

INTERIOR BOARD OF LAND APPEALS

Glen Beverly

142 IBLA 98 (December 30, 1997)

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GLEN BEVERLY

IBLA 96-182

Decided December 30, 1997

Appeal from a decision of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, finding that a state enforcement agency had taken appropriate action in response to a 10-day notice. OSM Dec. No. 94-47-Beverly.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

The regulatory jurisdiction of the state authority and OSM terminates where, consistent with the provisions of 30 C.F.R. § 700.11(d)(1), a state has made a written determination that reclamation has been fully completed at a permit site and issued a bond release. Pursuant to 30 C.F.R. § 700.11(d)(2), a reassertion of jurisdiction requires a showing that the written determination and bond release were based upon fraud, collusion, or misrepresentation of a material fact.

APPEARANCES: Glen Beverly, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Glen Beverly has appealed from a Decision dated December 21, 1994, by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), affirming an August 25, 1994, Decision by the Director of OSM's Lexington, Kentucky Field Office (LFO). The LFO Director had ruled, in response to a citizen complaint filed by Beverly, that the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE), had taken appropriate action in response to a 10-day notice (TDN).

This matter arose when Beverly, on June 3, 1994, filed with OSM's Prestonsburg Area Office a letter stating that "[a] break at the coal seam approximately 200 foot in elevation above my home has created a slide (200 yards long and 90 feet wide)." Beverly feared that "this slide will continue and eventually cover my home" and could threaten the property of his neighbors.

By letter of June 6, 1994, OSM's Prestonsburg Area Office Manager notified Beverly that a TDN (# X-94-083-132-055, June 6, 1994) was being issued to DSMRE and that a Federal inspection would be conducted if the State's response to the TDN were considered inappropriate.

The file contains a July 6, 1994, response from DSMRE. According to DSMRE, the slide area was an interim deep mine permit that had been transitioned into the permanent program and was granted a complete bond release in September 1991. In a May 1983 inspection, DSMRE had determined "that the coal seam mined was approximately 200 feet higher on the hill than the slide and therefore, the slide could not be related to deep mining activity."

In its July 6 response, DSMRE reported that on June 28, 1994, Randy Johnson and Wes Jones conducted another inspection. They

verified the interval between the coal seam and the top of the slide as indicated by Mike Rowe during his 1983 complaint investigation. Additionally they tested water from a seep at the top of the slide using a field conductivity meter. The temperature was 79 degrees and the conductivity was 150. Water that had pooled at the area of the old face-up for the deep mine was also tested. The temperature was 77 degrees and the conductivity was 750.

Johnson and Jones reviewed underground mine maps and spoke with Mrs. Beverly who stated that she and her husband had stabilized the slide in 1987 at their own expense but it had recently begun moving again.

The DSMRE concluded from the difference in elevation between the top of the slide and the coal seam and from the field conductivity readings that the slide was not related to the mining operation. Accordingly, DSMRE took no enforcement action.

In his August 25, 1994, ruling, the LFO Director notified Beverly that the results of DSMRE's June 1994 investigation yielded the same findings as its 1983 inspection. He noted specifically that in both inspections the coal seam was found to be 200 feet above the slide and that DSMRE had concluded the slide was not caused by the deep mining operations. The LFO Director "determined that DSMRE has taken appropriate actions regarding the TDN [and] no further action by OSM is required."

On September 8, 1994, Beverly wrote to OSM requesting a review of the matter. See 30 C.F.R. § 842.15. Beverly again indicated that the slide posed a grave danger to his home and property and that in April a "chunk of dirt slid down against my home." Beverly concluded that this was "only the bottom tip of a slide." Beverly disputed that DSMRE's 1994 inspection was made in the same area as its 1983 inspection. Beverly stated that in 1987 "we cleaned off an area that * * * broke and sagged down" and hauled "about 30 truckloads" away. Further, Beverly asserted that the DSMRE inspector acknowledged he did not walk the slide area, that if he had walked it he would have found that the "top of the slide is 200 ft. higher in elevation than the area they investigated in 1983." Moreover, if the inspector had "walked straight around the mountain he would have seen that the mine face-up is at the same elevation as the top of the slide." Beverly also alleged that the DSMRE inspectors failed to take water samples in the appropriate locations.

