

INTERIOR BOARD OF LAND APPEALS

David Ruth

v.

Office of Surface Mining Reclamation and Enforcement

158 IBLA 309 (March 25, 2003)

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DAVID RUTH

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 98-84

Decided March 25, 2003

Appeal from a decision by Administrative Law Judge David Torbett reversing an OSM decision imposing a permit block on a party by placing him on the Applicant/Violator System with a recommendation that future permits be denied. Kentucky Interim Program Permit No. 080-0083; Kentucky Permanent Program Permit No. 480-0083.

Administrative Law Judge's decision set aside; OSM decision considered de novo and reversed.

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

Under the ruling in National Mining Ass'n v. USDI, 177 F. 3d 1 (D.C. Cir. 1999), and regulatory amendments promulgated by the Department at 30 CFR 773.12 and 774.11(c) in response to that decision, OSM is not authorized under SMCRA to engage in permit-blocking in circumstances where there are violations by an operation that the applicant once controlled but no longer does, in the absence of evidence of a demonstrated pattern of willful violations of SMCRA of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with its provisions. An OSM decision to place a person on its AVS with a recommendation that he be denied future permits will be reversed where that person's ownership and control of the entity with unresolved violations ended prior to OSM's initiating the permit block, and where

there is no evidence of a demonstrated pattern of willful violations of SMCRA.

APPEARANCES: John Austin, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Chris Ratliffe, Esq., Pikeville, Kentucky, for the Respondent, David Ruth.

#### OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from the October 30, 1997, decision of Administrative Law Judge David Torbett reversing a June 1, 1994, decision by the Acting Chief of OSM's Applicant/Violator System (AVS) Office. <sup>1/</sup> The June 1994 AVS Office decision affirmed an entry into the AVS which recommended that David L. Ruth be denied future coal mining permits.

The administrative record (AR), transcript of hearing (Tr.), and exhibits (Exs.) submitted by the parties reveal that in January 1983 Bovine Mining Corp. (Bovine Mining) applied to the Kentucky Natural Resources and Environmental Protection Cabinet (KNREPC) for a transfer of permit rights to mine coal from lands located in Martin County, Kentucky. (AR 303-07.) <sup>2/</sup> KNREPC approved a permit for Bovine Mining to mine the site under Kentucky Interim Program Permit No. 080-0083 and, later, under Kentucky Permanent Program Permit No. 480-0083.

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<sup>1/</sup> As currently defined at 30 CFR 701.5, the "Applicant/Violator System" is the "automated information system of applicant, permittee, operator, violation and related data OSM maintains to assist in implementing" the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 through 1328 (2000) (SMCRA). The AVS is a computerized system maintained by OSM to identify ownership and control links involving permit applicants, permittees, and persons cited in violation notices. It includes information about past and current holders of surface mining permits, their owners, operators, and corporate directors and officers. It allows information about permit applicants to be reviewed to find relationships to entities that have unresolved problems under the surface mining laws, including unabated violations, unreclaimed areas, delinquent civil penalties, and unpaid abandoned mine land fees. See generally *The Pittston Co. v. Lujan*, 798 F. Supp. 344, 345-47 (W.D. Va. 1992).

<sup>2/</sup> Bovine Mining had entered into a "Sublease Agreement" with two corporations, the Toptiki Coal Corporation (Toptiki Coal) and the Pontiki Coal Corporation (Pontiki Coal), assigning Bovine Mining "the exclusive right and privilege of mining and removing [coal] by strip, augur, punch, or underground mining methods." (AR 379-89.)

On March 30, 1983, Bovine Mining entered into a contract with Stockton Mining. Ruth was president of Stockton Mining at that time and served in this capacity until its dissolution in 1989. (AR 88.) Under the terms of the contract, Stockton Mining was to deep mine (by conventional mining methods using a cutting machine) the coal seam known as the "Stockton Seam" located on the permit. (AR 391, 394.) The contract named Bovine Mining as "Owner" and Stockton Mining as "Contractor" and specified that the relationship was "in every respect, that of Owner and independent Contractor." (AR 391, 402.) Stockton Mining delivered all coal mined to Bovine Mining, which marketed the coal. (AR 400.) Stockton Mining was paid \$13.00 per ton "or fifty percent (50%) of the sales price received by [Bovine Mining] for the coal mined and produced," whichever was greater. (AR 398.) Stockton Mining was required to deliver "ten thousand (10,000) net tons monthly of acceptable coal" to Bovine Mining. (AR 397.)

On September 20, 1985, an employee of Bovine Mining signed OSM-1 forms prepared by Bovine Mining's auditor that listed Stockton Mining as "operator," addressed in care of "Bovine Mining Corp., P.O. Box 146, Paintsville, Kentucky." (Applicant Ex. 1 at 53-59 and H-70.) OSM later determined that Stockton Mining owed abandoned mine land (AML) fees resulting from its operations. <sup>3/</sup>

On December 4, 1985, Stockton Mining's representative Ruth and Bovine Mining's representative William Chealis Hammond agreed that their contract had concluded under its own terms, as Stockton had mined out all of the seam that could be mined under the contract specifications. (AR 377-78; Tr. 94, 96.) Articles of Dissolution of Stockton Mining Company were filed with the Kentucky Secretary of State on February 24, 1989, indicating that dissolution of Stockton Mining Company had been authorized unanimously by its shareholders on February 21, 1989. (AR 88.)

On May 2, 1990, OSM informed Stockton Mining that it owed \$37,228.91 in "reclamation fees," plus interest and penalties as allowed by law totaling \$65,944.49 as of March 31, 1990. (AR 376; Tr. 79-80.) OSM advised that, if the debt was not paid, "steps [would] be taken to ensure that all future coal mining permits and licenses applied for by Stockton Mining Company or its owners or controllers [would] not be issued until this debt is paid." (AR 376.) Ruth protested the collection letter and sent OSM a copy of Stockton Mining's contract with Bovine Mining and the notice of termination of the contract. It does not appear that OSM responded to Ruth's protest.

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<sup>3/</sup> The AML reclamation fee is a tax imposed on surface coal mining operations by section 402 of SMCRA, 30 U.S.C. § 1232 (2000), to provide funding to support the reclamation of abandoned mine lands.

Nearly 3½ years later, on October 8, 1993, KNREPC sent Ruth a printout of AVS computer files recommending that he be denied future permits to conduct coal mining activities. (Applicant Ex. 1 at 10-31; AR 348-62.) The printout lists AML violations for Stockton Mining. (Applicant Ex. 1 at 15-21). It contains a “system recommendation” of “deny” for Ruth as of October 8, 1993, citing nine “AML” violations from June 1983 through June 1985. <sup>4/</sup> (Applicant Ex. 1 at 28 and 29.) Ruth is also listed as a “controlling entity” of Stockton Mining. (Applicant Ex. 1 at 26.)

On November 23, 1993, OSM's Lexington, Kentucky, AVS Field Investigations Branch (AVSFIB), sent Ruth a letter stating that AVS “indicates that Stockton Mining is directly associated with delinquent [AML] fees on Mine Safety and Health Administration (MSHA) ID 1513978,01,U” from the second quarter of 1983 through the second quarter of 1985. (AR at 194.) The AVSFIB also notified Ruth that “AVS indicates that Bovine Mining is directly associated with delinquent AML fees on MSHA ID 1513978,01,S for the 2nd quarter of 1983,” and that “the bond for Bovine Mining's permit 480-0083 \* \* \* was forfeited by the State of Kentucky on August 20, 1987.” The AVSFIB held that, “[p]ursuant to 30 CFR § 775.5(b)(2) Stockton Mining is a presumed owner/controller of Bovine Mining,” and that since Ruth is “the President of Stockton Mining [he is] also a presumed owner/controller of Bovine Mining pursuant to 30 CFR § 773.5(b)(1) [(1993)].” (AR 196-97.) Although it did not expressly so state, the AVSFIB tacitly found that, since Ruth was owner/controller of Stockton, which was in turn the presumed owner/controller of Bovine (a company with unresolved violations <sup>5/</sup>), Ruth had been properly placed on the AVS.

Ruth protested. On June 1, 1994, OSM's Washington, D.C., AVS Office (AVSO) issued a decision formally affirming the AVSFIB's actions. The AVSO held that Stockton Mining conducted mining operations at the permit site as an operator and owned or controlled those operations within the meaning of 30 CFR 773.5 (1993). (AR 3-9.) Further, the AVSO found that Stockton had produced in excess of 250,000 tons of coal at the site on which AML fees had not been paid. (AR 3 and 4.) The AVSO found that “David L. Ruth owned or controlled Stockton” (AR 2) and that

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<sup>4/</sup> It is not clear whether that recommendation was first made in October 1993.

<sup>5/</sup> On Nov. 25, 1986, KNREPC initiated action against Bovine Mining for failure to perform reclamation in accordance with Kentucky reclamation laws. KNREPC's complaint sought permit revocation, bond forfeiture, and a bar from mining against Bovine Mining's representative Hammond. (AR 118-134, 280.) A hearing was held, and on June 24, 1987, the Hearing Officer upheld KNREPC's complaint. The Cabinet Secretary adopted the recommendations of the Hearing Officer and entered a default judgment against Bovine Mining. Its bond in the amount of \$117,400 was forfeited. (AR 118.)

Stockton, as the operator who actually conducted the surface coal mining operation, was directly liable for payment of those fees, pursuant to sec. 402 of SMCRA, 30 U.S.C. § 1232 (2000). (AR 4-5.) The AVSO also ruled that a contractual arrangement whereby Bovine agreed to report and pay reclamation fees did not relieve Stockton of its legal obligations if the payments were not made and rejected Stockton's defenses of estoppel and laches. (AR 6-7.) <sup>6/</sup> Again, although it does not expressly so state, the AVSO tacitly held that Ruth was properly placed on the AVS because he owned or controlled Stockton Mining, which had failed to pay AML fees for which it was responsible and which was linked to Bovine Mining, which also had unresolved violations.

Ruth appealed to the Office of Hearings and Appeals. The matter went through preliminary stages <sup>7/</sup> and the decision presently under appeal was issued by Judge Torbett on October 30, 1997.

It is incumbent upon an Administrative Law Judge to make "detailed findings and conclusions" on the record. 43 CFR 4.1127; James Spur, Inc. v. OSM, 133 IBLA 123, 137, 101 I.D. 32, 39 (1995); see Dean Trucking Co., 1 IBSMA 105, 112-13, 86 I.D. 201, 204-05 (1979). While Judge Torbett's factual description of the case generally conforms with the record, it does not contain references to the record or consider in systematic fashion the testimony proffered at the hearings. OSM rightly challenges the decision based on misstatements and errors of law. (Statement of Reasons (SOR) at 31-37.) The opinion's legal discussion speaks in generalities and is

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<sup>6/</sup> The AVSO noted that Bovine Mining was presumed to have controlled Stockton Mining's operations. However, it held that this did not "negate Stockton's control of the operations," because "[t]here can be more than one owner or controller of a mining operation, and each individual or entity which owns or controls a surface coal mining operation with outstanding violations of the surface mining laws is prohibited from obtaining permits to mine coal under 30 U.S.C. § 1260(c) and 30 CFR § 773.15." (AR 6.)

<sup>7/</sup> Because no procedures were in place for administrative review of AVS decisions in June 1994, this matter originally came before the Board on appeal by Ruth under 43 CFR 4.1280 and was docketed as Stockton Mining Co., IBLA 94-516. On June 21, 1994, we referred the case to the Hearings Division, Office of Hearings and Appeals, pursuant to 43 CFR 4.1286, where it was assigned to Judge Torbett for a hearing.

On Oct. 24, 1995, Ruth filed a "Petition for Temporary Relief" with Judge Torbett. On Nov. 2, 1995, Judge Torbett held a hearing in Lexington, Kentucky, limited to the question of temporary relief. He granted Ruth's petition on Nov. 29, 1995. A second, abbreviated hearing was held on the question of permanent relief on July 24, 1996; the Judge ruled against OSM on Oct. 30, 1997. OSM timely appealed.

confusing and unclear. It therefore does not articulate a legally sound and reasoned basis for the decision. For those reasons, we set aside Judge Torbett's decision and conduct a de novo review.

Turning to the merits, we consider only whether OSM properly placed Ruth's name on the AVS with a recommendation that he be denied future permits. Thus, it is unnecessary in the context of the present appeal to resolve either the question whether Stockton Mining is liable for AML fees or, if so, whether there is a statute of limitations applicable to any AML fees that are properly owed. This is because, even assuming arguendo that Stockton Mining does owe these fees and that the statute of limitations does not bar OSM from collecting them, Ruth would still prevail on the question presented, viz., whether he was properly placed on the AVS.

[1] That question is controlled by the ruling of the United States Court of Appeals for the District of Columbia Circuit in National Mining Ass'n v. USDI, 177 F. 3d 1 (D.C. Cir. 1999) 8/ and regulatory amendments promulgated by the Department at 30 CFR 773.12 and 774.11(c) in response to that decision. That decision held:

Second, [National Mining Association (NMA)] asserts the IFR [(interim final regulations)] overstep OSM's statutory authority insofar as it allows permit blocking based on a violation by an entity that the applicant formerly owned or controlled but does no longer. On this we agree. The statute expressly authorizes permit-blocking "when an operation owned or controlled by the applicant is currently in violation" of environmental laws. 30 U.S.C. § 1260(c). The legislative history indicates, as the statutory language suggests, that the Congress intended to authorize a permit block only when an applicant, through ownership or control, is in violation at the time of application. See S.Rep. No. 85-0128 at 79 ("This subsection prohibits issuance of a mining permit if the application indicated the applicant to be in violation of the act or a wide range of other environmental requirements.") (emphasis added). For violations of an operation that the applicant "has controlled" but no longer does, and for which it therefore lacks power to effect abatement, the Congress authorized permit-blocking only if there is a "demonstrated pattern of willful violations of this chapter of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter." 30 U.S.C. § 1260(c). Thus, to the extent the IFR authorizes permit-blocks based on past ownership

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8/ This decision is referred to as NMA v. USDI II, to distinguish it from National Mining Ass'n v. USDI, 105 F. 3d 691 (D.C. Cir. 1997).

and control without such a pattern, it contravenes the statute and cannot be upheld.

117 F. 3d at 5 (footnote omitted).

The import of the holding is that permit-blocking has never been authorized under SMCRA in circumstances where there were violations by an operation that the applicant “has controlled” but no longer does, unless there is evidence of a “demonstrated pattern of willful violations” of SMCRA “of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with” its provisions. 30 U.S.C. § 1260(c) (2000). Since permit blocking in these circumstances has been found to “contravene” SMCRA, the Court's ruling applies retroactively to the ownership and control rules promulgated pursuant to SMCRA as they existed prior to the IFR. It is those pre-IFR rules that are at issue herein. This reading is consistent with OSM's own interpretation of the Court's holding:

[T]he court held that “[f]or violations of an operation that the applicant ‘has controlled’ but no longer does, \* \* \* the Congress authorized permit-blocking only if there is ‘a demonstrated pattern of willful violations’” under section 510(c) of SMCRA. \* \* \* In other words, if an applicant severs its ownership or control relationship to an operation with a current violation, OSM, in general, may not consider that violation in making a permit eligibility decision under section 510(c) of the Act. Stated differently, in addition to the violation being current and ongoing, the applicant must also own or control the operation with a violation at the time of application; if the ownership or control relationship has been terminated, OSM may not deny a permit (absent a pattern of willful violations), even if the violation remains current and ongoing. [NMA v. USDI II,] 177 F.3d at 5. OSM may consider such past ownership or control of operations with violations only in determining whether there has been a “demonstrated pattern of willful violations” warranting permanent permit ineligibility under section 510(c).

65 FR 36098 (June 7, 2000). More recently, OSM stated as follows concerning the holding:

The [D.C. Circuit] agreed with NMA \* \* \* that “[f]or violations of an operation that the applicant 'has controlled' but no longer does, \* \* \* the Congress authorized permit-blocking only if there is ‘a demonstrated

pattern of willful violations” under section 501(c) of SMCRA. [NMA v. USDI II, 177 F. 3d] at 5.

65 FR 79583 (Dec. 19, 2000) (emphasis supplied). 9/

We regard the act of placing Ruth's name on the AVS along with a recommendation that he be denied future coal mining permits to be “permit blocking” within the meaning of the ruling in NMA v. USDI II. Indeed, OSM has treated AVS listing as “permit blocking”:

[In 1994, the OSM] Field Office noted that WVDEP's investigation had found that Appellants' allegation that Olga had control of the Barrenshe permit had merit and that the “relationship between Olga and Barrenshe has been entered into the AVS thereby blocking Olga and its affiliates” from receiving permits in the future.

West Virginia Highlands Conservancy, 140 IBLA 316, 319 (1997) (emphasis supplied).

The record does not show that, as of the time OSM permit-blocked Ruth, he owned or control any entity with unabated or uncorrected violations, and OSM has

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9/ OSM also stated:

“Under NMA v. USDI II, \* \* \* we may no longer routinely consider an applicant's past ownership or control of a violation during the permit eligibility process. We may, however, consider such past ownership or control in determining whether there has been a pattern of willful violations under section 510(c) of [SMCRA] and [30 CFR] 774.11(c) of this final rule (which accommodates the [D.C. Circuit C]ourt's retroactivity holding). We modified the permit eligibility criteria of final [30 CFR] 773.12 accordingly \* \* \* .”

65 FR 79612 (Dec. 19, 2000).

The regulation promulgated in 2000 at 30 CFR 773.12 manifests the holding in NMA v. USDI II by generally providing that an applicant is not eligible for a permit only in circumstances where the applicant owns or controls (present tense) an entity that has an unabated or uncorrected violation. It is only in 30 CFR 774.11(c) where it is relevant that an applicant has controlled (past perfect tense) surface mining operations. In that case, as dictated by NMA v. USDI II, the inquiry is whether the applicant “control[s] or [has] controlled surface coal mining operations with a demonstrated pattern of willful violations” (30 CFR 774.11(c)(1)) and whether the “violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate [the applicant's] intent not to comply with [SMCRA], its implementing regulations, the regulatory permit, or [the applicant's] permit.” 30 CFR 774.11(c)(2).

not alleged that he did. <sup>10/</sup> Although he did at one time own or control Stockton Mining (which arguably had unabated or uncorrected violations in its own right in the form of unpaid AML fees, and which was arguably linked to Bovine Mining Corp., which apparently also had unabated or uncorrected violations), his relationship with Stockton had ended when it was dissolved in 1989, prior to OSM's initiating the permit block.

Nor does the record contain evidence from which we might conclude that Ruth had controlled any entity (whether Stockton Mining or any other entity) that either had a demonstrated pattern of willful violations of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with SMCRA, as specified by the Court.

In these circumstances, OSM's decision to place Ruth's name on the AVS with a recommendation that future permits be denied must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is set aside, and the decision of OSM is considered de novo and is reversed.

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David L. Hughes  
Administrative Judge

I concur:

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T. Britt Price  
Administrative Judge

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<sup>10/</sup> The date on which Ruth's name was first listed in this manner on the AVS is not absolutely clear from the record. It was no later than October 1993. However, the question here, under the holding in NMA v. USDI II, *supra*, is whether OSM initiated the permit block prior to the dissolution of Stockton Mining Co. in 1989. There is no evidence that this is so.