



COALEX STATE INQUIRY REPORT - 103
January 31, 1989

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TOPIC: 30 CFR 816.95 OR STABILIZATION OF SURFACE AREAS

INQUIRY: Are there any OHA or court cases, decided after 1983, on this regulation?

SEARCH RESULTS: Several searches were conducted in the OHA decisions in COALEX as well as state and federal decisions and Federal Register notices in LEXIS.

A list of the relevant materials identified as a result of the research and the topics they address follows. Copies of the OHA decisions, cases and Federal Register notices are attached. (Please note: Due to the length of the *NWF v. Hodel* case, only the relevant portion of the case is enclosed.)

OHA DECISIONS

AMCORD, INC. v OSMRE, IBLA 88-583 (August 17, 1988). AMCORD, INC. v OSMRE, TU 7-16-R (June 30, 1988 [Amends May 27, 1987 Decision]). AMCORD, INC. v OSMRE, TU 7-16-R (May 17, 1987).

- a. a. Whether the lands in question are "Indian lands".
The mine is located on Indian lands "...as that term is defined by the Act, and OSMRE therefore has enforcement authority over the mine...."
- b. Validity of the inspection due to failure of the inspector to present credentials.
"...[T]here was no mining activity at the site when the OSMRE inspector entered...."
Therefore, "...there was no risk of interference with the safe and orderly conduct of mining operations...."
- c. Whether the Notice of Violation [NOV] was validly issued.
The NOV alleged violation of Section 515(b)(4) of the Act, 30 U.S.C. Sec. 1265(b)(4) and regulations 25 CFR 216.105(i) and 25 CFR 216.110(a)(2).

The NOV was not validly issued with respect to three areas in question "...because vegetation was established in those areas prior to the formation of the cited erosional features." The NOV was validly issued for the fourth area because the Applicant failed to prove "...that vegetation was established...prior to the formation of the cited gully or that the gully was exempt as an approved waterway."



NOTE: The interim program regulation is the applicable regulation. Under the interim regulation, "...the formation of rills and gullies in areas where vegetation has already been established does not necessarily constitute a violation of the regulations. In this respect, the regulation differs markedly from the permanent program performance standard."

THE PITTSBURG & MIDWAY COAL MINING CO. v OSM, TU 6-35-R (February 26, 1987 [Amends May 22, 1986 Decision]) [NOTE: Appeal Pending]. **THE PITTSBURG & MIDWAY COAL MINING CO. v OSM, TU 6-35-R** (May 22, 1986).

- a. Whether OSM has the authority to issue NOV's for coal mining activities on Indian Lands and whether the Applicant's due process rights were violated because a permit was required prior to NOV review. These issues were decided in **THE PITTSBURG & MIDWAY COAL MINING CO. v OSM, Docket No. TU 6-26-R** (October 24, 1986) and were incorporated into this decision by reference: OSM has the authority to issue NOV's for mining on Indian Lands and NOV review is available prior to issuance of a permit.
- b. Whether the regulation cited in the NOV is applicable to the subject drainage feature. The NOV cited 25 CFR 216.105(i); this section makes reference to 25 CFR 216.110, in particular, 25 CFR 216.110(f). The ALJ found that "The disputed drainage feature occur[ed] along a premining drainage way where vegetation was established." Therefore, the cited regulation was inapplicable and the NOV vacated.

EXCELLO COAL CORP./BERNOS COAL CO. v OSM, NX 5-55-R (October 28, 1985). Failure to stabilize and protect surface areas, to control erosion and to facilitate establishment of a vegetative cover. The NOV cited 30 CFR Sections 816.95 and 816.111. The NOV should have cited the interim program standards, not the permanent program standards, since the mining activities "...had ceased long before the permanent program standards were in effect." The applicable regulations are 30 CFR 715.14(i) [25 CFR 216.105(i)] and 521(a)(3) of the ACT - 30 CFR 715.20(f) [25 CFR 216.110(f)].

The ALJ found that the rills and gullies formed after the vegetation was established. This met the requirements of the interim regulation; therefore this part of the NOV was vacated. The ALJ noted that "...if the permanent regulations had applied, the result in this case may [have been] different. The permanent regulations at 30 CFR 816.95 often require the Applicant to stabilize rills and gullies that form after the vegetation has been established."

BIG FORK MINING CO. v OSMRE, NX 7-133-R, NX 88-4-R, NX 88-23-P (June 30, 1988). Failure to establish a vegetative cover capable of stabilizing the soil surface of the area. In this Consent Decision, the Applicant admitted the validity of the NOV. The remedial work was performed satisfactorily and the NOV and Cessation Order (CO) were terminated.

FEDERAL DECISIONS

NATIONAL WILDLIFE FEDERATION v Hodel, 839 F.2d 694 (1988).

Jurisdiction over nonerosional aspects of air quality. The court affirmed the Secretary's interpretation of SMCRA Section 515(b)(4) and the promulgated regulation "...requiring



operators to control only the impacts of mining on air quality due to erosion." The NWF had argued for a stricter reading of 515(b)(4) and regulation of "...all air pollution attendant to surface mining operations."

PRAGER v HODEL, 793 F.2d 730 (1986).

Designation of lands as unsuitable for mining because reclamation is "not technologically and economically feasible." This case mentions the requirement that surface coal mine operators must comply with regulations to "...stabilize and protect all surface areas to prevent slides, erosion and water pollution...."

FEDERAL REGISTER NOTICES

52 FR 28162 (JULY 28, 1987). Proposed Modifications to the New Mexico Permanent Regulatory Program.

Regrading or Stabilizing Rills and Gullies: New Mexico proposes to delete the current language found at section 20-106(a) and to replace it with language identical to the Federal language found at 30 CFR 816.95.

52 FR 34394 (SEPTEMBER 11, 1987). Petition to Initiate Rulemaking; Surface Coal Mining and Reclamation Operations; Federal Program for Indian Lands; Performance Standards. The Director denied Peabody Coal Company's petition requesting that "...OSMRE amend the applicable performance standards regarding stabilization of surface areas for existing operations not yet permitted under OSMRE's Federal program for Indian lands" [30 CFR 750.16 and 816.95].

ATTACHMENTS

- A. AMCORD, INC. v OSMRE, Docket No. IBLA 88-583 (August 17, 1988).
- B. AMCORD, INC. v OSMRE, Docket No. TU 7-16-R (June 30, 1988 [Amends May 27, 1987]).
- C. AMCORD, INC. v OSMRE, Docket No. TU 7-16-R (May 27, 1987).
- D. THE PITTSBURG & MIDWAY COAL MINING CO. v OSM, Docket No. TU 6-35-R (February 26, 1987 [Amends May 22, 1986 decision]).
- E. THE PITTSBURG & MIDWAY COAL MINING CO. v OSM, Docket No. TU 6-35-R (May 22, 1986 [Amended by February 26, 1987 decision]).
- F. EXCELLO COAL CORP./BERNOS COAL CO. v OSM, Docket No. NX 5-55-R (October 28, 1985).
- G. BIG FORK MINING CO. v OSMRE, Docket Nos. NX 7-133-R, NX 88-4-R, NX 88-23-P (June 30, 1988).
- H. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F.2d 694 (1988) NOTE: Only that portion of the decision which discusses the "stabilization of surface areas" is enclosed.
- I. PRAGER v HODEL, 793 F.2d 730 (1986).
- J. 52 Fed. Reg. 28162 (JULY 28, 1987).
- K. 52 Fed. Reg. 34394 (SEPTEMBER 11, 1987).