On October 25, 1994, OSM's Inspector Hamilton "went to the site * * * to try and determine if the deep mining had contributed to a slide that has occurred behind the complainant's home." Hamilton found that

the top of the slide is on or near the same elevation as the coal seam and could be a contributing factor to the cause of the slide, but the fact remains that this permit received a complete bond release on October 8th, 1991 [sic]. As this is the case neither OSM or DSMRE has jurisdiction to cite the company if they did indeed cause or contribute to the cause of the slide.

On October 27, 1994, Hamilton returned to the site at Beverly's request. Hamilton and Beverly walked the area, and Hamilton explained that because of the bond release neither DSMRE nor OSM had jurisdiction "unless it could be proven the bond was improperly released." In his report of this visit, Hamilton stated that underground mining may have contributed to the cause of the slide. He also stated that from checking underground maps he determined that there was approximately a 100-foot barrier left from the mining to the outcrop.

In the December 21, 1994, Decision now before us on appeal, 1/ the Assistant Director, Field Operations, affirmed the August 25, 1994,

1/ Under 43 C.F.R. § 4.1282(b), Beverly was required to file a notice of appeal from OSM's Dec. 21, 1994, Decision within 20 days from the date of receipt. He did not file it until Jan. 28, 1995. However, because there is no certified mail return receipt card in the record indicating when he received OSM's Decision, we will not assume his notice of appeal was untimely filed. Mobil Oil Exploration & Production Southeast, Inc., 90 IBLA 173, 174-75 (1986).

Decision "based on the * * * mining operation, permit number 498-5342, receiving final bond release in accordance with the approved State program requirements." He further stated:

[The October 25 and 27, 1994] inspections revealed that the top of the slide which occurred at your residence during 1994 was at approximately the same elevation as the coal seam identified with [permit #498-5342]. Also, the underground mine maps for this area were reviewed. There was a minimum of 500 feet of coal outcrop barrier remaining in place. As a result of the observations made during the site visits and the review of the underground mine maps, a conclusion could not be reached that the slide was related to [permit #498-5342].

Finally, the Assistant Director stated that under 30 C.F.R. § 700.11(d), in the absence of fraud, collusion, or the misrepresentation of a material fact in releasing the bond, DSMRE was not required to reassert jurisdiction at the site. He also noted that a state regulatory authority has "good cause" for failing to take action (to correct a violation) where it lacks jurisdiction to do so. See 30 C.F.R. § 842.11(b)(1)(ii)(B)(4). He therefore concluded, as had LFO, that DSMRE's response to the TDN had been appropriate.

In his appeal to this Board, Beverly points out the discrepancies in the findings reported by the Federal and State authorities. Beverly notes, for example, that there is no consensus on precisely where the coal seam is in relation to the slide area. Secondly, Beverly observes that the Assistant Director speaks of a 500-foot outcrop barrier remaining in place while Hamilton had reported a 100-foot barrier. Thirdly, Beverly asserts that the mine maps are not accurate representations of what has taken place on the site, showing less mining than has actually taken place.

The permitting history in the case file reflects that permit #298-5392 was issued to Goldy Coal Company, effective August 13, 1979. On October 22, 1981, Hilltop Energy Corporation was granted surface disturbance permit, #098-5342, as a successor to Goldy's permit. On October 12, 1984, the DSMRE issued a bond release on this permit. On September 11, 1984, Surface Coal Mining and Reclamations Operations permit #498-5342 was issued to Hilltop Energy Corporation, effective October 10, 1988. Hilltop's April 1991 application for Phase III bond release was protested. On September 5, 1991, DSMRE wrote to Hilltop, stating that a bond release on permit #498-5342 "should be granted." The file contains a bond release dated September 23, 1991, which states that "an inspection of the permitted area revealed that reclamation is complete and satisfactory."

