

KENTUCKY RESOURCES COUNCIL  
NATIONAL WILDLIFE FEDERATION

IBLA 96-73

Decided August 12, 2003

Appeal from a decision of the Regional Director, Appalachian Coordinating Center, Office of Surface Mining Reclamation and Enforcement, affirming a decision of the Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, declining to take enforcement action, based on finding a lack of ownership or control of permitted surface coal mining operations. 95-21-Manalapan.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:  
Applicant Violator System: Ownership and Control

OSM properly declines to take enforcement action against the lessor concerning outstanding violations of the surface mining law and regulations committed by its lessee where OSM determines that the lessor of privately-owned coal did not, within the meaning of 30 CFR 773.5(b)(6) (1994), "control" its lessee, who was engaged in surface coal mining operations under a lease contract, even though the lessor retained the unilateral right to terminate the contract by reason of the lessee's violations of the surface mining law and regulations without immediate recourse by the lessee, but retained no authority to exercise control over the manner in which the lessee generally conducted its operations.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, and Thomas J. Fitzgerald, Esq., Frankfort, Kentucky, for appellants.

## OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Kentucky Resources Council and National Wildlife Federation (hereinafter, collectively, appellants or complainants) have appealed from a May 10, 1995, decision of the Regional Director, Appalachian Coordinating Center, Office of Surface Mining Reclamation and Enforcement (OSM), on informal review. Therein, OSM affirmed a January 19, 1995, decision of the Lexington Field Office (LFO), OSM. In its decision, OSM declined to take enforcement action, based on finding a lack of ownership or control by the Manalapan Mining Company, Inc. (Manalapan), over the surface coal mining operations which had been conducted by J.Y.B., Incorporated (JYB), under Kentucky Permit No. 848-0004.

The surface coal mining operations at issue here were situated on private lands in Harlan County, Kentucky, and at all relevant times were subject to the primary regulatory authority of the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE), acting pursuant to a State program approved by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (2000). The lands and the underlying coal reserves owned or controlled by Manalapan were leased to JYB pursuant to a May 11, 1982, "Lease Contract." JYB conducted the surface coal mining operations under Permit No. 848-0004 which was issued on May 23, 1984, and revoked by DSMRE on September 20, 1988. JYB's performance bond was forfeited, because of JYB's failure to abate violations of the State program, and the absence of any reclamation of the mine site which had been abandoned.

On November 22, 1993, appellants filed a citizen's complaint, requesting OSM to inspect the "operations and surface mining permits held by Eastover Mining Company, Inc. (Eastover), or its affiliates in Kentucky and all other jurisdictions" subject to SMCRA and its implementing regulations (30 CFR Chapter VII).<sup>1/</sup> Appellants alleged that Eastover, Manalapan's predecessor-in-interest to the lease, "owned or controlled" JYB's operations within the meaning of 30 CFR 773.5(a)(3) and (b)(6) (1994). Appellants requested OSM to make an appropriate finding to establish an Applicant/Violator System (AVS) "link" between Eastover and JYB. They also asked OSM to take enforcement action in the form of blocking the issuance of any new permits to Eastover, unless and until outstanding violations by JYB of SMCRA and its implementing regulations were corrected or appropriate abatement plans were executed. Appellants also requested OSM to take action to rescind permits already issued to Eastover since the time of JYB's initial violation.

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<sup>1/</sup> The complaint was filed pursuant to section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2000), and 30 CFR 842.12(a) (1994).

On receipt of the citizen's complaint, OSM issued a Ten-Day Notice (TDN) (No. 93-080-474-024), requiring DSMRE to investigate whether Eastover controlled JYB's surface coal mining operations, and to take appropriate enforcement action. DSMRE declined to take any action. However, information provided to LFO by DSMRE and others, in the course of resolving the TDN, disclosed the possibility of a link between JYB and Manalapan, which had succeeded, on August 4, 1983, to Eastover's interest in the land and underlying coal prior to the issuance of Permit No. 848-0004.

