

FREMONT COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 91-204

Decided July 12, 1994

Appeal from a decision of Administrative Law Judge David Torbett sustaining a notice of violation and cessation order. CH 91-1-R and CH 91-2-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

When, after OSM provided notice of a failure to reclaim highwalls contrary to state law, the state failed to take appropriate action to abate the cited violation, OSM was required to take enforcement action although the state exercised primary enforcement authority under SMCRA.

2. Board of Land Appeals--Estoppel

OSM was not estopped to issue an NOV and CO requiring reclamation of highwalls by an OSM inspector's oral statement concerning alternative highwall reclamation made during discussion of permit amendments when no provision for such reclamation was included in the amended permit.

APPEARANCES: Daniel E. Rogers, Esq., Pittsburgh, Pennsylvania, for Fremont Coal Company; Wayne A. Babcock Esq., Office of the Field Solicitor, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Fremont Coal Company (Fremont) has appealed from a February 28, 1991, decision of Administrative Law Judge David Torbett that sustained issuance of notice of violation (NOV) No. 90-111-019-001 and cessation order (CO) No. 90-111-019-001 issued pursuant to section 521 of the Surface Mining

Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(A) (1988) and 30 CFR 843.12(a)(2). Following issuance of a notice to the State of West Virginia alleging (among other violations not here at issue) that Fremont had failed to eliminate highwalls left by Fremont's mining operations between ponds 5 and 6 at the Mingo County mine, the Office of Surface Mining Reclamation and Enforcement (OSM) issued the NOV on October 12, 1990, citing Fremont for failure to backfill and grade to approximate original contour so as to completely eliminate all highwalls at the company's contour strip mine in Mingo County, West Virginia. The CO was issued on November 5, 1990, for failure to abate. At a hearing held in Pittsburgh, Pennsylvania, on November 15, 1990, Judge Torbett denied temporary relief from the NOV and CO; in the 1991 decision here under review he sustained issuance of the NOV and CO.

Fremont contends on appeal, as it did at hearing, that OSM lacked authority to issue the NOV and CO in West Virginia at a time when the State was the primary regulatory authority governing the land here at issue; asserting that Departmental regulation 30 CFR 843.12(a)(2) (providing for exercise of oversight authority by OSM) is invalid because it lacks a statutory foundation, Fremont argues that the NOV should not have been issued because a State review board had determined that Fremont could, consistent with past State practice, leave highwalls that were up to 10 feet high if a ditch were provided "at top of backstack." Fremont maintains that OSM should balance the relative benefits and harm caused by highwalls to allow some highwalls to remain after final reclamation in order to support permanent drainage ditches. Fremont also argues that OSM was estopped to take enforcement action by oral statements made by an OSM inspector who suggested during reclamation discussions with the regulatory agencies that under certain circumstances highwalls on the Fremont mine might be left in place, a circumstance that led Fremont to redesign and reconstruct a portion of the mine drainage system.

Fremont's challenge of OSM's authority to cite violations in the State of West Virginia pursuant to its oversight authority under SMCRA section 521 and 30 CFR 843.12(a)(2) must be rejected. OSM is authorized to conduct inspections and cite surface mining law violations in states such as West Virginia despite the fact primary regulatory authority under SMCRA rests with state authority. See Consolidation Coal Co. v. OSM, 127 IBLA 192, 194-95 and authorities cited. Moreover, Fremont's claim that the State took appropriate action in response to the TDN under the circumstances shown in this case is not supported by the record, which shows that the State was content to permit highwalls up to 15 feet high to be left in reliance on a State administrative ruling that permitted Fremont to leave up to 10 feet of highwall in conjunction with diversion ditches. This was done despite State law that required complete removal of highwalls left by surface coal mining operations under circumstances found at the Fremont site (see Tr. 19-20; Respondent's Exh. 15 at 2). When OSM informed the State this approach to enforcement was unacceptable, the State issued an NOV that required vegetation to be grown on the remaining highwalls (see R-15), whereupon OSM notified the State that this action was also inadequate since it did not require elimination of all highwalls (Tr. 21, 39; R-17).

The record shows that when OSM again inspected the minesite the highwall violation had not been corrected and abatement action had not begun (Tr. 22-23; R-18). Unchallenged expert testimony by an OSM civil engineer established that drainage ditches constructed adjacent to residual high-walls (which totalled about 400 feet in length) were of problematic value; he explained that large cracks between fill and highwalls in the ditches allowed water to filter into the backfill, and that because the ditches were built parallel to the contour of the hill and were not impervious to water they were ineffective (Tr. 79-84). He concluded that the ditched highwalls were found in the steepest area to be filled, and probably had not been reclaimed for that reason (Tr. 84).

