

INTERIOR BOARD OF LAND APPEALS

Foster E. Sword

138 IBLA 74 (February 3, 1997)

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FOSTER E. SWORD

IBLA 94-342

Decided February 3, 1997

Appeal from a decision of the Lexington Field Office Director, Office of Surface Mining Reclamation and Enforcement, denying a citizen's complaint to the extent it related to an alleged unauthorized county road relocation by Chapperal Coal Corporation. Permit No. 898-8012.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally

When an appeal is taken from a determination by OSM following receipt of a citizen's complaint, only such issues as were raised in the original complaint and addressed in OSM's decision can be considered in the context of adjudicating the appeal.

2. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally

An OSM decision on a citizen's complaint alleging unauthorized relocation of a county road will be affirmed when the record establishes that the road in question is not a county road, but a private road on land owned by the coal company and not by the citizen. OSM has no authority to compel the coal company to survey property lines to determine the location of the citizen's private property or to adjudicate property right disputes or property boundary questions.

APPEARANCES: Foster E. Sword, Lexington, Kentucky, *pro se*; John Austin, Esq., Office of the Solicitor, Knoxville Field Office, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Foster E. Sword has appealed from a June 2, 1993, decision of the Lexington Field Office Director, Office of Surface Mining Reclamation and

Enforcement (OSM), denying his citizen's complaint to the extent it related to an alleged unauthorized relocation of a county road by Chapperal Coal Corporation (Chapperal). <sup>1/</sup> The Field Office Director found, based on an on-site inspection report, that relocation of the road had occurred on land owned by the coal company and that the road was a "private drive," not a county road. Under those circumstances, he concluded that OSM had no jurisdiction.

#### Background

In a letter dated January 10, 1992, Sword complained to OSM Director Harry Snyder that he had been unable to locate permits authorizing a coal company (Chapperal) to relocate a creek and a county road and construct two buildings on the area. He asserted his belief that no such permits existed. The area in question lies at the mouth of Marion Branch in Pike County, Kentucky. Marion Branch serves as a boundary between land owned by the Sword family and land owned by Chapperal.

In response to that letter, the Lexington Field Office Director, OSM, sent a memorandum to the Prestonsburg Area Office Manager, OSM, dated January 27, 1992, attaching a copy of Sword's letter and directing him to "issue a TDN (Ten-Day Notice) and handle in the normal manner for a written citizen complaint."

On March 10, 1992, OSM issued TDN No. 92-83-232-51 to the Commonwealth of Kentucky identifying Chapperal as the permittee and the permit number as 698-8061. <sup>2/</sup> Regarding the nature of the violation, the TDN merely stated: "Failure to file a complete and accurate application for a permanent program permit." The Director, Division of Permits, Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Department for Surface Mining Reclamation and Enforcement (DSMRE), objected to the broad nature of the TDN and requested more specificity. On March 25, 1992, OSM amended the TDN to add the following language:

The complainant believes the company submitted incorrect information when they applied for the permit. He alleges they submitted maps and deeds which erroneously included property belonging to Landon Sword. The complainant also alleges that the company changed location of a property line stream. This supposedly allowed a permit boundary which included land belonging to the heirs of Landon Sword.

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<sup>1/</sup> Some documents in the case file are signed on behalf of "Costain Coal Inc./Chapperal Coal Corporation." The relationship of Chapperal to Costain is not clarified in the record. However, it is not important to resolution of this appeal. We will refer to Chapperal throughout this opinion.

<sup>2/</sup> Chapperal apparently held a number of surface mining permits. However, in a letter to OSM dated Feb. 25, 1992, Sword stated: "My opinion is that the permit No. 098-8005 was used to relocate the creek, relocate the county road, move a large portion of hill side and make large fill at the location where the office building and I believe a repair shop is located there also, and near the mouth of Marions Branch."

Following a number of extensions of time, the Director, Division of Permits, DSMRE, responded to the TDN in a letter dated November 12, 1992, explaining that, although the TDN had identified only one permit, the Division's investigation had disclosed the existence of six permits. The Director stated that permit No. 098-8005, which became permit No. 898-8012 in the permanent program, issued to Chapperal on August 29, 1979, for a 5.73-acre refuse fill and that Chapperal represented in the application that it owned all the property to be disturbed. A map accompanying the application showed a Landon Sword as a property owner in the vicinity. The Director explained that subsequent to the issuance of that original permit, Chapperal received two amendments and one revision all of which increased the refuse disposal area, resulting in a total of 118.4 acres being subject to the permit.

He explained the background concerning four other permits, including permit No. 298-8061, which issued on November 19, 1981, for an existing coal preparation plant which was not engaged in new surface disturbance. That permit became permit No. 698-8061 in the permanent program.

The Director observed that none of the permitting actions involved either requests, or approval, for any stream or county road relocations or any new disturbance at the mouth of Marion Branch. The Director stated that as part of the Division's investigation it had obtained copies of deeds from Sword, as well as certain correspondence between Sword and representatives of Chapperal and he noted that the question appeared to be "where the actual property line lies between the property owned by Chapperal and Sword." He explained:

The only measurement on the deeds that establishes this line is found on an April 1902, deed between John R. Sword and Mary Elizabeth Sword and J. Morg Sword and Martha J. Sword and some earlier deeds. In the 1902 deed, the line is established as "Beginning at the mouth of F.M. Swords branch and running up the branch about two hundred yards to a stooping sycamore." In his complaint, Mr. Sword noted that the sycamore tree no longer exists. Assuming that F.M. Swords branch noted in the deed is the same as Marion Branch on the U.S.G.S. [United States Geological Survey] 7.5 minute topographic map and scaling the distance off the topo map using the "about two hundred yards" measurement from the deed, the permit boundary of permit number 698-8061 falls entirely within the property owned by Chapperal.

In summary, based upon the information available, DSMRE has no reason to believe that any of the Chapperal permits as issued to Chapperal included any stream relocation or county road relocation requests and none were granted. If any stream or road relocation occurred, it would appear to have occurred prior to the enactment of SMCRA [the Surface Mining Control and Reclamation Act of 1978, 30 U.S.C. §§ 1201-1328 (1994)], and regulation by this agency.

On December 18, 1992, OSM received a letter from Sword responding and taking exception to DSMRE's determinations. While appellant agreed that F.M. Sword Branch is the same as Marion Branch, he maintained that the creek was relocated and that Chapperal encroached on his property. Appellant claimed that the United States Geological Survey map was in error. Appellant felt that relocation took place at the time permit No. 698-8061 was issued, that proper investigations and reports were not filed, and that only a survey would determine the correct location of the property line.

By letter of January 6, 1993, the Lexington Field Office Director, OSM, notified appellant that OSM considered DSMRE to have taken appropriate action on the TDN, that appellant had provided no further information to dispute DSMRE's findings, and that therefore no further action was required by OSM. In his letter, the Field Office Director endorsed DSMRE's finding that no permits allowing stream or road relocation had been issued to Chapperal, and that if any such relocation occurred it would appear to have occurred prior to the enactment of SMCRA.

On January 12, 1993, appellant requested an informal review, reiterating his position that Chapperal had, in 1980 or 1981, relocated a stream and county road, created a fill area, and built buildings thereon without being properly permitted. Appellant claimed that Chapperal failed to perform a survey and encroached to the extent of 10 acres, more or less, on Sword property. Appellant requested a thorough check for violations by Chapperal and that a survey be performed to locate property lines before and after the fill took place.

On March 12, 1993, the Assistant Deputy Director, OSM, notified appellant of her findings on informal review. She concluded that DSMRE did take appropriate action, except in one respect. She stated on page 3 of her attached findings, regarding alleged stream and county road relocation, that "I do not find the State's response to affirm or deny whether such relocations actually occurred." Accordingly, she directed the Field Office Director to "order an inspection and to make a determination on whether stream and road relocations occurred in [the fill] area after the effective date of the Surface Mining Control and Reclamation Act, May 3, 1978" (Findings at 4).

On April 20, 1993, appellant and another citizen, Chester Coleman, accompanied OSM Reclamation Specialist George Morgan and the Prestonburg Area Office Manager Peter Hackney on a field inspection of the area in question. The file contains an inspection report, dated May 10, 1993, which states in pertinent part as follows:

Mr. Sword was concerned about relocation of a portion of the road in an area entirely on Costain property. In ancient times this section of the road followed the west stream bank of Marion Branch according to Sword and Coleman. There is no on-ground evidence of the road in this area at present. Portions of the subject area have been filled. Aerial photographs show this fill

was constructed sometime before June of 1978. The road was not evident in this photograph even at this early date. Some additional fill construction occurred between June 1978 and September 1980. Coal mining restrictions in effect during that period were interim regulations. Although the fill constructions and road move were clearly done to facilitate mining they are moot issues since they occurred beyond OSM jurisdiction.

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Because the 1978 and 1980 photographs showed some minor road relocation and additional fill development after 1978 but before 1980, we continued investigation of the road issue. Research at the Pike County office showed that the subject road is not officially recognized as a county road. However, a county road map shows it as number 2802, Chapperal Coal Road. According to available records, there are no county funds authorized for maintenance. Records on file at the Pike County courthouse do not contain any deeds or easements granted to the county for this road. The road is perhaps best described as a private drive. The owner of such a road is free to move it at will. Although evidently not officially a county road, all access is considered public by county officials because it has been open for many years.

As further confirmation of this, neither Mr. Sword nor Mr. Coleman could provide documentation of any right of way deeded to Pike County for those portions of the subject road in proximity of their property. They claim J. Morg Sword, a former owner of the property where the tippie operations are concentrated, deeded property to the county so a WPA project to widen and otherwise improve the road could be implemented. No record of the J. Morg Sword grant could be located.

Pike County contacts Costain Coal when maintenance of this road is needed and the company performs the necessary work. Chapperal Coal Road provides access for thirteen homes, five of which are above the preparation plant on a portion of the road not used by the company. These five include the Sword and Coleman properties.

The complaint area of stream obstruction and property encroachment was investigated. From this point upstream the road is not used by Costain Coal although they also maintain this portion in response to county requests. The stream in this area has clearly been diverted by a slide. This slide appears to have occurred in response to construction of the Costain refuse haul road sometime after 1978 but before 1980. Aerial photographs show the stream was impacted post-SMCRA. Road bed levels have been rased [sic] and dike-berms constructed by Costain to counter this problem. However, Marion Branch has clearly encroached

on Sword property in response to this diversion. Some pre-law slides from an old deep mine tramway are also evident in the 1978 photograph.

At the request of Mr. Coleman we reviewed several other slide areas upstream of the Sword property which caused or were continuing to cause stream diversion. At least one of these slides is still active. All occurred post-SMCRA as evidenced by the 1978 photograph. It appears the slides were caused by use of poor technique in construction of the Chapperal refuse haul road.

Further investigation of the stream diversion slides is needed. Aerial photograph enlargements and copies of the 1976 DOT photographs have been ordered. Engineering assistance will also be needed. Additionally, several violations which were not part of the Sword complaint were observed at the site. These will be addressed in the investigation of the refuse haul road slides.

Based on discussions with Messrs Sword and Coleman, our on-site inspection and the evidence reviewed, we conclude the issues of road relocation and fill development are satisfactorily answered. Only the matter of stream diversion remains to be investigated and has been initiated as given above.

(Report at 1-3).

On June 2, 1993, the Lexington Field Office Director, OSM, issued the decision now before us on appeal. Therein, he endorsed the findings of the inspection report and concluded that OSM did not have jurisdiction in the road relocation matter. With respect to stream relocation, he stated that further investigation would be undertaken and that appellant would be notified of the results.

On appeal, appellant asserts that he disagrees that the road in question is a private drive. He contends that road relocation, land filling and office building construction took place in late 1979 or later. He expresses his belief that OSM can require Chapperal to conduct a survey. He states that he is concerned about the road relocation because "the stream and the road ran very close to each other and [the] stream identified [the] property line" (Appeal at 1). Appellant also mentions land slides, blasting, black water discharges, and numerous complaints from area residents.

OSM contends that the record shows the road at issue is not a county road, that appellant's concerns have been properly addressed, and requests that the complaint be dismissed.

#### Discussion

[1] We note at the outset that appellant's complaint has been enlarged during the course of this proceeding to include items not raised

in the original January 10, 1992, letter of complaint. In that letter appellant mentioned four specific items: creek relocation, road relocation, the placement of fill material, and the erection of buildings. On appeal, he has discussed blasting, black water discharges, and complaints from area residents.