By letter dated September 22, 1994, and subsequent oral communications, LFO advised Manalapan that it had determined that Manalapan, as a successor-in-interest to Eastover, presumptively controlled JYB's operations. In its response, dated October 20, 1994, Manalapan sought to rebut the presumption in 30 CFR 773.5(a)(3) and (b)(6) (1994) that it controlled JYB's operations. While Manalapan acknowledged that it currently was lessor on the coal lease to JYB, Manalapan argued that it did not control JYB's operations since it lacked the "right to receive" the coal after mining and had purchased only an insignificant amount (close to two percent) of coal generated by those operations. Finally, Manalapan explained that it did not have the "authority to determine the manner in which" JYB conducted its operations, under 30 CFR 773.5(b)(6) (1994).<sup>2/</sup>

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<sup>2/</sup> Manalapan specifically stated: "[W]hen Manalapan acquired the lease from Eastover, it could not require JYB to sell the coal mined from the property to Manalapan. JYB remained free to sell the coal mined from the property to whomever it wished, whenever it wished, and at whatever price it could secure." (Letter to LFO, dated Oct. 20, 1994, at 2-3, citing Affidavit of Duane H. Bennett, President, Manalapan, dated Oct. 20, 1994 (Bennett Affidavit).) In addition, Manalapan asserted that it did not participate in acquisition of the permit, or in any development or other work associated with starting up and operating the mine, and otherwise did not exercise or even have the authority to control the manner in which JYB conducted its operations:

"The relationship between JYB and Manalapan provided JYB with an interest in the coal and the right to mine it provided that the laws and regulations pertaining to coal mining were complied with, the royalties were paid and duly accounted for, and coal was mined in a diligent and workmanlike manner."

(Letter to LFO, dated Oct. 20, 1994, at 6, citing Mills v. Mills, 121 S.W.2d 962 (Ky. 1938), and Elkhorn Coal Corp. v. By-Products Coal Co., 35 S.W.2d 898 (Ky. 1931); see Letter to LFO, dated Oct. 20, 1994, at 3-6, citing Bennett Affidavit.) Finally, Manalapan stated that it "did not own any stock in JYB and none of its \* \* \* officers, directors or stockholders were stockholders, officers, [or directors] \* \* \* of JYB." (Letter to LFO, dated Oct. 20, 1994, at 4, citing Bennett Affidavit.)

Based on its investigation, LFO concluded in its January 1995 decision that Manalapan's contractual lease relationship with JYB did not constitute presumptive control over JYB's surface coal mining operations under 30 CFR 773.5(b)(6) (1994). With reference to the lease, LFO specifically noted:

The lease does contain provisions that give the lessor the ability to protect its property, but none of these provisions give[s] the lessor the authority to determine the manner in which the lessee conducted surface coal mining and reclamation operations. OSM has no evidence that Manalapan, in any way, determined, or had the authority to determine, the manner in which JYB conducted surface coal mining and reclamation operations on permit number 848-0004.

(LFO Decision at 2.) LFO stated that this lack of authority also precluded a finding of control under 30 CFR 773.5(a)(3) (1994). Thus, having investigated the matter, LFO determined that there was no evidence demonstrating that Manalapan controlled JYB's operations within the meaning of 30 CFR 773.5(a)(3) or (b)(6) (1994). It thus declined to take enforcement action against Manalapan for the outstanding violations attributable to JYB's operations.

Appellants requested informal review of LFO's January 1995 decision on April 7, 1995, pursuant to 30 CFR 842.15 (1994). They asserted that the contract between Manalapan and JYB clearly demonstrated that Manalapan had the "capacity to control" JYB's surface coal mining operations, and thus LFO had erred by not finding a control link between the parties or taking appropriate enforcement action. Appellants argued that such capacity existed by virtue of contract provisions which afforded Manalapan the unilateral right to immediately terminate the contract and thus JYB's right to mine the coal without any recourse by JYB, whenever Manalapan determined that there had been a breach of the contract, including a violation of relevant Federal and State surface mining laws and regulations. Appellants reasoned that this situation was akin to that in S&M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984), wherein the Board concluded that "[t]his power \* \* \* gave [the controlling entity] the effective authority to direct whether, when, and how [the controlled entity] mined." (Letter to Regional Director, dated Apr. 7, 1995, at 6.) Appellants argued that "[t]he inherently coercive character of an unfettered, unilateral power to terminate another's right to mine constitutes, at a minimum, authority to determine indirectly how that other person conducts mining operations." Id. at 7, emphasis added. Appellants contend that this authority constitutes control under 30 CFR 773.5(b)(6) (1994).

In his May 1995 decision, the Regional Director concluded that appellants had failed to overcome the evidence of record which established that Manalapan did not own or control JYB's surface coal mining operations, either actually or potentially.

