



COALEX STATE INQUIRY REPORT - 100
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TOPIC: RECLAMATION RESPONSIBILITY

INQUIRY: Can the regulatory agency take any action to compel a landowner to allow a permittee to complete reclamation work on a permitted area, when the landowner refuses to do so?

SEARCH RESULTS: Section 515(b)(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires that all mined areas be reclaimed. The responsibility for completing this reclamation work normally rests with the permittee. In some instances, a landowner may refuse to allow the permittee to have the access to the property which is necessary for completing its reclamation obligations. Given this situation, the question arises as to whether the regulatory agency can take any action to compel the landowner to allow a permittee to gain the necessary access to the property.

No cases were located which specifically address this question; however, a number of permittees have attempted to assert the landowner's refusal to allow access to the property as a defense to a notice of violation. In each of those cases, it has been held that a landowner's refusal of access to the property does not relieve the permittee from its obligations to reclaim the permitted area.

In *NEW RIVER COALS, LTD. v OSMRE*, No. NX 5-8-R (October 25, 1984), the permittee was issued a notice of violation and a cessation order for failure to reclaim a highwall on the permitted area. The permittee filed an application for temporary relief, based on other grounds, under Section 525 of SMCRA. During the hearing on the permittee's application, it was discovered that the permittee's lease to the property in question had been invalidated by a court ruling, and that the permittee could no longer gain access to the property. As Judge Torbett noted:

"The dispute is basically between the landowner and the [permittee]. There is no way [OSMRE] can solve the [permittee's] problem of access. This is an unfortunate situation, because, unless the [permittee] can gain access to the property, the [permittee] will suffer a \$32,500 fine, but the subject property will not be reclaimed and the purposes of the Act will be defeated.

"It would appear to the undersigned that the [permittee] would have a legal right of entry for the purpose of reclamation work on the subject property regardless of the cancellation



of the lease because the Act requires the reclamation work to be done, and this was well known to the lessor when the lease was entered into. The undersigned has no authority to enforce this right of re-entry for this limited purpose."

Two points should be noted from the above-quoted language. First, Judge Torbett stated that neither OSMRE nor the Interior Board of Land Appeals possessed the requisite authority to require the landowner to allow the permittee the necessary access. Thus, while this issue was not squarely addressed, it would appear that the regulatory authority does not possess the power necessary to force the landowner to permit the reclamation work to be completed.

As Judge Torbett noted, the dispute involved in this issue was not between the permittee and the regulatory authority, but rather between the permittee and the landowner. While not expressly stated in the NEW RIVER opinion, the ALJ is apparently suggesting that the permittee should file some sort of legal action in a state court to compel the landowner to allow it the necessary access to the property. Thus, it appears that the power to gain a right of re-entry lies not with the regulatory agency, but with the permittee.

While no other cases were located which addressed this precise issue, several opinions have dealt with the issue of operator liability for reclamation work when the operator no longer has a legal right of entry to the permitted property. In *ELK VALLEY MINING COMPANY et al. v OSMRE*, No. NX 6-65-R (March 31, 1988), the permitted had entered into an oral lease with the property owner to conduct mining operations. After conducting some mining operations, the permittee entered into an "assumption agreement" with another party. The second party had agreed to obtain a successor permit on the property and to accept the site in an unreclaimed condition; however, the successor permit was never obtained, and the reclamation work not completed. As a result, OSMRE issued a notice of violation to Elk Valley for failure to reclaim the site.

The operator argued that it was excused from liability for the reclamation work because its lease with the property owner had expired when he signed the assumption agreement with the second party, and because the property owner refused to allow him to complete the necessary reclamation work. Judge Torbett held that, regardless of Elk Valley's agreement with the second party, the company was still the "permittee" and was still responsible for the site. Further, the fact that the company's lease was no longer valid was no defense: "It would be contrary to the purposes of the Act for [Elk Valley] to be able to shield itself from enforcement of the Act by his failure to reach a lease agreement with a private party." *Id.* at 5.

Some state regulatory programs require that an operator obtain the written consent of a landowner, which would allow the permittee to retain the necessary access to complete the required reclamation work, prior to the commencement of mining operations. In Pennsylvania, for example, the permit application must contain:

"upon a form prepared and furnished by the Department, the written consent of the landowner to enter upon any land to be affected by the activities by the operator and by the Commonwealth and of its authorized agents prior to the initiation of coal mining



activities, during coal mining activities and for a period of five years after the activities are completed or abandoned for the purposes of reclamation, planting and inspection or for the construction of any such pollution abatement facilities as deemed necessary by the Department for the purpose of the Acts." (Pennsylvania Permanent Program Regulations, Section 86.64)

It is unclear whether this regulation would give the state regulatory the right to force the landowner to permit access to the property. However, it would appear that, while state officials might be able to gain access to the property for inspection and monitoring purposes, the burden of obtaining access for purposes of completing the necessary reclamation work would still fall upon the operator.

ATTACHMENTS

- A. NEW RIVER COALS, LTD. v OSMRE, No. NX 5-8-R (October 25, 1984).
- B. ELK VALLEY MINING COMPANY et al. v OSMRE, No. NX 6-65-R (March 31, 1988).
- C. Pennsylvania Permanent Program Regulations, Section 86.64