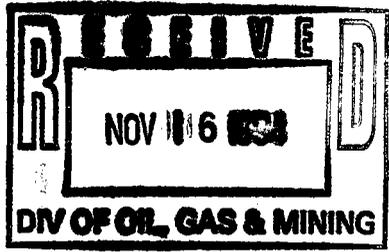


SUNNYSIDE COGEN ACT/007/035
— Application for Review & Relief
Fed. NOV #94-020-370-003

Federal NOV # N94-020-370-003

cc: JWC
TAM
11-16-94 PPS
SPB
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UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARINGS AND APPEALS

* * * * *

SUNNYSIDE COGENERATION)	Civil No. DV-94-11-R
ASSOCIATES, a Utah joint)	
venture,	)	Application for Review
	)	and Temporary Relief
Applicant,)	
	)	Notice of Violation
vs.	)	No. 94-020-370-003
)	
THE UNITED STATES OF	)	Permit No. ACT\007\035
AMERICA, department of the)	
Interior, Office of Surface	)	Carbon County, Utah
Mining reclamation and)	
Enforcement,)	
)	
Respondent.)	

* * * * *
APPLICANT'S SECOND POST HEARING BRIEF
* * * * *

The Applicant, Sunnyside Cogeneration Associates ("SCA"), hereby submits the following Second Post Hearing Brief in accordance with the order of the Administrative Law Judge ("ALJ").

I

STATEMENT OF THE CASE

The relevant facts pertaining to the dispute have been set forth in detail in previous briefs submitted to the court. In its simplest form, the dispute arrives out of the following transactions and occurrences. On June 2, 1994, Respondent, Office of Surface Mining Reclamation and Enforcement ("OSM") issued a Notice of Violation ("NOV") requiring SCA to "cease mining operations." Such cessation meant that the SCA power plant would have to shut down. To avoid the costs of shutting down its operations, SCA filed for Review and Temporary Relief on June 3, 1994, in both the Federal District Court and the Department of Interior, Office of Hearings and Appeals ("OHA"). As a direct result of conferences held with the various judges, SCA obtained the requested Temporary Relief.

When an applicant seeks a review of a NOV requiring the cessation of mining, the NOV should be either affirmed, modified, terminated or vacated. The NOV at issue has already been terminated and SCA has obtained the temporary relief. The issue now before the court is whether the NOV should be affirmed as urged by OSM, or vacated as urged by SCA. In the event that any OHA order is vacated as requested by SCA, SCA has requested that its reasonable costs, including attorneys' fees, be awarded. In resolving the issue, the following questions should be addressed.

1. **Should the NOV in effect for one day be vacated because:**
 - A. **SCA had a revised surface mining permit that on June 1, 1994, included the disputed area;**

- B. OSM improperly cited SCA for an off site coal processing plant permit violation when both SCA and DOGM had determined that the disputed area was more properly a part of the existing SCA surface mining permit;
 - C. OSM failed to show the existence of the requisite threat to the environment, public health or safety necessary for regulatory jurisdiction to issue a cessation order.
2. Is SCA entitled to recover costs and attorneys' fees from OSM? If SCA prevails on its Application for Review and Temporary Relief, the criteria to be used in determining if it is proper for SCA to receive its costs for prevailing against OSM are set forth in: (a) SMCRA § 525(e) which provides that any party who obtains an order issued under § 525 may request reimbursement for reasonable costs, including attorney fees, as deemed proper; (b) 43 CFR 4.1294 which requires a finding that the OSM action must be taken in "bad faith" and to "embarrass or harass" the applicant; and (c) the Ruckelshaus decision which requires substantial prevalence as a threshold standard.

Therefore, in determining whether SCA should be awarded costs and attorneys' fees, the issues to be determined are:

- A. Did SCA substantially prevail on any of the issues associated with its application for review and temporary relief in either the judicial or administrative forums?

- B. Did SCA incur reasonable costs in obtaining such substantially prevailing orders?
- C. Was OSM enforcement conducted in bad faith and did it harass or embarrass SCA?
1. Did OSM fail to follow its own regulatory and statutory enforcement procedures?
 2. Is there a pattern of recent enforcement actions conducted by OSM in Utah that demonstrate a pattern of harassment, embarrassment, and bad faith SMCRA enforcement against other permit holders?
 3. Does a record of violation requiring a cessation order embarrass and damage the reputation of a SMCRA permit holder?
 4. Did OSM harass SCA by utilizing the most stringent enforcement option provided by SMCRA, when OSM knew that SCA had requested and DOGM had approved the incidental boundary change.

II

STATEMENT OF THE FACTS

Both parties have filed extensive Statement of Facts in their first post hearing briefs. It appears that most of the facts are undisputed. There are some facts in the Statement of Facts submitted by the Respondent, however, which require clarification.

A. On page 4, OSM states, "After the conclusion of the State enforcement actions, OSM determined that the actions did not adequately address the TDN, and OSM once again notified DOGM that OSM would be conducting a follow-up inspection to the TDN and that any unabated violation would be cited by OSM".

While these events probably occurred, OSM failed to provide the dates for each event mentioned above. DOGM concluded its enforcement action on the TDN on January 19, 1994, and then issued its Findings of Facts and Order on January 21, 1994. (R-15) OSM received, within two weeks of the decision, a written copy of the January 21, 1994 DOGM Order. (TRV-II, page 113)

The evidence does not indicate exactly when OSM reviewed the January 21, 1994 Order. At best, OSM inspector Rollins became aware of the January 21, 1994 Order some time in April of 1994. Supposedly he told someone else about it, but he was not clear in his testimony about who and when. (TRV-I, pages 86-88) On May 4, 1994, DOGM in writing asked OSM to respond to its well written order and findings of January 21, 1994. (A-27) Finally, on May 12, 1994, almost 4 months after the DOGM order of January 21, 1994, in Denver Colorado, at a meeting called for some other purpose, OSM informed the DOGM Director orally that it disagreed with DOGM and that on June 1, 1994, there would be a Federal Inspection at SCA and a citation would issue for any violation. (TRV-I, pages 86-88 and TRV-II, pages 172-173)

B. On page 5, OSM states that it modified the NOV twice and then terminated the NOV so that the power plant would not have to be shut down. OSM fails to state and acknowledge that the Temporary Relief that it granted was exactly the same relief SCA had requested in its administrative Application for Review and Temporary Relief and in the Judicial Complaint and Restraining Order matter. The first temporary relief came at the request of Federal District Court Judge Sam. (TRV-II, pages 201-202 and R-11) During a telephone conference with Judge Sam, OSM backed down from its hardline position so Judge Sam did not have to order the relief. The second temporary relief came at the order of ALJ Switzer. (R-12) Effective June 3, 1994, OSM terminated the entire NOV. (R-13) Since the Temporary Relief requested by SCA was obtained, the power plant continued operation and the SCA Application for Temporary Relief was dismissed. However, OSM did not move to grant any of this requested temporary relief until its own actions were under review in two different forums.

C. Throughout the hearing and its first Brief, OSM has failed to recognize the difference between two very different type of permits and regulatory schemes, surface mining permits and special category permits for offsite coal processing. OSM has repeatedly attempted to characterize two very different permits as the same permit, when in fact, they are very separate. OSM in its Brief fails to identify this difference.

III

DISCUSSION

A. **Should the NOV in effect for one day be vacated because:**

1. **SCA had a surface mining permit that on June 1, 1994 included the disputed area.**

When OSM issued the 9/1/93 TDN, it did not cite SCA, but gave notice to DOGM that the SCA operation violated R-645-300-112.400 and R-645-300-141 of the Utah Program. The approved Utah Program requires all those conducting surface mining to have a permit and permittees may only mine on those areas included in the permit areas. (TRV-II, page 104) OSM claimed that the fuel preparation area of the power plant, consisting of 4.5 acres was a surface coal mining operation rather than a power plant and further found that this area was not included in SCA's surface mining permit. Therefore, according to OSM, SCA was operating a surface mine without a permit. (R-15)

Even with the most favorable treatment given to OSM's interpretation of its own regulations, it must be noted that even if all of the TDN allegations were true, SCA did have a surface mining permit that had been issued after a long review both by DOGM and OSM in its oversight capacity for the operation of its Sunnyside Waste Coal mine. This was clearly not the case of a owner or operator starting out a mining operation with complete disregard for the reclamation requirements of SMCRA and the Utah Program. Since February 4, 1993, SCA had been permitted and had a \$1.5 million bond in place to cover the

worst case reclamation cost for over three hundred acres, containing nine million tons of coal refuse.

The Utah Program requires permits for exploration, (R-645-200, et al.), for surface mining permits, (R-645-300, et al.), and for Special Categories, such as off site coal processing, (R-645-302). Once a permit has been issued, the Utah Program provides for an orderly process to change or amend a permit to meet a changing condition, (R-645-303, et al.). The amending process requires each change to be categorized as either a Significant Revision or an Amendment, (R-645-303-223). The Utah Program treats an incidental boundary change as an Amendment rather than a Significant Revision and provides a less stringent approval process for amendments. (R-645-303-223)

The bonding provisions of the Utah Program for surface mining permits, R-645-301-800, et al., provide a process for handling permit amendments. R-645-301-844 states:

In the event that an approved permit is revised in accordance with the R-645 rules, the Division will review the bond for adequacy and, if necessary, will require adjustment of the bond to conform to the permit as revised. (emphasis added)

This process also differs than the initial bonding required for the issuance of a permit. No permit should be authorized until a detail review of the required reclamation costs has been completed and the appropriate bond is in place. All of the bonding references to the Utah Program by OSM clearly identify this rule. But OSM fails to identify the different procedure provided by the Utah Program for incidental

boundary changes to existing operating permits as opposed to those required for the issuance of a new "Special Category Permit for an "off site coal processing plant".

DOGGM has followed the two-step process of the approved Utah Program for incidental boundary changes, determine if it should be revised, then review for bonding adequacy. (A-28 and TRV-II, page 179). SCA did have a revised permit for a surface mining operation covering the disputed 3.0 acres on June 1, 1994. Thus on June 2, 1994, the disputed area was part of an existing surface mining reclamation permit and by definition could not be "an off-site coal processing plant" requiring a Special Category Permit under R-645-302-260, et al.

2. **OSM improperly cited SCA for an off-site coal plant permit violation when both SCA and DOGM had determined that the disputed area was more properly a part of the existing SCA surface mining permit.**

If SCA had not requested the incidental boundary change for the disputed area and DOGM had not approved the amendment on June 1, 1994, then the issue of the existing Utah "ultimate end use exemption" would have been applicable to this case and the violation as issued on June 2, 1994, may have been valid. Then OHA would have to decide if this "ultimate end use" exemption in the Utah program is an arbitrary and capricious interpretation in an approved Utah Program that is in noncompliance with the provision of SMCRA. Since OSM had repeatedly refused to resolve this difference pursuant to the 30 CFR 732, 733 and

842 processes, SCA applied for the incidental boundary change to its existing surface mining permit to avoid further conflict. Therefore, all of OSM's briefing materials on pages 19 and 20 related to the off-site coal processing and "end use" issues are not applicable to the present matter.

Further, if SCA had not applied for the incident boundary change, then the issue of whether the disputed area was part of the power plant for fuel preparation or an integral part of the surface coal mining operation, would clearly have been before OHA for determination. Since SCA wanted to avoid this conflict and had applied for the incidental boundary change, all of the information in the OSM's brief on pages 12-15 and 18, related to whether the fuel preparation area was a surface mining operation is moot. Both SCA and DOGM had moved past this issue. It appears that it took OSM until June 10, 1994, to come to the same realization when it terminated the NOV effective June 3, 1994.

OSM issued a September 1, 1993 TDN for failure to include the disputed area in its surface mining permit and then on June 2, 1994, issued a NOV for failure to permit an off site coal processing plant which was not mentioned in the TDN. (R-15, R-6 and TRV-II, pages 104-107) To "bootstrap" from one alleged violation to another, OSM has attempted to merge two separate permits, Surface Mining (R-645-300, et seq.) and Special Categorical Off Site Coal Processing (R-645-302-260 et seq.) into one permit violation; see Respondent's First Post Hearing Brief. Since the disputed area was part of the revised SCA surface mine

area on June 1, 1994, a day later it could not have been a off-site coal process area. OSM simply issued a Cessation Order based on an alleged violation of a Special Categorical Permit that was not applicable to the existing facts of the revised SCA surface mining permit.