In Betty L. and Moses Tennant, 135 IBLA 217, 226-27 (1996), we stated citing Patricia A. Marsh, 133 IBLA 372, 375-76 (1995), that a citizen's complaint is the basis for initial Federal regulatory authority inquiry, when such a complaint alleges facts which, if true, would constitute a violation of SMCRA, its implementing regulations, or a permit issued thereunder. In such a case, OSM properly issues a TDN to the State regulatory authority, for the purpose of apprising it of the allegations, but also to afford it an opportunity to take action thereon or to explain why it declines to take action. The scheme of investigation, enforcement and review must necessarily be limited to the set of facts alleged in the complaint and cannot be expanded to include items the complainant wishes to add after investigation and response by the State regulatory authority. Allowing periodic amendment or amplification of a complaint would clearly serve to undermine the comity considerations which are at the heart of the TDN process. See Patrick Coal Co. v. OSM, 661 F. Supp. 380, 384 (D. W.Va. 1987). However, additional allegations might properly serve as an independent basis for OSM to issue one or more TDN's. <sup>3/</sup>

In this case our review is further limited because, except for the alleged unapproved road and stream relocation, issues raised by appellant's complainant were finally resolved by the Assistant Deputy Director's March 12, 1993, decision, when appellant did not seek review of that decision by this Board. In addition, the charge concerning stream relocation was still under OSM investigation at the time of issuance of the decision under appeal. Therefore, our review will consider only the propriety of OSM's findings concerning allegations of unauthorized county road relocation.

The responsibility for enforcement of SMCRA and the regulations rests in the first instance with the State regulatory authority where, as here, the State has "primacy." See 30 CFR 917.10. However, under section 521(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (1994), OSM is required to take action where the State fails, in response to a TDN notifying it of a possible violation of SMCRA, to take appropriate action or to show good cause for failure to do so. See, e.g., R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 147 (1991).

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<sup>3/</sup> In this case, appellant raised additional allegations at the time of the on-site inspection. OSM Inspector Morgan informed the Lexington Field Office Director by memorandum dated May 18, 1993, that he intended to address those allegations by issuing "several" TDN's.

These procedures were followed in this case. OSM issued a TDN. DSMRE conducted an investigation and found no violation. Upon informal review of DSMRE's response, the Assistant Deputy Director, OSM, found DSMRE's response to be lacking in only one area. Accordingly, she remanded the complaint to the Lexington Field Office Director for a determination of whether there were any unauthorized stream or road relocations in the area in question after the effective date of SMCRA. OSM conducted an on-site inspection and concluded that there had been a road relocation, that it occurred entirely on property owned by the coal company, and that some minor road relocation work occurred after 1978, but that the road in question was a "private drive" and not a county road.

[2] As we stated in Paul F. Kuhn, 120 IBLA 1, 21-22, 98 I.D. 231, 241-42 (1991), "not only does the permitting scheme place significant responsibility on adjacent landowners to diligently defend their boundaries," but the regulatory authorities are powerless to adjudicate property title or rights disputes. See 30 U.S.C. § 1257(b)(9) (1994); 30 CFR 778.15(c). SMCRA provides at 30 U.S.C. § 1257(b)(9) (1994) that "nothing in this chapter shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes." Clearly, therefore, no authority exists for appellant's position that it is incumbent upon the Federal enforcement agency to compel Chapperal to locate one of his private property lines by having a survey performed. Where a property owner alleges an unauthorized use of his property, it is his burden to demonstrate that the unauthorized use complained of did, in fact, occur on his property. Appellant has not offered a land survey in support of his allegation that Chapperal undertook unauthorized activities on his land. Nor has appellant shown that the road relocated by Chapperal was a county road. OSM undertook an on-site inspection, accompanied by appellant, and concluded that the portion of the road that was relocated was a private road located entirely on property owned by Chapperal.

We conclude that the Field Office Director's conclusion that OSM lacks jurisdiction of the matter is adequately supported by the record. Appellant has presented only disagreements with, but no evidence to contradict, the findings and conclusions resulting from OSM's on-site investigation.

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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Franklin D. Amess  
Administrative Judge