UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CIVIL ACTION NO. 88-166

UNITED STATES OF AMERICA, PLAINTIFF,

VS: ORDER

T & E COAL COMPANY, INC. and
THOMAS GREGORY, DEFENDANTS.

* * * * * * *

In accordance with the memorandum opinion entered this same date,

IT IS HEREBY ORDERED that the motion for summary judgment filed by the plaintiff be GRANTED.

This the _____ day of August, 1990.

_____
G. WIX UNTHANK,
SENIOR JUDGE

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INTRODUCTION

The plaintiff brought this action for injunctive relief pursuant to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sections 1201, et seq. It is currently before the undersigned on the plaintiff's motion for summary judgment, which has been opposed by the defendant.

UNDERLYING FACTS

The defendant T & E Coal Company (hereinafter, T & E) was[1] a Kentucky corporation which came into existence in approximately 1977 and was issued a permit to mine certain Knox County land which it leased. Mining operations continued from the fall of 1981 through the fall of 1984, when the company ceased such operations altogether. Federal inspections conducted on the site beginning in March, 1987 resulted in the issuance of at least two Notice of Violations; the agency subsequently determining that the original violations had gone unabated, two cessations

orders were issued. It is these charges which are at the heart of the present action.

The other defendant in the above-styled case is an individual, Thomas Gregory (hereinafter, Gregory). According to his own deposition testimony received in the present action, Gregory and his wife were the only two shareholders in T & E, with each holding a fifty percent interest. Gregory also testified that he was the corporate president, was the chairman of the Board of Directors, and had been the person who signed the original mining permit application. In addition to his managerial duties, the man also acted as foreman on the mine site in question, being present "all the time" in a supervisory capacity. Gregory also admitted that he had met with Office of Surface Mining (OSM) inspector Gary Hall on two occasions to discuss the specific violations in question.[2]

There is also no dispute about the fact that Gregory (or T & E) did not take advantage of the formal administrative appeal procedures provided in statutory provisions such as 30 U.S.C. Sections 1268, 1275, 1276.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

In United States of America v. Finley,, 835 F.2d 134 (6th Cir. 1987), the Sixth Circuit Court of Appeals affirmed a district court's entry of summary judgment in favor of the United States in an action brought under the Act. The plaintiff had moved for summary judgment, asserting that the defendant has failed to exhaust his

administrative remedies and thereby was precluded from challenging the violations or raising the defense that OSM was bound by Kentucky's grant of exempt status to the mining activities challenged. The Sixth Circuit held that, with the exception of an argument actually addressed on its merits by the agency during administrative proceedings, consideration of the defendant's arguments was precluded by his failure to exhaust administrative remedies.

In the current case, there appears to have been no evidence presented to indicate that exhaustion of such remedies would have been futile, that OSM actively and specifically waived the specified administrative procedures, nor have any constitutional challenges been raised. Rather, the only related suggestions (made via statements in the defendant's brief rather than by affidavit to counter the sworn statements made by Inspector Hall) is that the defendant was an "illiterate" man who simply did not understand that he needed to go through formal procedures to protect his rights. Not only does this not give rise to exemption to the exhaustion doctrine, but also it appears to have been somewhat logically contradicted by the deposition testimony of record. Although he indicated that he only had a fourth grade education, Gregory additionally testified that he had been involved in mining activities for many years, that he constantly exercised both managerial and supervisory responsibility in connection with T & E apparently without

difficulty, and was aware of both the NOVs and the precise complaints made by the federal inspector about the site.

Accordingly, the plaintiff's argument with regard to the defendant's failure to exhaust administrative remedies has merit.

EFFECT OF ISSUANCE OF VARIANCE
BY THE COMMONWEALTH

Even assuming the doctrine of exhaustion of administrative remedies did not apply, the coal company's defense would not be appropriate for substantive reasons.

The sole defense raised in the answer, and the major argument made in the defendants' brief focuses on the fact that the site's condition had been determined to have been properly reclaimed by the state agency charged with primary enforcement of the Act.

Neither collateral estoppel nor res judicata would preclude a suit by the federal OSM against a mine operator, despite the fact that a settlement agreement on the very same matter existed between that operator and the Kentucky Natural Resources and Environmental Protection Cabinet. Annaco v. Hodel, 673 F. Supp. 1052 (E.D. Ky 1987). This conclusion flows from the facts that: (1) a mere settlement agreement is not a final judgment by a court of law; (2) there was no full and fair litigation of the issues during the proceedings;[3] and (3) there was no identification of interests and the federal/state agencies were not in privity with one another.

The defendant challenges the jurisdiction of OSM to issue the NOVs in the face of the state variance by virtue of the fact that Kentucky is a "primacy" state which has assumed jurisdiction over the regulation of surface coal mining operations under 30 U.S.C. Section 1253. See Annaco, 675 F. Supp. at 1055, 1056.

Under such circumstances, the Secretary may provide for enforcement of the state program only if the state "is not enforcing any part of such program." 30 U.S.C. Section 1254(b). Notice must be given that a state is failing to comply with its program. 30 U.S.C. Section 1271(a)(1). If the state fails to take appropriate action, the Secretary must then order an inspection and if there has been no abatement of the challenged condition, a Notice of Violation is issued. 30 U.S.C. Section 1271(a)(1), (3). 30 CFR Section 843.12(a) indicates that OSM may issue NOVs in primacy states without public hearings, even when no "imminent danger" exists.

From the unopposed affidavits of OSM officials, it is clear that there was appropriate compliance with the pertinent regulations. Further, although the defendants cited case of Clinchfield Coal Company v. Hodel, 640 F. Sup.. 334 (W.D. Va. 1985), rev'd 802 F.2d 102 (4th Cir. 1986), for the proposition that OSM action in the present case exceeded its statutory authority, the Court rejects the case as persuasive authority for the reasons cited in the plaintiff's reply brief at pages 4 to 5.

GREGORY AS AN "AGENT" OF THE CORPORATION WITHIN THE MEANING OF 30 U.S.C. SECTION 1271

Section 1271(c) of Title 30 of the United States Code provides that:

> The Secretary may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court. . .whenever such permitee or his agent. . .violates or fails or refuses to comply with any other order or decision issued by the Secretary under this chapter. (Emphasis added).

In United States v. Dix Fork Coal Company, 692 F.2d 436 (6th Cir. 1982), the Sixth Circuit Court of Appeals determined that the definition of agent "includes that person charged with the responsibility for protecting society and the environment from the adverse effects of the surface mining operation and particularly charged with effectuating compliance with environmental performance standards during the course of a permitee's mining operation." An "advisor and spokesman" for a coal company who met with and discussed mining violations with OSM inspectors was held to fall within the pertinent definition even though he was not an office or stockholder of the corporation. Dix Fork Coal Company, 692 F.2d at 440. Similarly, a "contact person" on site who also signed the permit applications and reclamation plan has also been construed to be an "agent". United States v. Peery, 862 F.2d 567 (6th Cir. 1985). According to these standards, then, Gregory's actions/authority clearly place him within the parameters of the definition.

CONCLUSION

The plaintiff's motion for summary judgment will be granted.

This the _____ day of August, 1990.

G. WIX UNTHANK,
SENIOR JUDGE

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[1]According to Thomas Gregory's deposition testimony, the corporation is still in existence, although it has ceased mining operations.

[2]Gregory admitted in his deposition that he was familiar with not only the underlying contentions of the federal inspectors, but also the Notice of Violations. There has been no challenge to the assertion by the government that the company or Thomas received proper notice of the Notice of Violations or Cessation Orders.

[3]This factors was addressed for the present case in the plaintiff's brief at 7-9.