3. OSM failed to show the existence of the requisite threat to the environment, public health or safety necessary for regulatory jurisdiction to issue a cessation order.

Assuming that OSM had made a prima facie case for the citation of operating an off-site coal processing plant without the requisite Special Category Permit, OSM did not have regulatory authority to issue a cessation order because there was no requisite threat to the environment, public health or safety.

It is very clear from SMCRA § 521(2) that significant, imminent, environmental harm, or threat thereof, to the land, air or water resources or the public health and safety is a requisite to the use of a cessation order. In fact, if no such threat is present, then a notice of violation providing notice and 90 days to abate the violation must issue. SMCRA § 521(3).

Both the OSM field inspector and DOGM Director testified that there was no significant, imminent environment threat to the land, air or water or public health or safety. (TRV-II, pages 128, 184, 185) Most of OSM's Brief, pages 7-12, 17 and 18, and its testimony at the hearing, centered on whether there was a technical violation, i.e., the permit wasn't valid because it was conditional, or, until the adequacy of

bonding is determined after a review of detailed cost information, a valid permit can not be issued. These issues are clearly technical paper issues, and do not relate to the reduction or abatement of one ounce of environmental harm.

OSM's attempt to create the requisite environmental harm, was found in 30 CFR 843.11a(2) which as quoted by OSM implies that mining without a permit constituted the requisite environmental harm to justify the issuance of a CO. (TRV-II, pages 126-128) However, the regulation is a two edged sword. The presumption of environmental harm is negated by exemptions provided in (i) for a timely filed permit application and (ii) for state approval, as previously noted in SCA's first brief. SCA's operation of the disputed area was an integral part of SCA's operation of its surface mining operation, as stressed by OSM in its Brief on pages 3, 4, 14 and 15. SCA had timely filed on May 16, 1994, for an incidental boundary change amendment. It was complete enough for DOGM to revise the existing permit boundaries to include the disputed area on June 1, 1994. (R-24 and R-25)

Even if SCA had not applied and had been granted the June 1, 1994 revision of its boundary, SCA had been operating legally under the approved Utah Program and the Primary Regulator, DOGM had on January 21, 1994 specifically ruled that this disputed area did not require permitting. (R-23)

OSM's only claim to the requisite environmental harm or threat thereof, is its reliance on a regulator presumption of threat which is

destroyed by the exceptions contained in the regulations. SCA has met the ultimate burden of persuasion; OSM did not show the requisite threat to issue a NOV on June 2, 1994 requiring the cessation of mining. Clearly, SCA has demonstrated that it was not liable as cited. The NOV, in effect for one day, should be vacated.

B. In the event that SCA prevails on its Application for Review and Temporary Relief, the criteria to be used in determining if it is proper for SCA to receive its costs for prevailing against OSM are: SMCRA § 525(e) provides that any party who obtains an order issued under § 525 may receive reimbursement for reasonable costs including attorney fees may be awarded as deemed proper; 43 CFR 4.1294 requires a finding that the OSM action must be done in "bad faith" and to "embarrass or harass" the applicant; and the Ruckelshaus case requires substantial prevalence as a threshold standard.

Therefore the issues to be determined are:

1. Did SCA substantially prevail on any of the issues associated with its application for review and temporary relief in either the judicial or administrative forums?

Utah Federal Judge David K. Winder in Utah Int'l. Inc., v. The Dept. of Interior, 643 F. Supp. 810 (Dist. Utah, 1986) has provided perhaps one of the best explanations of the federal rule for the awarding of costs, including attorneys' fees as provided by SMCRA. Judge Winder has ruled that the U.S. Supreme Court case of Ruckelshaus

v. Sierra Club, 463 U.S. 680 (1983) which was a Federal Clean Air case that provided for cost shifting when "appropriate", was the same standard as the SMCRA test of when deemed "proper". Thus Ruckelshaus is the controlling Supreme Court case for SMCRA cost shifting cases. The Ruckelshaus majority required that the American Rule for cost shifting, although modified slightly, was still applicable under federal cost shifting statutes. Ruckelshaus requires a finding that a party must substantially prevail in order to be eligible for a proper cost shifting order.

