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to Triple R for "[m]ining without a valid surface disturbance permit from the Kentucky regulatory authority -- exceeding two acres of disturbed area" in violation of Kentucky Revised Statutes (KRS) § 350:060; section 506(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(a) (1988); and 30 CFR 843.11(a)(2). 1/ Section 528(2) of SMCRA, P.L. 95-87, 91 Stat. 445, 514 (1977), provided at the time mining occurred in this case that SMCRA would not apply to "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less" (2-acre exemption). 30 CFR 700.11(b). 2/ Pursuant to this exemption, appellant was issued a 2-acre permit (No. 826-0033) to mine coal (Exh. R-1). 3/

On April 27, 1983, DSM issued Notice of Non-Compliance No. 06-1754 to Triple R for its 2-acre permit No. 826-0033 situated 2.8 miles northeast of Fall Rock in Clay County, Kentucky. That noncompliance cited, among other things, that "operator has disturbed excess acreage on his two acre or less permit" (Exh. R-3). Remedial action required included

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1/ CO No. 89-84-062-009 (Exh. R-15) was issued for this violation on Mar. 21, 1989, after an inspection on that same date. CO No. 89-84-062-011 (Exh. R-16) was issued on May 1, 1989, for failure to abate the violation cited in the former CO.

2/ The 2-acre exemption was repealed by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300.

3/ The permit was issued by the Kentucky Department for Surface Mining Reclamation and Enforcement (DSM). Effective May 18, 1982, DSM was deemed the regulatory authority in Kentucky for surface coal mining and reclamation operations in Kentucky on non-Federal lands. 30 CFR 917.10; see SMCRA, sec. 503, 30 U.S.C. § 1253 (1988).

elimination of the highwall and a return to approximate original contour (Exh. R-3, Tr. 22). DSM on June 23, 1983, surveyed appellant's site and found the disturbed area to be 3.26 acres (Tr. 23, Exh. R-4). The citation was thereafter settled by an Amended Agreed Order entered into by Triple R and DSM and approved September 14, 1983 (Exh. R-5). That order stated, "The Natural Resources and Protection Cabinet \* \* \*, and Triple R Coal Company agree to the entry of this Amended Agreed Upon Order, which will abate Non-Compliance No. 06-1754 issued to Triple R's Permit No. 826-0033 on April 27, 1983" (Exh. R-5). Pursuant to the terms of the agreed order, Triple R agreed to pay a civil penalty of \$1,000 and to "complete all reclamation activities in conformance with Permit No. 826-0033, according to the time schedule set forth by the London Office, Department for Surface Mining Reclamation and Enforcement" (Exh. R-5).

On August 19, 1987, DSM inspector Lance Hill and OSM inspectors Hamilton and Chase conducted a joint inspection of appellant's permit (Exh. R-6). During the inspection another survey was completed and the site was determined to be 3.4 acres (Exh. R-11 at 5, 6). As a result of that inspection DSM issued Notice of Non-Compliance No. 063339 to Triple R requiring it to reclaim all disturbance to permanent program standards or obtain a permanent program permit by September 18, 1987 (Exh. R-7). Appellant's failure to abate the non-compliance by the time of a September 21, 1987, followup inspection resulted in issuance by DSM of a cessation order on that date (Exh. R-8). These citations were contested at a hearing on December 15, 1987, before a hearing officer for the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet). The hearing officer found that the Cabinet was estopped from pursuing these charges on the ground that the September 1983 Amended Agreed Order recognized that the operation had disturbed more than 2 acres, levied a fine, and required reclamation. Further, the hearing officer found that the operator had paid the fine and complied with the reclamation requirements imposed by the 1983 agreement. Hence, he recommended that the 1987 charges be vacated (Exh. R-12). This recommendation was approved by the Cabinet, by order of the Secretary dated February 22, 1988 (Exh. R-12).

Subsequently, on March 21, 1989, OSM Reclamation Specialist John Chedester conducted an inspection of appellant's permit. Inspector Chedester issued CO No. 89-84-062-009, citing Triple R for mining without a valid surface disturbance permit from the Kentucky regulatory authority by exceeding 2 acres of disturbed area (Exh. R-15). The inspection report stated that: "A survey, conducted on 8/19/87, by [OSM] Inspectors Robert L. Hamilton and Charles Chase ... determined that 3.43 acres had been disturbed by this operation. This site has been reclaimed to two-acre standards as per an agreed order with the state which required reclamation to two-acre standards" (Exh. R-15). The report observed that a highwall approximately 830 feet in length and 30 feet in height remained exposed on the site (Exh.