[1] The State administrative ruling that allowed highwalls to be left in conjunction with diversion ditches was contrary to West Virginia law that required a surface miner to "grade in order to restore the approximate original contour." See W. Va. Code § 22A-3-12(b)(3) (1991) and W. Va. Code of State Regulations § 38-2-14.15(a) (1992), providing that "[s]poil returned to the mined-out area shall be backfilled and graded to the approximate original contour with all highwalls eliminated." If, after notice of a suspected violation, a State regulatory agency takes action inconsistent with correction of a cited violation of State law, OSM is required, as was done in this case, to make an inspection. W. E. Carter, 116 IBLA 262, 268 (1990). Following inspection, if OSM determines that the activity or condition in question violates State or Federal law, issuance of an NOV or CO is required. 30 CFR 843.12(a)(2); Paul F. Kuhn, 120 IBLA 1, 32 (1991). The corrective action required by the NOV and CO issued by OSM in this case was elimination of highwalls left between ponds 5 and 6 at the Fremont site in Mingo County; the State response made in reliance on an erroneous finding by an administrative board did not constitute appropriate action tending to secure abatement of the cited violation, and Federal oversight action was required. See Delmar Adkins v. OSM, 128 IBLA 1, 6 (1993).

Fremont argues, however, that the State ultimately took needed action by requiring revegetation of the highwalls left between ponds 5 and 6, contending that this action was tantamount to requiring removal of the highwalls because it meant "that the highwalls would have to be backfilled and reclaimed in order to be revegetated" (Statement of Reasons at 12). Fremont reasons that this must be so because "revegetation is simply the next step after backfilling and regrading in a sequential reclamation process required by W. Va Code Section 22A-3-12(b)." Id. Judge Torbett rejected this argument; finding that it was an attempt to allow some highwalls to avoid required reclamation, he correctly determined that it was not appropriate State action because it would not "result in an abatement of the violation" (Decision at 9). Similarly, Fremont's argument that the Department should balance the cost of highwall abatement against possible benefits from leaving the walls must be rejected. SMCRA does not provide for, or allow, consideration of relative harm and benefit of highwall reclamation, but requires that it be done. See Shelbiana Construction Co. v. OSM, 102 IBLA 19, 23 (1988).

[2] Citing Gabriel Energy Corp. v. OSM, 105 IBLA 53 (1988), Fremont argues that OSM is estopped to take enforcement action by an oral statement of an OSM inspector. This argument arises from a 1987 meeting at the mine by OSM, Fremont, and State representatives to discuss reclamation requirements and re-permitting of the site (Tr. 55-56). The record indicates that OSM's representative, Jack Nelson, informed Fremont mine manager Roger Dale Gann that the highwalls at issue should be eliminated unless Fremont could design highwall reclamation like that done by Marrowbone Construction Company, "by leaving some of these ditches at the top of the wall * * * just like Marrowbone" (testimony of Roger Dale Gann, Tr. 57). This estoppel argument is flawed at the outset because the amended permit did not allow any such highwalls to be left between ponds 5 and 6 (see Tr. 43-44, 60-61, Applicant's Exh. 11) and because oral statements by Federal employees are insufficient to support estoppel; erroneous advice upon which reliance is predicated so as to support a claim of estoppel must appear as a crucial misstatement in an official decision. See Steven E. Cate, 97 IBLA 27, 32 (1987), and authorities cited. No such decision was issued in this case.

Further, if the analogy sought to be drawn between this case and Gabriel Energy were to be completed, it should be shown that there was a relevant written agreement by OSM. See Gabriel Energy at 105 IBLA 54. (In Gabriel Energy, OSM was held to a written agreement regarding temporary relief, while characterized as an estoppel, this ruling amounted to nothing less than enforcement of a written agreement that was not otherwise contrary to law.) No such agreement has been shown to have been made in this case. While the merits of highwall reclamation done by Marrowbone seem to have been discussed, the discussion did not lead to addition of a new reclamation provision into the revised permit.

It is therefore concluded that the State failed to take appropriate action to abate a cited violation in reliance on an erroneous finding by a State administrative board that ditched highwalls up to 10 feet high could be left on part of the Fremont permit site; an NOV and CO issued by OSM were a correct exercise of Federal oversight authority needed under the circumstances. Consequently, Judge Torbett correctly sustained issuance by OSM of the NOV and CO requiring reclamation of highwalls between ponds 5 and 6 on the Fremont mine in Mingo County, West Virginia.

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 affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge