

INTERIOR BOARD OF LAND APPEALS

Martha and Roy A. McBride

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Appeal from a decision of the Assistant Director, Eastern Support Center, Eastern Field Operations, Office of Surface Mining Reclamation and Enforcement, on informal review of a determination by the Columbus Field Office involving action on a citizen's complaint regarding well water quality. Ten-Day Notice No. 90-07-251-01.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

Under 30 CFR 816.42(h), any person who conducts surface mining activities is required to replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. The replacement requirement is controlled by the owner's pre-existing uses of the water supply.

2. Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

When OSM issues a 10-day notice to a state regulatory authority pursuant to sec. 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(1) (1988), in response to a citizen's complaint alleging that the quality of a well water supply has not been replaced to that existing before

commencement of nearby surface coal mining activities, this Board will affirm OSM's decision declining to take Federal enforcement action where the record shows that the water supply is potable and has been restored to comparable premining quality. In such a situation, the water supply has been replaced within the meaning of 30 CFR 816.42(h).

APPEARANCES: Martha and Roy A. McBride, Beloit, Ohio, pro sese. 1/

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Martha and Roy A. McBride have appealed from a November 6, 1990, decision of the Assistant Director, Eastern Support Center, Eastern Field Operations (EFO), Office of Surface Mining Reclamation and Enforcement (OSM), following informal review of OSM's investigation of the response of the State of Ohio, Department of Natural Resources, Division of Reclamation (DOR), to a Ten-Day Notice (TDN). OSM had issued the TDN following receipt of the McBrides' citizen's complaint alleging that the quality of their well water had not returned to that existing before commencement of nearby surface coal mining operations by the S.M.E. Bessemer Cement Company, Inc. (SME), on Permit No. D-0431 in Mahoning County, Ohio.

Factual and Procedural Background

In 1980, SME commenced surface coal mining operations under Permit No. D-0431. In 1985, SME's operations breached the workings of an old shallow abandoned underground mine, the McKinley mine, and water in a shallow (100 feet or less) unconfined aquifer drained down dip into the mine cut. That resulted in the dewatering of numerous private domestic water wells in the adjacent area, including the well of Martha and Roy A. McBride. The McBrides and other individuals complained to DOR. On May 8, 1985, the Chief, DOR, issued an order (Chief's Order No. 5532) requiring that SME replace the McBrides' water supply within 20 days. During that 20-day period, SME had a replacement well drilled. The water in the replacement well was not potable.

Thereafter, the record before the Board is unclear as to actions taken by the State with regard to the McBrides' water supply. However, on January 5, 1990, Martha McBride filed a letter with OSM's Columbus Field Office (CFO), complaining that nearly 5 years earlier they had lost their water due to SME's mining operation and that she had heard that other neighbors with the same problem might receive a temporary water line to their houses. She stated that "[w]e filed a recent complaint (again) with the State so they would know we are still out here - waiting." (Emphasis in original.)

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1/ Steve J. Edwards, Esq., Grove City, Ohio, filed the notice of appeal on behalf of the McBrides. He has made no other appearance in the case, and the McBrides filed their own reasons in support of their appeal.

CFO considered the letter to be a citizen's complaint, and on January 8, 1990, a CFO employee contacted Martha McBride and learned that "[t]hey are using the original well for bathing, washing etc. but are hauling drinking water from downtown" (CFO Telephone/Contact Record, dated Jan. 8, 1990). On January 9, 1990, CFO, acting 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), issued TDN 90-07-252-01 to DOR. That notice stated that "[t]he complaint indicates that water supplies which were interrupted and/or contaminated by mining operations of S.M.E. Bessemer have not been replaced for all of the affected persons addressed by enforcement or other action taken by the Ohio Division of Reclamation since May 1985." 2/

DOR sought an extension of time to respond stating that "[d]ue to the complicated nature of the SME Bessemer situation and the long time frame involved in the case (over four years), the Division has had to undertake time-consuming research to determine the status of the 17 complainants, the Division's past enforcement actions, and the history of the litigation involved." CFO granted an extension until January 26, 1990. Following receipt of DOR's response that it had resolved a number of the complaints, but that it was continuing to review the McBride situation, CFO issued letters on January 30, 1990, to DOR and the McBrides informing them that it considered the response to be an appropriate interim response. 3/

On March 1, 1990, DOR provided the following additional response to the TDN:

The water quality in the old well has returned to its approximate premining condition. The quality of the water in this well is acceptable with the treatment system installed by the McBrides. Since the quality and quantity of water has returned, C.O. [Chief's Order] #5532 will be terminated.

The McBrides have complained a second time regarding their desire to have the new well plugged and the reimbursement for their expenses involved in the installation of the permanent treatment system. Since the old well has recovered and continues to improve in quality, the Division does not believe that the plugging of the new well would provide any substantial benefit.

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2/ The record indicates that OSM considered the TDN to cover the water supplies of all affected landowners, except Ethel Carpenter, Pat Krug, and Betty Lewis, whose supplies were being addressed by Federal Notice of Violation (NOV) 89-07-251-02. OSM issued that NOV to SME on Nov. 21, 1989, following an inappropriate response from DOR to a TDN. The abatement required by OSM was replacement of the water supplies. SME sought review of that NOV, and it was docketed by the Department's Hearings Division as Docket No. CH 90-3-R.

3/ The McBrides appealed that determination and in a Feb. 21, 1990, decision EFO affirmed CFO's determination. There is no record of an appeal to this Board of that decision.

Regarding reimbursement to the landowner for cost he incurred installing a permanent treatment system, the statute clearly allows for reimbursement for interim water supplies only. [Emphasis in original.]

By letter dated April 12, 1990, DOR informed CFO that it had received its final water test results and "[w]ith the treatment systems in place, the McBride and Shreve water supplies now meet or exceed the premining water quantity and quality." DOR also stated that it had no authority to require SME to plug the McBride replacement well, noting that plugging of wells fell under the jurisdiction of the county health department, and no authority to require SME to develop a water system maintenance contract with affected landowners for continuing expenses "which exceed premining maintenance costs, e.g., salt for softeners, routine adjustments on treatment systems, increase in electrical use, etc."

By letter dated May 4, 1990, CFO advised DOR that it considered the overall response to the TDN to be inappropriate, although some portions of the response were considered appropriate. On the issue of the quality of the water in the McBrides' original well, CFO found the State's response was appropriate, and agreed with DOR's conclusion that the quality met or exceeded the premining condition with the use of treatment systems (water softeners). Also, CFO agreed with DOR's response that the Ohio Program did not require the operator to develop a contract with affected landowners to address increased cost of maintenance and to provide for ongoing water replacement. However, it stated:

As DOR is aware, OSM has established Directive REG-27 concerning replacement of water supplies impacted by mining which addresses the need for such contractual arrangements. Although not specified in either the Federal or State regulations, such arrangements are necessary to assure continued replacement after bond release. Such arrangements must be made before a final bond release is granted.

This portion of the response is considered to be appropriate since there has not been a request for final release of the bond. Therefore, there is no need for such contractual arrangements to exist at this time. OSM will discuss this matter in detail with DOR and pursue actions to address this issue.

(Letter at 6).

Regarding reimbursement for interim water supplies, CFO stated that DOR's response was inappropriate because "DOR's policy to only require reimbursement for interim water supplies conflicts with the requirements of the Ohio program" and is "arbitrary and capricious" (Letter at 6). It also found the response inappropriate because DOR had not taken actions to assure that replacement wells were properly installed and/or abandoned.

By letter dated May 7, 1990, CFO forwarded to the McBrides a copy of its May 4, 1990, letter to DOR. It also stated that it found the DOR response to be appropriate regarding their water supply and that the response was appropriate as it related to requiring reimbursement of costs for obtaining a water supply until replacement occurred. It stated, however, that it considered DOR's determination that it would not require SME to reimburse costs associated with permanent replacement to be inappropriate.

DOR sought informal review of CFO's determination, arguing that it had no authority to order the McBrides' replacement well to be plugged or to direct reimbursement for more than interim water supplies. In response to DOR, the Deputy Director, Operations and Technical Services, OSM, stated in pertinent part in a July 25, 1990, letter:

With respect to the reimbursement of costs for the water treatment systems, you maintain that the issue involves a difference of opinion between our agencies concerning statutory construction. Based on your agency's interpretation of ORC [Ohio Revised Code] Section 1513.162(A), you argue that your authority under this statute is limited to requiring an operator to "replace" a water supply and to reimburse a property owner for the cost of obtaining a water supply only between the time of contamination to the time the permanent water supply is replaced. Therefore, you maintain that an operator's liability for replacing a water supply terminates when a third party such as a property owner independently installs a treatment system to restore a permanent water supply.

Based on my review of the applicable State program requirements governing water replacement, I will accept your response as constituting good cause under 30 CFR 842.11(b)(1)(B)(4)(iii) based on your position that your agency lacks jurisdiction under the Ohio program over the alleged violation. I recognize that the language in ORC 1513.162(A) may be interpreted to limit an operator's obligation to replacing a disrupted water supply and reimbursing a property owner solely for the costs of obtaining a temporary water supply up until the time the operator replaces the disrupted supply. However, to the extent the Ohio program does not authorize your agency to require an operator to replace or compensate a property owner for the replacement of a disrupted water supply in all cases, I find that it is inconsistent with, and less effective than, the water replacement provisions required under the Surface Mining Control and Reclamation Act (SMCRA). Accordingly, you will be notified pursuant to 30 CFR Part 732 that an amendment to the Ohio Program is necessary to resolve this program defect and to bring about a resolution that is

consistent with the intent of SMCRA in the instant case, as well as in a[11] similar cases. [4/]

(Letter at 2).

The McBrides in a June 4, 1990, letter also requested informal review generally expressing concern with the quality of their water. In addition, an attorney representing the McBrides, as well as other landowners, in a state court suit against SME, informed OSM in a letter dated June 14, 1990, that on behalf of his clients he was registering an objection to conclusions contained in a May 29, 1990, cover memorandum from the Deputy Assistant Director, Program and Technical Support, EFO, through the Deputy Assistant Director, Program Operations, EFO, to the Director, CFO, which capsulized an attached undated technical evaluation entitled "REPORT OF INVESTIGATION GROUND-WATER DIMINUTION, REPLACEMENT AND CONTAMINATION S.M.E. BESSEMER CEMENT COMPANY MAHONING COUNTY, OHIO (Report of Investigation)." (Capitals in original.) 5/ Regarding the objectionable conclusions therein, he stated in that June 14, 1990, letter: "Specifically, the conclusion that at least three of the original wells [Krug, Shreve, and McBride] are currently useable, and the post-mining and pre-mining water quality of the wells is comparable, and that the hydrologic balance has been restored."

He further stated that he would submit technical information in support of the objections. According to a Telephone/Contact Record, dated June 15, 1990, the attorney, after checking with Mr. McBride, represented that OSM could consider the June 4 and June 14 letters together during its informal review.

In a letter dated June 20, 1990, OSM advised the McBrides that it would delay resolution of the pending informal review until receipt of the technical information from their attorney. No such information was ever submitted. 6/

In addition, on June 22, 1990, the McBrides' attorney filed a "Motion to Intervene" in the SME application for review proceeding pending in the Department's Hearings Division, CH 90-3-R (see note 2, supra). He sought intervention on behalf of the Krugs and the McBrides. Therein, he stated:

Roger and Patricia Krug and Roy and Martha McBride are homeowners in Mahoning County. Applicant has de-watered their wells

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4/ DOR was notified by OSM in a second letter of the same date that amendment of Ohio's permanent program was necessary in light of DOR's interpretation of Ohio Rev. Code Ann. § 1513.162 (A) (Anderson 1992).

5/ In his letter the attorney did not identify the memorandum by date or the Report of Investigation by name. However, review of the record in this case reveals that he clearly was referring to those documents.

6/ The record indicates that a CFO employee was informed by the McBrides' attorney on Aug. 28, 1990, that OSM should proceed with its informal review and that no additional information would be filed (Telephone Contact/ Record, dated Aug. 28, 1990).

and polluted the aquifer underlying their homes through strip mining. This has been on going for over five years. Most recently, the Respondent has indicated that the Krug's and McBride's original wells can now provide satisfactory water. The Intervenors disagree with these conclusions and recommendations \* \* \*.

The intervenors' homes are located where the Applicant dewatered the area through its strip mining operations. The only water the intervenors have is from their wells that were dewatered. The intervenors strongly disagree with the conclusions and recommendations in the attached memorandum. (See Exhibit A) [Exhibit A was the May 29, 1990, OSM internal memorandum and the accompanying Report of Investigation]. If these conclusions and recommendations are adopted, the intervenors will be "stuck" with terrible water which will prevent them from living a normal life and drastically reduce the value of the biggest asset in their lives, their homes. This is certainly a sufficient interest to warrant this intervention.

In a June 28, 1990, order, an Administrative Law Judge granted intervention, and on October 11, 1990, he dismissed CH 90-3-R pursuant to a joint motion to dismiss in which counsel for SME, counsel for OSM, and counsel for the Krugs and McBrides represented that all substantive aspects of the application for review were no longer in controversy. <sup>7/</sup>

On November 6, 1990, EFO issued a decision stating that "CFO's action in response to your concerns was appropriate." In support of that decision, EFO enclosed a copy of the May 29, 1990, memorandum and the Report of Investigation.

The McBrides' attorney filed a notice of appeal of that decision, stating that "[a]ppellants are appealing due to the erroneous determination that the present water quality in their wells [sic] is acceptable and is comparable to pre-mining water quality." In their statement of reasons, appellants contend that the law requires replacement of their water and that the use of "national standards" by the "informal Review Board" to determine potability is "wrong." Appellants state that sulfate levels are "within reason to accept," but that "over all hardness and other chemicals are not within reason." They assert that the total dissolved solids in their water have increased from 340 to 550 milligrams per liter (mg/l) and that iron has increased from 30 to 50 mg/l. Appellants believe that these new levels do not constitute replacement of water to premining quality. Appellants also state that their water now requires additional treatment equipment and more salt than was necessary before mining operations began. Appellants also fear that their water supply is less reliable, asserting that it is prone to a future diminution in quality, which, they allege, has occurred in other wells.

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<sup>7/</sup> We have gathered the information relating to CH 90-3-R from the official Department file for that proceeding. No further explanation of the reasons for the joint dismissal is including in that case file.

Discussion and Conclusions

The question presented by this appeal is whether EFO, in approving the action of CFO, properly responded to the McBrides' citizen's complaint. We conclude that it did.

Section 717(b) of SMCRA, 30 U.S.C. § 1307(b) (1988), provides:

The operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation. [8/]

[1] The Department promulgated 30 CFR 816.41(h) to implement the requirements of that provision:

Any person who conducts surface mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. Baseline hydrologic information required in §§ 780.21 and 780.22 of this chapter shall be used to determine the extent of the impact of mining upon ground water and surface water.

The preamble to the final rulemaking for 30 CFR 816.41(h) made clear that the requirement thereof to replace water supplies related "to pre-existing uses and not the postmining land use" (48 FR 43980 (Sept. 26, 1983)).

In accordance with 30 CFR 780.21(b)(1), a permit application is to contain, for the permit and adjacent areas, groundwater baseline information, including location and ownership of existing wells, springs, and other groundwater resources, seasonal quality and quantity of groundwater, and usage. Water quality descriptions are to include, at a minimum, total dissolved solids or specific conductance corrected to 24° C, pH, total iron, and total manganese.

The applicable provision of Ohio's permanent regulatory program is Ohio Rev. Code Ann. § 1513.162(A) (Anderson 1992), which provides:

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8/ Subsection (a) of section 717 of SMCRA, 30 U.S.C. § 1307(a) (1988), provides that "[n]othing in this chapter shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation."

The operator of a coal mining operation shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where the supply has been affected by contamination, diminution, or interruption proximately resulting from the coal mining operation and shall reimburse the owner for the reasonable cost of obtaining a water supply from the time of contamination, diminution, or interruption by the operation until the water supply is replaced.

From the record before the Board, there is no question that SME's surface coal mining operation adversely impacted appellants' water supply by dewatering their well and that the adverse impact continued for an extended period of time. Accordingly, under both Federal and State law, SME was required to replace appellants' water supply.

[2] As indicated above, the replacement requirement is dependent on the pre-existing water supply uses. In this case, appellants used their well water for drinking and other domestic uses. At the time appellants filed their complaint with OSM in 1990, they had resumed domestic use of their original water supply, except for drinking purposes. Thus, their complaint was directed to the quality of their water supply for drinking purposes, the quantity thereof apparently having been restored.

The challenged decision relies upon the Report of Investigation which states at page 4:

Water samples were collected from three of the original wells (Krug, Shreve, and McBride) during February and March 1990 site visits by OSM. The analyses of these samples are shown in Attachment B. Table 1 [which bears a date of "4/19/90"] compares the pre-mining and post-mining water quality of the wells. Although the pre-mining and post-mining quality are slightly different, there has not been an overall decrease in water quality as a result of mining. The post-mining and pre-mining quality is comparable.

Table 1 in the Report of Investigation sets forth water sample data for the three wells in seven categories--pH, total acidity, total alkalinity, total manganese, total iron, total sulfate, and specific conductance. For appellants' well, three samples are compared in Table 1. The first, taken in "6/84," represents the premining baseline. <sup>9/</sup> The other two were

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<sup>9/</sup> Table 1 shows that the premining baseline sample for the Krug well and for the Shreve well were each taken in "6/80." While it is possible that the Table contains a typographical error for the year in which appellants' baseline sample was taken, a sample taken in 1980 or in 1984 would have been prior to dewatering of appellants' well in 1985. The record does not disclose the sampler for any of the baseline samples. However, appellants have raised no objection to the use of the baseline sample data.

taken by OSM, one in January 1990 and the other in March 1990. The data portrayed in Table 1 for those two samples matches the values in Attachment B to the Report of Investigation for samples taken before treatment (addition of softener) by appellants. Attachment B also shows the results for a sample from appellants' well water taken in March 1990, after the addition of softeners. 10/

The Report of Investigation explained that the premining water quality data for wells, like appellants', drilled to the Zone 1 aquifer showed the water to be potable, although hard, with high alkalinity. It stated that some wells had elevated levels of iron and manganese, but it did not identify which wells. Also, it stated that because of the hardness and iron, most homeowners installed water softeners.

Federal water potability standards are found in national primary and secondary drinking water regulations (40 CFR Part 141 and 40 CFR Part 143) promulgated by the Environmental Protection Agency (EPA) to implement the Safe Drinking Water Act, 42 U.S.C. § 300f (1988). The State of Ohio has assumed primary enforcement responsibility for the safe drinking water program in Ohio. See Ohio Rev. Code Ann. Chapter 6109 (Anderson 1992). The primary drinking water regulations, promulgated by EPA and adopted by Ohio, are mandatory, health-based and establish maximum contaminant levels (MCL's) or treatment techniques for contaminants that may adversely affect human health. See 40 CFR Part 141, Subpart B; Ohio Admin. Code §§ 3745-81-12 to 81-16 (1993). 11/ Appellants' objections regarding the quality of their water supply do not involve any of the contaminants listed in the primary drinking water regulations.

The secondary drinking water regulations, promulgated by EPA and adopted by Ohio, are not health-based and apply only to contaminants that affect aesthetic qualities relating to the public acceptance of drinking water. These regulations "are not Federally enforceable but are intended as guidelines to the States." 40 CFR 143.1. These regulations identify secondary advisable maximum contaminant levels for various contaminants, including iron, manganese, sulfate, and total dissolved solids. Appellants have complaints regarding the levels of iron and total dissolved solids in their postmining water supply. 12/

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10/ Although the May 1990 CFO decision found that DOR's response was appropriate on the issue of the quality of the water in the McBrides' original well and agreed with DOR's conclusion that the quality met or exceeded the premining condition with the use of treatment systems (water softeners), the EFO decision is clearly based on the Report of Investigation and Table 1, which show the untreated postmining water samples are comparable in quality to the premining baseline sample.

11/ The primary drinking water regulations address MCL's for nitrate, arsenic, barium, cadmium, chromium, lead, mercury, selenium, fluoride, organic chemicals, turbidity, and various radioactive materials.

12/ The secondary MCL's for iron and total dissolved solids are 0.30 mg/l and 500 mg/l, respectively. The postmining values for the Mar. 20, 1990, untreated water sample from the McBride well showed values for iron and

However, notably, the mandatory primary drinking water regulations and the guidelines of the secondary drinking water regulations only apply to a "public water system." 40 CFR 141.2; 40 CFR 143.2. 13/ Appellants' single well is not a "public water system." Under Ohio law governing private water systems, appellants' single well is considered a "private water system." Ohio Rev. Code Ann. § 3701.344(A) (Anderson 1992); Ohio Admin. Code § 3701-28-10(V) (1993). Contamination of a private water system in Ohio means "introduction of any contaminant into the private water system or ground water which renders the water unfit for human consumption." Ohio Admin. Code § 3701-28-01(H) (1993). Contamination levels are to be prescribed by the Director of the Ohio Department of Health. Id. 14/

There is no evidence in the record that at the time appellants filed their citizens' complaint or at the time OSM issued its decision under review that appellants' water was unfit for human consumption. The only evidence in the present record of premining and postmining data for appellants' well is contained in the Report of Investigation. Appellants do not dispute that data. Nor do appellants present their own water sample data. Appellants merely disagree with the conclusions drawn by OSM from that data.

The record supports the conclusion that as of the time of OSM's investigation of appellants' water supply in 1990 it had been restored to premining uses. Accordingly, we must conclude that despite the fact that appellants' premining and postmining water quality was not identical, their water supply had been replaced within the meaning of the applicable law, and that OSM properly found the State's response to the TDN to be appropriate.

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fn. 12 (continued)

total dissolved solids of 0.50 mg/l and 645 mg/l, respectively. Although the McBrides claim an increase in total dissolved solids of 210 mg/l, the data in the record before the Board does not show any water samples with the values claimed by appellants.

13/ A public water system is "a system for the provision to the public of piped water for human consumption," and it is either a "community water system" or a "non-community water system." 40 CFR 141.2; 40 CFR 143.2.

14/ There is no evidence in the record that the applicable state or local body designated to regulate the McBrides' private water systems had adopted, in 1990, the secondary MCL's as mandatory safe drinking water standards. Thus, the fact that appellants' postmining water supply may have had slightly elevated levels of two contaminants listed in the secondary drinking water regulations does not establish that the water was unfit for human consumption.

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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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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

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