R-15). The required abatement action under OSM's CO was to file an application to obtain a permanent program permit or reclaim the site to permanent program standards by April 20, 1989 (Exh. R-15). On May 1, 1989, Inspector Chedester, finding that timely abatement had not occurred, issued failure-to-abate CO No. 89-84-062-011 to Triple R, citing the same violations of the Act and regulations (Exh. R-16).

Triple R filed an application for review of the CO's and for temporary relief pursuant to section 525 of the Act. 30 U.S.C. § 1275 (1988). A temporary relief hearing was held on February 21, 1990, in Knoxville, Tennessee. The parties agreed that the temporary relief hearing shall be the record in this case.

Evidence presented by OSM at the hearing before Judge Torbett consisted of the testimony of OSM inspectors John Chedester, Robert Hamilton, and Sharon Hall. Ronnie Roberts was called by OSM as an adverse witness. OSM introduced 20 exhibits, R-1 through R-20. Dalmis Roberts, a partner in Triple R, was called to testify by Triple R and Triple R introduced two exhibits into evidence, A-1 and A-2. The decision of Judge Torbett summarized the testimony presented at the hearing:

Inspector Chedester testified that the OSM [CO] was based on the survey of Robert Hamilton which found the site to be 3.43 acres (Tr. 21; R-11). He testified that the survey had resulted from a joint OSM/DSM inspection of the site in 1987 (Tr. 24). Inspector Chedester stated that after the DSM Non-Compliance had been dismissed by Hearing Officer Craig Dance on January 8, 1988, that he, Chedester, had reinspected the site in January of 1989 and issued the present [CO] (Tr. 26).

Inspector Robert Hamilton who had undertaken a joint inspection of the site with OSM Inspector Lance Hall in August 28, 1987, testified that he had surveyed the site at 3.4 acres (Tr. 34; R-11). He stated that he had testified about this survey at the 1988 state hearing (Tr. 34).

Ronnie Roberts, a partner in Triple R, agreed that the 1983 Non-Compliance was "\* \* \* probably for being over acreage, I guess." (Tr. 38) He explained that the overacreage was because the permit markers were not in the right place (Tr. 40). He testified that he had agreed to the findings of fact of the Agreed Order of September 24, 1983, "to go ahead and get the job done and get rid of it." (Tr. 46) He agreed at the OSM mine site hearing he had not objected when his lawyer stated that the "\* \* \* off-permit disturbance was for soil disposal." (Tr. 45) Mr. Roberts explained that Applicant had, as a condition of its lease from the mineral owner, made an oral agreement to complete excavation work on an adjoining, disturbed area (Tr. 47). He

testified that Applicant did not do any mining or disturb any highwalls in this adjoining area, but had only reclaimed the area with soil which was heaped up on the area (Tr. 48). Roberts testified that Applicant was performing "dress-up" work at the behest of the lessor on this off-permit area (Tr. 52-53).

OSM Inspector Sharon Hall testified that she conducted the mine site hearing in May of 1989 where Applicant and its attorney, Mr. Gregory, were present (Tr. 66). Ms. Hall testified that Applicant's attorney stated among other things that " \* \* \* the area that was off-permit was not used for mining purposes but used as spoil storage." (Tr. 67)

Applicant's witness Dalmas Roberts, a partner in Triple R, testified the off-permit disturbance was created as a result of excavation or reclamation work that Roberts had agreed to do when leasing the mineral rights to the site (Tr. 72, 80). He testified that Applicant "dressed up" the area with spoil that existed on the disturbed area, not with spoil from the two acre permit (Tr. 74, 75, 76). He explained that Applicant had agreed to the findings of fact of the Agreed Order of 1983 because, " \* \* \* that judge \* \* \* at that other court, said pay this fine and be done with it. And I asked him myself, I said if we pay this, will it be finished. He said yes." (Tr. 77).

(Judge Torbett's Decision at 3-4).

Based on the record, Judge Torbett upheld the CO's issued by OSM. In reaching this conclusion, he found that OSM was not a party to the prior State regulatory proceedings and, accordingly, they were not res judicata and OSM was not estopped from issuance of the CO's. Further, Judge Torbett held that appellant, having had the opportunity to challenge the citation for surface disturbance exceeding 2 acres in the 1983 State regulatory proceedings, was precluded from asserting that less than 2 acres was disturbed in the surface mining operation.

Appellant argues before the Board that the operator did everything required of it by the Amended Order (i.e., reclaiming the property to 2-acre standards) which terminated the proceedings arising out of the 1983 DSM citation. In these circumstances, appellant contends it is unfair and unjust to require it to reclaim the land to permanent program standards. Citing the fact that the Commonwealth of Kentucky has been granted primary enforcement responsibility for surface mining regulation, appellant contends that the resolution of the DSM citation for this 2-acre violation is res judicata in view of the fact that the administrative agency was acting in a judicial capacity resolving disputed issues which the parties had an ample opportunity to litigate. Further, appellant asserts that the site at issue has not been environmentally damaged.

Counsel for OSM argues in its answer that the principle of res judicata is inapplicable to this enforcement proceeding initiated by OSM. It

is pointed out that OSM was not a party to and had no control over the state regulatory proceedings. With respect to the acreage disturbed by appellant's operation, OSM asserts that appellant is collaterally estopped to deny a determination of fact or law necessary to the judgment in the state regulatory proceeding, *i.e.*, the disturbance of more than 2 acres. Further, OSM contends that the record establishes a surface disturbance in excess of 2 acres, citing the Amended Agreed Order of September 1993 (Exh. R-5). Apart from this admission of off-permit spoil storage, OSM argues that appellant's contention at the hearing before Judge Torbett that the off-permit disturbance was merely part of an agreement with the mineral owner to "dress up" certain previously disturbed lands as a condition of granting a right to mine the 2-acre tract does not constitute a defense.

[1] It is well established that the fact that primary responsibility for enforcement of SMCRA has been vested in the State regulatory authority does not oust OSM of jurisdiction to issue a CO where it is found on the basis of a Federal oversight inspection 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 also 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." 30 U.S.C. § 1271(a)(2) (1988); Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987); R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 147 (1991); Slone v. OSM, 114 IBLA 353, 357 (1990).

Appellant's contention that it had a right to rely on the Cabinet's determination that reclamation consistent with the 2-acre standard satisfied the requirements of the law is unavailing. Had appellant's site been mined pursuant to a permit for a mine exceeding 2 acres, appellant as permittee would have been required by section 515(b)(3) of SMCRA, 30 U.S.C. 1265(b)(3) (1988), to reclaim the site by eliminating the highwall, restoring the site to its approximate original contour. Because he mined more than 2 acres, appellant must comply with what is required of those who had obtained a permit for a mine exceeding 2 acres. The record discloses that a highwall measuring approximately 830 feet in length and 30 feet in height exists on the area disturbed under appellant's 2-acre permit (Exh. R-15; Tr. 26). Nor is it disputed that appellant created the highwall in mining the permit (Tr. 82). Triple R's permit contained in the record describes the operations contemplated to be performed on the permit and specifically identifies the creation of a highwall 30 feet in height (Exh. R-1). The Administrative Law Judge upheld the 2-acre violation finding that the applicant was estopped to deny a disturbance in excess of 2 acres having acknowledged such a violation in settling the DSM citation (Exh. R-3) before the Kentucky Cabinet (Exh. R-5). The Administrative Law Judge also noted there was evidence that the excess disturbed area resulted from improperly placed perimeter markers (*see* Tr. 38-40; Exh. R-3; Exh. R-5) and that excess acreage was used for spoil storage (*see* Exh. R-3; Exh. R-5). The record supports Judge Torbett's finding that the surface disturbance associated with

appellant's mining operations exceeded 2 acres notwithstanding the testimony that appellant proceeded to "dress up" some previously disturbed lands adjacent to the permit.

Appellant's contention that mining did not cause environmental harm or damage, and that the property has in fact benefitted from mining does not establish a defense because mining without a valid permit constitutes environmental harm by regulatory definition: "[s]urface coal mining 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." 30 CFR 843.11(a)(2); see R.C.T. Engineering, Inc. v. OSM, supra at 142, 146 n.5; Slone v. OSM, supra at 357. Thus, the record supports issuance of the CO's under appeal. 30 U.S.C. § 1271(a)(2) (1988); 30 CFR 843.11(a).

[2] With respect to appellant's assertion that enforcement of the CO's issued by OSM is barred by res judicata and collateral estoppel, we note that this Board has on several occasions held that the countervailing statutory policy of SMCRA precludes reliance upon the doctrines of res judicata and collateral estoppel based on a prior state enforcement proceeding which failed to secure abatement of a violation. R.C.T. Engineering, Inc. v. OSM, supra at 148; Annaco, Inc. v. OSM, 119 IBLA 158 (1991); Slone v. OSM, supra at 353, 357; 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). <sup>4/</sup> In Bernos, we held:

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

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<sup>4/</sup> Although Bernos has been reversed by the district court, we continue to adhere to the rationale set forth in that decision, as reaffirmed in R.C.T. Engineering, Inc. v. OSM, supra; Annaco, Inc. v. OSM, supra; Slone v. OSM, supra. We have observed in those cases that: "[w]hile recognizing that a district court ruling on judicial review reversing a Board decision is clearly the binding law of the case with respect to a particular appeal, we have noted that the precedent may not always be followed in appeals arising in other jurisdictions: '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.' Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984). We believe that rationale is applicable in this case, especially given the well-reasoned opinion of Chief Judge Siler in Annaco [675 F. Supp. 1052 at 1058-1059]." R.C.T. Engineering, Inc. v. OSM, supra at 148 n.6; Annaco, Inc. v. OSM, supra at 165 n.8.

doctrines inapplicable to issues arising in the Federal/State context. The 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.]

A key to this holding regarding the defense of res judicata based on state enforcement proceedings in primacy states is the language of section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1988), which expressly authorizes Federal inspection and enforcement in states with primary jurisdiction. Bernos Coal Co. v. OSM, *supra* at 300, 94 I.D. at 190. Another statutory basis for this holding is the operative provision in this case, found in section 521(a)(2) of SMCRA, 30 U.S.C. § 1271(a)(2) (1988), which authorizes OSM to issue a CO on the basis of any Federal inspection which discloses any violation which is causing or can be expected to cause imminent environmental harm. *See Slone v. OSM*, *supra* at 357. This was one of the provisions of section 521 of SMCRA relied upon by the court in Annaco in finding that OSM had jurisdiction to issue a CO in a primacy state. 675 F. Supp. at 1058.

[3] Apart from the statutory mandate, we think that careful analysis of the doctrines of res judicata and collateral estoppel indicates they are inapplicable to review of the CO's at issue here. These preclusion doctrines were discussed by the Supreme Court 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.]

The Court in Montana found the United States had a "sufficient 'laboring oar' in the conduct of the state-court litigation" to invoke the principle of estoppel. 440 U.S. at 155; *see United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980). 5/ The Kentucky Cabinet and OSM are

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5/ The notion that the Government must have been a "laboring oar" or have controlled or directed the prior proceeding, *see Montana v. United States*, *supra* at 155, is not absent in ITT Rayonier; rather, it is merged into the

not in privity in this proceeding as the Cabinet has approved a settlement of the 2-acre violation which required the operator to pay a fine but only required reclamation to the 2-acre permit standard rather than elimination of the highwall and return to approximate original contour. OSM, on the other hand, has consistently maintained that reclamation to eliminate the highwall is required as the surface disturbance exceeded 2 acres. See Annaco, Inc. v. Hodel, 675 F. Supp. at 1059. <sup>6/</sup> The Board discussed a similar situation in Annaco, Inc. v. OSM, 119 IBLA 158 (1991), and found that OSM's interests were not represented by DSM in the state proceedings. In that case, OSM had ordered Annaco to reclaim the sites to permanent program standards while DSM did not require reclamation and only assessed civil penalties. It was precisely DSM's decision not to require reclamation that prompted OSM's enforcement action which formed the basis of appeal to the Board. We declined to find that DSM was OSM's delegated enforcement arm or its virtual representative during the state proceedings. In that case we noted that

OSM did not control the conduct of [DSM] 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, [440 U.S.147] at 155 [1979]. 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.

Annaco, Inc. v. OSM, *supra* at 166; accord R.C.T. Engineering, Inc., *supra* at 149. We find this analysis compelling in the present context.

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fn. 5 (continued)

definition of "virtual representative." Thus, the Ninth Circuit in ITT Rayonier stated: "Courts have recognized that a non-party may be bound if a party is so closely aligned with its interests as to be its 'virtual representative.' Aerojet Gen'l Corp. v. Askew, 511 F.2d 710, 719 (5th Cir.) (and cases cited), *cert. denied*, 423 U.S. 908, 96 S.Ct 210, 46 L.Ed. 2d 137 (1975) (citations omitted). This contemplates an express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues." 627 F.2d at 1003. In the Rayonier case the court found the relationship between the state regulatory agency and the Federal regulatory agency sufficiently "close" to preclude relitigation of the issue already resolved in state court.

<sup>6/</sup> The court in Annaco, Inc. v. Hodel expressly distinguished the Rayonier ruling in finding that the settlement between Annaco and the Kentucky Cabinet did not preclude OSM from citing Annaco for violation of SMCRA. Annaco, Inc. v. Hodel, 675 F. Supp. at 1059. First, the court noted that in Rayonier the State agency had maintained the same position in state administrative and judicial proceedings as the Federal agency maintained and there was no assertion that the State agency failed to assert the Federal agency's position vigorously. By contrast, the Annaco court noted that OSM had ordered the operator to reclaim the sites involved while the

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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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge

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fn. 6 (continued)

Kentucky Cabinet had not. Second, the Annaco court noted the prior litigation in Rayonier culminated in a decision by the State supreme court whereas the prior action against the operator in Annaco involved an administrative agency settlement.