He specifically distinguished the case of S&M Coal Co., upon which appellants primarily relied:

The Complainants correctly note that the Board in [S&M Coal Co.] recognized that “[c]ontrol can be passive as well as active.” 79 IBLA at 358. The Board ruled that [the] Jewell Smokeless [Coal Co.] controlled the S&M [Coal Co.] [surface coal mining] operation because in an oral lease “[t]he lessor maintains the right to exercise control over the operations by virtue of the ability to terminate the lease without cause if the lessor, for any reason, no longer desires to have the lessee do the actual mining of the coal.” *Id.* (emphasis supplied[.]) The Complainants argue that Manalapan's unilateral right to terminate its lease with JYB immediately, *if* JYB defaulted on the lease requirements, afforded Manalapan a degree of control equivalent to Jewell Smokeless' in its oral lease. This, however, is not the case. Manalapan could terminate its lease with JYB only for cause. As long as JYB complied with its lease, Manalapan had no special control over the operation by virtue of its lease with JYB. Accordingly, I find that the Field Office correctly determined that insufficient evidence exists to determine that Manalapan owned or controlled JYB.

(Decision at 2.) The Regional Director thus held that LFO had properly decided, absent a showing of ownership or control by Manalapan of JYB's operations, not to take enforcement action against Manalapan concerning outstanding violations of the surface mining law and regulations occasioned by operations conducted by JYB.

Appellants timely appealed to the Board from the Regional Director's May 1995 decision, pursuant to 43 CFR 4.1282. In their statement of reasons for appeal (SOR), appellants contend that the Regional Director erred in affirming LFO's finding of lack of control by Manalapan over JYB's surface coal mining operations, and thus declining to take appropriate enforcement action.

First, appellants argue that, where evidence provided in their citizen's complaint gave rise to a presumption (or, at least, reason to believe) that Manalapan controlled JYB's operations, in order to find that the presumption had been rebutted or reach a contrary conclusion, OSM was required to investigate the question of control, considering, at a minimum, 16 factors, which had been adopted by the Board in James Spur, Inc. v. OSM, 133 IBLA 123, 102 I.D. 32 (1995), by the Director, Office of Hearings and Appeals, in James Spur, Inc. v. OSM, 12 OHA 133 (1996), and by the Solicitor (with the approval of the Secretary of the Interior) in Solicitor's Opinion, “Control’ of Surface Coal Mining Operations under the Surface Mining Control and Reclamation Act,” M-36986 (Dec. 5, 1996) (hereinafter, Solicitor's Opinion).

Second, appellants argue that the lease contract between Manalapan and JYB conclusively establishes that Manalapan had, throughout the time period in question, the “capacity to control” JYB's surface coal mining operations, thus demonstrating control within the meaning of 30 CFR 773.5(b)(6) (1994). (SOR at 11; see id. at 11-15.) They challenge OSM's conclusion that the case of S&M Coal Co. is distinguishable. Thus, with respect to the issue of control, appellants argue that, regardless of whether it can be exercised for cause or not, the unilateral right to immediately terminate a lease contract, without any recourse by the lessee, which was the situation in both S&M Coal Co. and the case at hand, invests the lessor with the capacity to control the lessee's operations, and thus constitutes control under 30 CFR 773.5 (a)(3) and (b)(6) (1994).

[1] Section 510(c) of SMCRA, 30 U.S.C. § 1260(c) (2000), requires that, as a condition of obtaining a new surface coal mining permit, a permit applicant must submit proof that any existing SMCRA violation caused by surface coal mining operations which it “owned or controlled” has been corrected or is in the process of being corrected to the satisfaction of the appropriate regulatory authority. See 30 CFR 773.15(b) (1994).

What constitutes ownership or control by an applicant is defined at 30 CFR 773.5, which provides that “[o]wned or controlled and owns or controls mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition.” Paragraph (a) of 30 CFR 773.5 identifies those relationships that are conclusively “deemed to constitute ‘ownership or control.’”<sup>3/</sup> It lists:

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<sup>3/</sup> On Jan. 31, 1997, the U.S. Court of Appeals for the D.C. Circuit in National Mining Association v. U.S. Department of the Interior, 105 F.3d 691 (D.C. Cir. 1997), overturned “in toto” the Department's original ownership and control regulation (30 CFR 773.5), which had been promulgated effective Nov. 2, 1988. However, on Apr. 21, 1997, OSM issued an interim final rule (IFR), effective Apr. 3, 1997, inter alia, to cover the period prior to the Court of Appeals decision and to “cure” the “defect” in the ownership and control rule identified by the Court. Both 30 CFR 773.5(a)(3) and (b)(6) were retained. See 62 FR 19450 (Apr. 21, 1997). Subsequently, in National Mining Association v. U.S. Department of the Interior, 177 F.3d 1 (D.C. Cir. 1999), the Court further considered the validity of the IFR's ownership or control presumptions set forth within 30 CFR 773.5(b). However, as 30 CFR 773.5(b)(6) was not challenged therein, the Court specifically did not address its validity. 177 F.3d 1, 6 n.6. OSM amended the ownership and control rule in 2000, but prospectively, 65 FR 79661 (Dec.19, 2000). Accordingly for purposes of this decision the provisions of 30 CFR 773.5(a)(3) and (b)(6) (2000) cover the entire period relevant to this appeal.