[1] The issue in this case is one of jurisdiction and focuses on the applicability of Departmental regulation 30 C.F.R. § 700.11(d)(1):

A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed

surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of this chapter [2/] have been successfully completed; or

(ii) The regulatory authority determines in writing that under the permanent program, all requirements imposed under the applicable regulatory program have been successfully completed or, where a performance bond was required, the regulatory authority has made a final decision in accordance with the State or Federal program counterpart to part 800 of this chapter to release the performance bond fully.

30 C.F.R. § 700.11(d)(2), provides that

[f]ollowing a termination under paragraph (d)(1) of this section, the regulatory authority shall reassert jurisdiction under the regulatory program over a site if it is demonstrated that the bond release or written determination referred to in paragraph(d)(1) of this section was based upon fraud, collusion, or misrepresentation of a material fact.

In Appolo Fuels, Inc. v. OSM, 125 IBLA 369, 100 Interior Dec. 63 (1993), we discussed the rationale behind the promulgation of 30 C.F.R. § 700.11(d). We noted that OSM was mindful of the coal operators' concern that they not be subject to perpetual liability under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (1994) (SMCRA or Act), which might adversely impact their ability to obtain bonds on other sites. In published comments, OSM observed that the purpose of the new regulation was "to ensure that the regulatory authority makes a conscious decision that an operation is completed and has met [the requirements of the [Act]]." The OSM further observed that while SMCRA does not clearly specify when enforcement authority ends, "the Act does not contemplate perpetual regulation," and "that jurisdiction under the Act must end simultaneously for State regulatory authorities and OSMRE because once the Act's reclamation requirements are completed at a site, it no longer is a surface coal mining and reclamation operation." 52 Fed. Reg. 24093 (June 26, 1987); Appolo Fuels, Inc. v. OSM, at 381-82, 100 Interior Dec. at 69-70.

In Appolo, the State had released bond on 37 acres of the operator's 39-acre permit area, having found that the operator had met the standard

^{2/} Subchapter B contains the "Initial Program Regulations" including the general performance standards, special performance standards, and underground mining performance standards.

of 30 C.F.R. § 700.11(d) based on evidence that the site had been reclaimed to initial performance standards in 1980. The Board ruled that OSM was without jurisdiction over the site in 1989 when an OSM inspector observed a landslide in a backfill area and issued a Notice of Violation. Id. at 380, 100 Interior Dec. at 69.

We conclude in the case before us that the State's written finding in its bond release terminated the jurisdiction of both the State regulatory authority and OSM in its oversight role. See LaRosa Fuel Corp. v. OSM, 134 IBLA 334, 350 (1996). In this case, OSM and DSMRE might have notified Beverly in a more timely fashion that action by the regulatory authorities was precluded by lack of jurisdiction. However, the fact that both OSM and DSMRE responded to Beverly's complaint by investigating the site and drawing conclusions as to the cause of the slide is not tantamount to a reassertion of jurisdiction, within the prescription of 30 C.F.R. § 700.11(d)(2), nor are inconsistencies in those conclusions dispositively relevant to this appeal. Under 30 C.F.R. § 700.11(d)(2), reassertion of jurisdiction by OSM requires two distinct steps: (1) OSM must make a factual finding that the bond release or the written determination referred to in 30 C.F.R. § 700.11(d)(1)(i) "was based on fraud, collusion, or misrepresentation of a material fact"; and (2) OSM must make a finding that a state's determination not to reassert jurisdiction was arbitrary, capricious or an abuse of discretion. Id. at 351.

There is no evidence to indicate that the September 23, 1991, bond release was tainted by fraud, collusion, or misrepresentation, and OSM made no such finding. We likewise make no such finding. Consequently, there is no reason for OSM to reassert jurisdiction.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge