INTERIOR BOARD OF LAND APPEALS

Fremont Coal Co.
v.
Office of Surface Mining Reclamation and Enforcement

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

IBLA 93-119 Decided March 20, 1996

Appeal from a decision by Administrative Law Judge David Torbett affirming issuance of Notice of Violation No. 90-111-019-002 and Cessation Order No. 91-111-019-001. CH 91-3-R and CH 91-4-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Under the Surface Mining Control and Reclamation Act of 1977, a state with an approved program has primary responsibility for enforcing its state standards, with OSM acting with oversight authority. In the exercise of this oversight role, OSM enforces state and Federal standards on a mine-by-mine basis if the state fails to do so.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

The unique Federal/state balance created under SMCRA manifests a "countervailing statutory policy" rendering the doctrines of res judicata and collateral estoppel inapplicable to issues arising when state enforcement proceedings do not culminate in an abatement of the violation.

APPEARANCES: Robert D. Pollitt, Esq., Steven P. McGowan, Esq., Charleston, West Virginia, for appellant; Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Fremont Coal Company (Fremont) has appealed a November 13, 1992, decision of Administrative Law Judge David Torbett, affirming issuance of Notice of Violation (NOV) No. 90-111-019-002 and Cessation Order (CO) No. 91-111-019-001, issued to Fremont for failure to eliminate highwalls at its Mingo County steep slope contour mine (State permit No. S-71-82), in violation of West Virginia Code 22A-3-12(b)(3) and West Virginia Regulation § 14.15(a).

Background

While mining at its Mingo County steep slope contour mine, Fremont cut a Columbia Gas Company (Columbia) road going to Columbia owned gas wells located above the contour of the strip mining operation, destroying a segment of that road, and blocking Columbia's access to its wells (Tr. 50). Columbia sued Fremont and the parties entered a settlement agreement giving Fremont the option to either repair the road or build a new access road. Fremont attempted to construct an alternate road, but was unable to design one on a grade and with sufficiently large curves to allow movement of the heavy equipment necessary for Columbia's operations. In July 1987, Fremont submitted a permit modification request to the West Virginia Department of Energy (DOE), seeking to construct the Columbia access road on backfill (Tr. 56). DOE approved the permit modification and the road construction was completed in December 1987, leaving a highwall approximately 200 feet long where the road crossed the backfill (Tr. 56; App. Exh. 1). The lawsuit was then dismissed without prejudice.

In October 1988, after an on-site meeting between Fremont, the Office of Surface Mining Reclamation and Enforcement (OSM), and DOE, DOE issued an NOV for failure to backfill the highwall. Fremont appealed the NOV to the West Virginia Reclamation Board of Review (Board of Review). The Board of Review found that greater environmental harm would result from eliminating the highwall above the gas access road and constructing another road than would result if the gas access road was left unchanged. The Board of Review's order stated in part:

> This activity would be counterproductive in that the final result would be essentially identical to the situation that now exists at the mine site, but would cost Fremont substantial sums of money and would create the potential for new erosion and sedimentation in and around the mine site.

(App. Exh. 2). On June 6, 1989, the Board of Review vacated the NOV.

On June 26, 1989, OSM informed DOE that the Board of Review's decision was inconsistent with West Virginia's approved permanent regulatory program and with the approved permit application under which the "highwall was to

be completely removed and the gas well access road was to be constructed at the bottom of the fill, thus eliminating the need to retain the highwall above the access road" (Resp. Exh. 13). 1/

OSM Reclamation Inspector Thomas E. Sentz inspected the site on September 5, 1990. On November 8, 1990, he issued a Ten-Day Notice (TDN), informing DOE that Fremont was in violation of State and Federal law for failure to grade and backfill to approximate original contour with highwalls eliminated, and directing DOE to take action to correct the violations (Tr. 16; Resp. Exh. 9).

On November 19, DOE responded, noting that the Board of Review's decision vacating the NOV precluded further DOE action (Resp. Exh. 10). On November 26, 1990, OSM issued a memorandum to DOE finding DOE's response to the TDN arbitrary and capricious (Resp. Exh. 11). On December 19, 1990, Sentz reinspected the site and issued NOV No. 90-11-019-002. On January 8, 1991, he issued CO No. 90-11-019-001. Fremont filed an application for review and temporary relief from both the NOV and CO. On December 12, 1991, a hearing was held before Judge Torbett in Pittsburgh, Pennsylvania.

In its posthearing brief Fremont presented argument on four issues: (1) OSM's jurisdiction to issue the NOV; (2) whether DOE's response to the TDN was appropriate, so as to foreclose further OSM enforcement action; (3) whether DOE's approval of the permit modification precluded OSM enforcement action; and (4) whether the called for abatement action (removal of highwall) would cause more environmental harm than nonaction.

Judge Torbett's decision addressed three of the four arguments presented by Fremont. 2/ Responding to the first contention, he found that section 521(a)(3) of SMCRA (30 U.S.C. § 1271(a)(3) (1994)) granted authority to OSM to issue NOV's in a primacy state when state programs are not

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1/ It is difficult to envision how the road could be built at the toe of the backfill. The existing road commences below the backfill and climbs across the backfill area to the wells which are located on a ridge above the minesite.

2/ Judge Torbett did not weigh the environmental consequences of removing, or allowing the highwall to remain. He ruled simply that allowing the highwall to remain was in clear violation of both State and Federal law (Decision at 5). This ruling was correct. When Congress enacted section 515 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1265(b)(3) (1994), and 30 CFR 715.14, it mandated the complete elimination of highwalls. The Administrative Law Judge and this Board were afforded no latitude to compare the environmental harm or grant relief from the requirement, regardless of how reasonable or compelling the arguments for leaving a highwall might be. See Delmar Adkins v. OSM, 128 IBLA 1, 6 (1993), and cases there cited; River Processing, Inc. v. OSM, 76 IBLA 129, 138, 90 I.D. 425, 430 (1983).

being enforced. See also 30 CFR 843.12(a)(2). He then considered whether the State's response to the TDN amounted to "good cause" or "appropriate action" under 30 CFR 842.11(b)(1)(ii)(B)(3) and (4), and found that the Board of Review's decision was "in clear violation of both State and Federal law * * * was arbitrary and capricious, * * * and thus did not amount to 'good cause'" (Decision at 5). He also found that the State's response to the TDN did not amount to "appropriate action" because it was not designed to abate the violation. Judge Torbett then found that OSM was not equitably estopped from undertaking enforcement action by DOE's erroneous approval of Fremont's permit modification which allowed the highwall to remain on the site. He noted that requisite elements of estoppel were not present and that estoppel would "divest OSM of the authority expressly conferred by Congress." Bernos Coal & Excello Land & Mineral v. OSM, 97 IBLA 285, 300-301, 94 I.D. 181, 191 (1987), rev'd, Bernos Coal Co. v. Lujan, Civ. No. 3-87-437 (E.D. Tenn. June 6, 1989) (Decision at 6).

Discussion

On appeal to this Board Fremont contends that OSM was without authority to take enforcement action in West Virginia, a primacy State. 3/ It also contends that, having failed to object to the modification of the permit, OSM should be estopped from exercising further oversight authority. In support of its position, Fremont cites Clinchfield Coal Co. v. Hodel, 640 F. Supp. 334 (W.D. Va. 1985), and Haydo v. Amerikohl Mining Co., 830 F.2d 494, 497 (3d Cir. 1987).

In its response OSM states that its authority to take enforcement measures after an oversight inspection of an operation in a primacy state is clearly set out in 30 CFR 843.12(a)(2), and that this authority has been affirmed by the courts and by this Board. OSM also notes that the Clinchfield and Haydo cases, cited by Fremont, were overruled by subsequent court decisions. In Clinchfield Coal Co. v. Hodel, 802 F.2d 102, 103 (4th Cir. 1986), the Fourth Circuit Court held that the District Court for the Western District of Virginia had exceeded its jurisdiction when finding 30 CFR 843.12(a)(2) void because it went beyond the scope of authority granted to OSM. The Fourth Circuit Court affirmed OSM's permanent program oversight authority to issue enforcement actions on a mine-by-mine basis pursuant to 30 CFR 843.12(a)(2). Similarly, in Amerikohl Mining, Inc. v. United States, 16 Ct. Cl. 623, 627 (1989), the court held that it lacked jurisdiction to examine refund claims for fees assessed pursuant to regulations promulgated under SMCRA when the claims were based on alleged improprieties in those regulations.

3/ Fremont did not pursue its arguments regarding the State's response to the TDN, or the evaluation of comparative environmental harms.

[1] A state with an approved state program has primary responsibility for enforcing its state standards, with OSM acting as an oversight authority. In the exercise of this oversight role, OSM enforces state and Federal standards on a mine-by-mine basis if the state fails to do so. Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987); Ron Deaton/Barwick Coal Co. v. OSM, 126 IBLA 320, 325 (1993); Triple R Coal Co. v. OSM, 126 IBLA 310, 315 (1993); Annaco, Inc. v. OSM, 119 IBLA 158, 162 (1991). In Annaco, Inc. v. OSM, at 163, we set out the source of OSM's authority:

> The referenced section, section 521 of SMCRA, 30 U.S.C. § 1271 (1988), authorizes, inter alia: Federal inspection of surface coal mining operations if a state fails to take appropriate action or to show good cause for such failure after receiving a TDN (section 521(a)(1)); issuance by the Secretary of a CO if any Federal inspection reveals a condition, practice, or violation which "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 to land, air, or water resources" (section 521(a)(2)); issuance by the Secretary of a notice of violation if a Federal inspection, including one carried out pursuant to section 504(b), 30 U.S.C. § 1254(b) (1988), uncovers a violation which does not create imminent danger to health, safety, or significant, imminent environmental harm to land, air, or water resources, followed by a CO if the violation is not abated in a timely manner (section 521(a)(3)); and Federal enforcement of all or part of a state's approved program if the state has failed to enforce its program section 521(b)).

The legislative grant of OSM's enforcement authority in a primacy state is well supported by the legislative history, and our prior analysis of this issue parallels the analysis on page 4 of Judge Torbett's decision.

Fremont's arguments, which are based on overruled precedent, have previously been considered and rejected by the Board. Relying on authorities expressly rejected by the Board, Fremont also argues that OSM's enforcement authority is precluded by collateral estoppel and res judicata because the violation cited in OSM's NOV had previously been cited in the State NOV vacated by the State Board of Review. In related arguments, Fremont asserts that it was entitled to rely on the finality of the Board of Review order, that it was deprived of due process, that it was subjected to double jeopardy, and that OSM's enforcement actions are barred by laches.

OSM has responded by stating that the Federal statutory and regulatory oversight role, which was designed to mesh with and supplement the state

enforcement authority if a state fails to act, is not subject to estoppel and res judicata. OSM notes that, by regulation, "the authority of the United States to enforce a public right or protect a public interest is not violated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties." 43 CFR 1810.3. OSM further argues that SMCRA involves a civil rather than criminal sanction system, making Fremont's double jeopardy argument inapplicable.

[2] This Board has repeatedly rejected the argument that Federal authority to enforce a violation is barred when a state regulatory authority has vacated a state-issued citation for the same violation. Ron/Deaton Barwick Coal Co. v. OSM, supra at 326; Triple R Coal Co. v. OSM, supra at 316. In Annaco, Inc. v. OSM, supra at 164, quoting Bernos Coal Co. v. OSM, supra, we stated:

> Our analysis of the applicability of res judicata/collateral estoppel principles * * * leads to the conclusion * * * that the unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders those doctrines inapplicable to issues arising in the Federal/State context. That 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.]

See also Slone v. OSM, 114 IBLA 353, 356 (1990). The Annaco decision contains a full discussion of our rationale with ample citation of authority. The countervailing statutory policy of SMCRA precludes reliance upon the doctrines of res judicata and collateral estoppel when state enforcement proceedings do not culminate in an abatement of the violation. RTC Engineering, Inc. v. OSM, 121 IBLA 142, 148 (1991).

Similarly, the other arguments advanced by Fremont have been considered and rejected. The Office of Hearings and Appeals is not a proper forum for addressing constitutional issues. Slone v. OSM, 114 IBLA 353, 357 (1990). There is no issue of double jeopardy when the imposition of a civil penalty is remedial or corrective rather than punitive. United States v. Halper, 490 U.S. 435, 446 (1989). Finally, laches is not available to preclude enforcement. River Processing Inc. v. OSM, 76 IBLA 129, 142 n.6, 90 I.D. 425, 432 n.6 (1983).

To the extent not discussed herein, Fremont's arguments have been considered and rejected.

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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R. W. Mullen
Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge