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April 3, 1995

TO: Lowell P. Braxton, Associate Director, Mining

FROM: Pamela Grubaugh-Littig, Permit Coordinator 

RE: Sunnyside - Status of Grassy Trail Reservoir, Sunnyside Coal Company, Sunnyside Mine, ACT/007/007, Folder #3, Carbon County, Utah

Attached please find the decision from the Federal Mine Safety and Health Review Commission Judge, for Kaiser Steel Corporation, Contestant, and Joint Venture - United States Steel Corporation and Kaiser Steel Corporation, Contestant v. Secretary of Labor, Respondent, FMSHRC Docket Nos. West 80-301-R and 80-483-RM, April 21, 1981, final order June 1, 1981.

The citation issued to the operator for hazardous condition at reservoir was vacated since reservoir is not "mine" as defined in Act because water from dam, used in mine's bathhouse, in shop area, in showers, for drinking water and to fill boiler, was not used in "work of preparing the coal". The decision concluded that the Grassy Trail Dam was (is) not a "coal or other mine" and is, therefore, not subject to the jurisdiction of the Act. It was not necessary to decide the issue of whether or not 30 CFR 77.216-3(b) was violated. The citation was vacated.

This determination by Administrative Law Judge Jon D. Boltz on June 1, 1981 concluded that the reservoir is not "mine" as defined the Act (MSHA). Therefore, if the reservoir is not "mine" according to MSHA, the same should be applicable as to whether or not the reservoir is "mine" relative to the SMRCA/UMCRA reclamation liability and Grassy Trail Reservoir could/should be removed from the bonded area.

cc: Thomas Mitchell  
Randy Harden  
Daron Haddock  
Joe Helfrich



*States Steel Corporation v. Mine Workers***WITHDRAWAL ORDER****Unwarrantable Failure — Overhanging Loose Ribs — 24.20**

Issuance of withdrawal order for operator's alleged unwarrantable failure to maintain condition of loose or overhanging ribs was improper, because operator was not aware of existence of conditions which were not so obvious that operator should have known of violations.

*Digest of Judge's Decision*

[Digest] This proceeding involved an alleged violation by the operator of a mandatory safety regulation promulgated by the Federal Mine Safety and Health Act of 1977 and the operator's contest to the validity of a withdrawal order issued under Section 104(d)(1) of the Act.

The order at issue charged eight separate violations which fall within three categories. The first category involved loose or overhanging ribs which were alleged to have existed in violation of the standard found at 30 CFR 75.200. That section provides that the roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The second and third categories of alleged violations concerned the operator's roof control plan. The standard found at 30 CFR 75.200 requires that the operator comply with a plan which has been approved by the secretary. The second category of violations charged that the entry was in certain areas of the mine were in excess of 16 feet in violation of the roof control plan. The third category of violations charged that excessively long diagonal braces existed at various intersections.

It cannot be concluded that any of the violations were caused by unwarrantable failure. "Unwarrantable failure" has been defined as the failure by an operator to maintain a condition that he knew or should have known existed or the failure to abate the condition by indifference or lack of due diligence or reasonable care. *Zeigler Coal Corporation, 2 IBMA 280 (1977)*.

It was not shown that the operator was unaware of the existence of overhanging ribs. The testimony of two members of the mine safety committee was incon-

*Kaiser Steel Corporation*

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sive. Although the men had complained to the mine superintendent about various general safety problems, they did not seek to have the ribs scaled. This indicated that there was no specific or serious concern with any obvious rib condition.

The operator's witnesses testified that the cited rib conditions were not very unusual when compared to other uncited sections in the mine and other mines in the Pittsburgh seam. The violative conditions here were not so obvious and clear that the operator could be charged with having knowledge that the violations existed or that it should have known of the conditions before they were cited in the order.

The first and second of the eight charges related to loose and overhanging ribs. The inspectors' testimony indicated that significant portions of the cited ribs were cracked, that two-to-three-foot sections of rib extended into the entry from six to twelve inches, and that these conditions existed sporadically throughout 300 to 400 feet of certain entries. This evidence of the rib conditions is supported by the operator's own witnesses. Two violations of the standard found at 30 CFR 75.200 are found and two \$200 penalties are assessed.

The next series of violations related to provisions of the roof control plan which specify that entry widths shall be 16 feet. The operator is bound by the plain meaning of the language in its roof control plan and must strictly comply with its terms. When the roof control plan calls for entries not to exceed 16 feet, the entries must not exceed 16 feet. If the entries are wider than 16 feet it is at least a technical violation of the plan. There is no dispute that the widths of the cited entries were in excess of 16 feet where noted by the inspector. Because this technical violation did not create a hazard under the facts of this case, a penalty of \$1 is assessed.

With respect to the final series of charges, it is found that there are two possible violations of the roof control plan. The plan requires that the sum of the diagonals in the intersections shall not exceed 56 feet. The evidence submitted by the inspector showed that the sum of the diagonals in each and every cited intersection exceeded 56 feet. Since the operator has failed to produce any affirmative evidence to contradict these measurements, it is found that at least technical violations have been proven. A \$1 penalty is assessed for each of these violations.

**KAISER STEEL CORPORATION****Federal Mine Safety and Health  
Review Commission Judge**

**KAISER STEEL CORPORATION,**  
Contestant, and **JOINT VENTURE — UNITED STATES STEEL CORPORATION AND KAISER STEEL CORPORATION,** Contestant v. **SECRETARY OF LABOR,** Respondent, FMSHRC Docket Nos. WEST 80-301-R and 80-483-RM, April 21, 1981, final order June 1, 1981.

**Contest of citation.**

Louise Q. Symons, Pittsburgh, Pa., for United States Steel Corporation.

David B. Reeves, Fontana, Calif., for Kaiser Steel Corporation.

Robert A. Cohen, U.S. Department of Labor, Arlington, Va., for the secretary.

Before Jon D. Boltz, Administrative Law Judge.

**COVERAGE OF ACT****Reservoir Water — Use in "Work of Preparing Coal" — 5.106**

Citation issued to operator for hazardous condition at reservoir is vacated since reservoir is not "mine" as defined in Act because water from dam, used in mine's bathhouse, in shop area, in showers, for drinking water and to fill boiler, was not used in "work of preparing the coal".

*Digest of Judge's Decision*

[Digest] This proceeding arose pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977. United States Steel Corporation and Kaiser Steel Corporation contested the issuance of a citation alleging a violation of the mandatory standard found at 30 CFR 77.216-3(b) (water impoundments, correction of hazards).

The citation stated that a potentially hazardous condition existed at the Grassy Trail Reservoir because the spillway structure was inadequate. The operators denied that the alleged violation existed and contended that the secretary had no jurisdiction to issue the citation because the reservoir was not a "coal or other mine" as defined by the Act.

The dam in question was constructed by Kaiser Steel Corporation and Geneva

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*Kaiser Steel Corporation*

Steel Company. United States Steel Corporation later succeeded to the interest of Geneva Steel Corporation. The dam was constructed to provide a stable supply of water for domestic use. If there was excess water, it was agreed that it could be used for industrial or miscellaneous purposes at Kaiser's nearby coal mine.

Water from the dam was used by the mine's bathhouse, shop area, and office area for showers and drinking water and to fill the boiler. The boiler provided heat for the coal preparation plant, the shop, the bathhouse, and the warehouse.

The joint venture of Kaiser and United States Steel is a legal entity separate from either Kaiser or United States Steel as individual corporations. Since the ownership and operation of the dam is vested in the separate entity of the joint venture, any rights or liabilities accruing from the application of the Act would be directed to Kaiser and United States Steel only to the extent of their respective interests in the joint venture.

United States Steel argued that, since the joint venture did not own any coal mines, does not mine any coal, and does not prepare any coal for market, it is not subject to the jurisdiction of the Act. The secretary argued that the Act gives jurisdiction over the dam because the dam is owned, operated, and controlled by a mining company, that the dam is a surface facility close to the mine, and that the dam is used in the mine operation and for the preparation of coal.

The Act does not concern itself with the question of ownership. The only relevant issue is whether the water from the impoundment or dam is used or to be used in the "work of preparing the coal". If it is, it is a coal mine according to the definition contained in Section 3(h)(1) of the Act and would be subject to the jurisdiction of the Act regardless of the ownership of the dam or its location.

The final question is whether the water in the dam was used in the "work of preparing the coal" as that phrase is defined in Section 3(i) of the Act. It is undisputed that water from the dam has not been used for coal preparation for the last three to four years. Water from the dam is used at the coal mine for drinking purposes, sanitation, and in the boiler.

Within the last five years, an underground sump capable of holding mil-

lions of gallons of water has been developed at Kaiser's mine. All of the water used at the coal mine for the purpose of cleaning and washing coal comes from this underground source. Therefore, the water "used in or to be used in, the work of preparing coal" does not come from the Grassy Trail Dam.

The secretary also argued that mining activities around the area depend on a stable water supply and that water from the dam serves the towns where the majority of miners live and also supplies the domestic needs of the Kaiser mine. The domestic use of the water by the mine, the secretary contended, allows the mine to comply with many of the health requirements of the Act.

This argument is rejected. Jurisdiction under the Act does not extend to include the dam based on use of its water for purposes other than in the work of preparing coal. The water from the dam is used for domestic purposes. The definition of the work of preparing coal contained in Section 3(i) does not include water for domestic purposes at a mine or at a town where many coal miners may happen to reside.

It is concluded that the Grassy Trail Dam is not a "coal or other mine" and is, therefore, not subject to the jurisdiction of the Act. It is not necessary to decide the issue of whether or not 30 CFR 77.216-3(b) was violated. The citation is vacated.

*Duval Corporation v. Donovan***DUVAL CORPORATION v. DONOVAN**U.S. Court of Appeals  
for the Ninth Circuit

DUVAL CORPORATION, Petitioner  
Appellant v. RAYMOND J. DONOVAN,  
Secretary, U.S. Department of Labor, and  
FEDERAL MINE SAFETY AND  
HEALTH REVIEW COMMISSION,  
Respondents-Appellees, No. 80-72  
July 13, 1981.

Affirmance of decision of Federal Mine Safety and Health Review Commission denying operator's petition for discretionary review as untimely and denying operator's petition for reconsideration.

Lina Rodriguez, Tucson, Ariz.,  
Duval Corporation.

Michael McCord, U.S. Department of Labor, Arlington, Va., for the secretary.  
Before Tang and Skopil, Circuit Judges, and Hawk,\*\* District Judge.

**COMMISSION PROCEDURE****1. Denial of Operator's Petition for Review — Timeliness — 35.103**

Commission's denial of operator's petition for review, received 31 days after issuance of administrative law judge's decision, as untimely is upheld, and operator's argument, that date of issuance of judicial decision is date operator received it, is rejected since this argument was not raised before Commission.

**2. Denial of Operator's Petition for Reconsideration — Timeliness of Petition for Review — 35.103**

Commission's rejection of operator's petition for reconsideration of denial of petition for review, which was received 10 days after administrative law judge's decision, is affirmed, because Commission did not abuse its discretion in finding that operator failed to show good cause for filing.

**JUDICIAL REVIEW****3. Merits of ALJ Decision — Untimely Petition for Review — 201.10 — 35.103**

U.S. court of appeals may not consider merits of administrative law judge's decision.

\* The substitution of Secretary of Labor Raymond J. Donovan for former Secretary of Labor F. Ray Marshall is effected by rule 43(c)(1) Federal Rules of Appellate Procedure.

\*\* The Honorable A. Andrew Hawk, United States District Judge for the Central District of California, sitting by designation.