(1) Being a permittee of a surface coal mining operation; (2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. [Emphasis added.]

30 CFR 773.5(a).

Paragraph (b) of 30 CFR 773.5 sets forth relationships that create a rebuttable presumption that an applicant “owns or controls” an individual or entity engaged in surface coal mining operations. The only relationship which might give rise to the regulatory presumption in the present case concerns ownership or control of the coal which is being mined under lease as described at 30 CFR 773.5(b)(6), which provides:

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation. [Emphasis added.]

30 CFR 773.5(b); see Kentucky Resources Council, Inc., 155 IBLA 354, 356-57 (2001).

After carefully considering the matter, OSM determined that Manalapan did not exercise control over JYB's surface coal mining operations, during the time period in question. Appellants assert, on appeal, that OSM failed to fully investigate the matter to determine whether Manalapan participated in issuance of the surface coal mining permit to JYB, made decisions concerning the manner and scope of day-to-day operations under the permit, or responded to any of the enforcement actions directed at JYB by reason of such operations. Appellants have failed to show specifically how OSM's investigation was deficient. Nor, ultimately, have they provided any evidence that Manalapan actually exercised any control over JYB's operations. See SOR at 11. Thus, we conclude that appellants have failed to demonstrate, by a preponderance of the evidence, that Manalapan actually controlled JYB's operations, within the meaning of 30 CFR 773.5(b)(6).

Under the lease contract, Manalapan, as the owner or controller of the coal, leased the right to mine and remove coal to JYB, in return for the payment of royalty on the coal produced and sold by JYB:

Lessee shall conduct its strip and auger operations hereunder in a diligent, careful and workmanlike manner, using modern, efficient and

approved methods of strip and auger mining and employing sound engineering practices, so as to remove as soon as practicable all the mineable and merchantable coal and not to permit any waste and to do no damage to the premises other than that which is reasonably necessary in the mining of coal by the strip and auger methods[.]

(Lease Contract dated May 11, 1982, at 1.) During the term of the lease, Manalapan had the right to inspect the leased premises, and to place a first lien against all of the property placed on the premises “to secure the payment of all royalty and to secure the performance of this lease by Lessee.” Such property could not then be removed “unless Lessee has paid all royalty and performed its obligations hereunder.” Id. at 4.

Importantly, paragraph 15 specifically provided that

[i]f Lessee [JYB] shall fail to pay the royalty provided hereunder or if Lessee shall fail in the performance or observance of any of the terms and provisions hereof[, including the requirement to comply with Federal and State surface mining laws and regulations “applicable to or affecting its operations under this lease”], Lessor [Manalapan] shall have the right, at its election, to declare this lease terminated. [Emphasis added.]

(Lease Contract at 2, 4.) In order to exercise this election, the contract stated that Manalapan had only to notify JYB in writing that it had chosen to do so, whereupon

this Lease Contract and the term hereof shall immediately cease and expire with Lessee having no further rights or privileges hereunder and Lessor having the full right to take complete possession of the leased premises the same as though this Lease Contract did not exist.

Id. at 4.

After reviewing the contractual relationship between Manalapan and JYB, we are not persuaded that Manalapan had the capacity to control JYB's surface coal mining operations. We agree with appellants that Manalapan had the unilateral right to terminate the contract without immediate recourse by JYB, since the election by Manalapan took instant effect. However, we do not think that Manalapan's decision to terminate the contract was “within [its] absolute, unreviewable discretion,” or that JYB had no further recourse whatsoever. (SOR at 14.) Rather, the exercise of Manalapan's discretion was constrained by the contractual prerequisite that Manalapan act on the basis of a demonstrable violation of one of the contract's terms and conditions, including compliance with the surface mining law and regulations.

The provision at issue here did not, as written, invest Manalapan with the authority to dictate the manner and scope of JYB's operations. We are simply not persuaded that the Department, in promulgating 30 CFR 773.5, or the Board precedent construing this rule intended to encompass such a situation in its definition of control. Nor do appellants provide any evidence to that effect.

Manalapan's ability to prevent or correct a violation, by threatening to shut down operations, extended only so far as Manalapan's ability to make a credible threat and JYB's willingness to comply. This situation is akin to that in Spur, where we held that the contractual provisions requiring the sublessee (B&J) to “abide by state and federal laws and regulations concerning strip mining,” upon risk of default and assumption of the permits by the sublessor (Spur), did not afford the sublessor control over the operations of its sublessee, within the meaning of 30 CFR 773.5 (1994):

[T]he possibility that Spur could actually have influenced B&J's mining as a result of the contract clauses is highly speculative. It is equally possible that B&J would simply have refused to change its mining operations, even if doing so resulted in default and eventual loss of the permits following litigation. Under this hypothesis, Spur could have taken over the permits without ever forcing B&J to take any action to [prevent or] correct violations.

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Where a link is established, the justification for withholding a permit is that the applicant could have, but failed to, require compliance with the surface mining laws so that violations would not have occurred or outstanding violations would have been corrected. We are not convinced these clauses put Spur in a position either to prevent violations or to have outstanding violations corrected \* \* \*. [Emphasis added.]

133 IBLA at 190, 191-94, 102 I.D. at 65, 66-67. That ruling was affirmed by the Director. 12 OHA at 189.

While appellants rely heavily on Spur, we note that subsequent history leaves its precedential value in some disarray. Portions of the IBLA and OHA decisions were expressly repudiated by the Solicitor in M-36986 (Dec. 5, 1996), at 19-24, and that opinion was adopted by the Secretary. There, the Solicitor, with the Secretary's approval, modified Spur, id. at 15-16, and stated that the “reasoning contained in the [Spur] opinion is flawed \* \* \* and should not be followed in future applications except to the extent consistent with the analysis below.” Id. at 1 (emphasis added).

Subsequently, in Kentucky Resources Council, 155 IBLA at 355, the Board applied the Solicitor's opinion instead of Spur's analysis. In Angus E. Peyton v. OSM, 158 IBLA 335, 358 (2003), the Board cited Spur as "overruled as precedent, Solicitor's M-Opinion (Dec. 5, 1996)." <sup>4/</sup> In fact, as the Solicitor's opinion indicates, to the limited extent Spur is consistent with the opinion, its logic may be considered as sound.

The analysis of the Solicitor in that opinion involved an issue of the legitimate business exercise of control; while the Solicitor's opinion acknowledged legitimate business reasons for the exercise of "control," it found no reason to create an exception to the consequences of "ownership and control" within 30 U.S.C. § 1260(c) (2000), for the legitimate exercises of it. We agree with appellants that nothing in the Solicitor's Opinion rejected the relevant analysis cited from Spur above. We disagree with appellants in our application of it, however; we find that prior pronouncements on the topic support OSM's decision at issue here, and that the Solicitor's Opinion contains no discussion that would lead to a contrary conclusion.

Moreover, our holding is consistent with subsequent precedent addressing 30 CFR 773.5(b)(6). In Kentucky Resources Council, 155 IBLA at 357, the Board found the existence of ownership and control within the meaning of that regulation in an express lease provision requiring the lessee to submit a mining plan for approval to the lessor, and reserving in the lessor the authority to disapprove the plan. We find no counterpart provision within the lease transferred to Manalapan. Rather, the provisions, as cited above, reserve a right to the lessor to terminate the lease based upon a demonstrated violation of law. As in Spur, we find this lease provision to provide Manalapan the right to terminate, not the right to control mining operations given to the lessor in Kentucky Resources Council.

Thus, we do not find that the terms of its lease with JYB placed Manalapan in a position of authority to prevent or correct outstanding violations. Under the circumstances, we cannot say that Manalapan controlled JYB's operations within the meaning of 30 CFR 773.5(a)(3) and (b)(6).

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellants are rejected on the grounds that they are contrary to the facts or law, or are immaterial.

We, therefore, conclude that the Regional Director, in his May 1995 decision, properly affirmed LFO's January 1995 decision declining to take enforcement action against Manalapan concerning JYB's surface coal mining operations, based on its

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<sup>4/</sup> We note that this reference in Peyton comes from a description of the status of Spur provided by the appellants rather than the Board's analysis. 158 IBLA at 155.

finding that Manalapan did not own or control these operations, within the meaning of 30 CFR 773.5(a)(3) and (b)(6), during the time period in question.

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.

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Gail M. Frazier  
Administrative Judge

I concur:

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Lisa K. Hemmer  
Administrative Judge