Both DOGM and SCA had approached OSM for a modification of the NOV eliminating the Cessation Order which required the power plant to shut down within 24 hours before filing both the Administrative and Judicial review matters. Both requests were rejected by OSM. As a direct result on the June 3, 1994 conference call between the parties counsel and Federal District Court Judge Sam, the Cessation Order was stayed until June 14, 1994. (R-11) As a direct result of ALJ Switzer's order on June 6, 1994, OSM granted a second stay of its cessation order until June 17, 1994. (R-12) As a direct result of the Administrative Review, on June 10, 1994, OSM terminated the NOV effective June 3, 1994. (R-13) Because OSM stayed and terminated the NOV, SCA prevailed on the temporary relief issue.

OSM, after the hearing, after filing its answer, and within 10 days of submitting the first post hearing brief, filed a motion to dismiss SCA's Application for the lack of subject matter jurisdiction. The

briefing schedule was suspended and SCA was given the opportunity to brief the jurisdictional issue. During the Motion to Dismiss briefing process, OSM assessed SCA a proposed fine for the one day Cessation Order. SCA, to preserve its right to contest the validity of the cessation order, filed a formal appeal of the proposed penalty. That proceeding is OHA Docket # DV 94-8-P. Subsequently, OHA denied OSM's motion to dismiss. SCA absolutely prevailed on the jurisdictional matter and it was so ordered. In Utah Int'l., a prevailing party on a contested jurisdictional and procedural matter, was entitled to attorney fees for prevailing on the contested jurisdictional issue.

In the event that the Cessation Order is vacated, OSM will absolutely prevail on the formal review of the penalty assessment because with no Cessation Order, there can be no fine imposed. In this case, that effort related to the formal review of the penalty assessment and SCA is eligible under the Ruckelshaus criteria for the award of costs if deemed proper by OHA.

Also, in the event that the one day Cessation Order is vacated, SCA will have once again absolutely prevailed, rather than just substantially prevailing, on the issue of the validity of NOV. If deemed proper, SCA would be entitled to received reasonable costs as provided by SCMRA § 525(e).

B. Did SCA incur reasonable costs in obtaining such substantially prevailing orders?

In Utah Int'l., Judge Winder identified the actual hours worked by counsel multiplied by counsel's hourly rate as the "lodestar" for determining the reasonableness of the cost of attorney's fees. SCA has filed along with its Second Post Hearing Brief, the Affidavit of Fred W. Finlinson setting forth the costs that SCA has incurred in the defense of its Application for Review and Temporary Relief. The costs have been separated in various actions and periods of the administrative review for ease of review. The total amount of costs incurred by SCA through October 31, 1994, is \$42,479.14.

OSM mentioned in its Brief that any fees incurred by SCA in District Court should not be considered reasonable because SCA administrative remedies must be exhausted before SCA may apply for judicial relief. OSM cited Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981) to support this argument. Shawnee Coal Co. is distinguishable from the present matter in the following particulars: 1) Shawnee Coal Co., is not an attorneys' fee case, 2) the Shawnee Coal Co. was attempting to avoid the entire administrative process, unlike SCA which only wanted to keep the power plant operating while the validity of the NOV could be resolved administratively, and 3) after OSM granted the first stay of Temporary Relief no more action took place in Federal District Court.

The Affidavit is attached as Exhibit A to this brief. In the event that the NOV is vacated, SCA reserves the right to file a subsequent affidavit documenting the rest of the costs incurred in connection with

prevailing on the issue of vacation of the one day cessation order. SCA also requests the Court to review the submitted costs to determine their reasonableness.

C. Was OSM enforcement conducted in bad faith and did it harass or embarrass SCA?

Under 43 CRF 4.1294, OSM may be required to pay costs to a substantially prevailing party when its enforcement is in bad faith or is intended to embarrass or harass the permittee. The effect of this regulation requires a permittee who has already substantially prevailed to also show that in addition to not being liable as cited, that the enforcement was conducted in bad faith and to embarrass or harass the permittee.

This far stricter standard may be justified because the traditional theories of sovereign immunity required strict adherence to the exceptions of such immunity in order to prevail against the sovereign. This particular issue has rarely been litigated. See Illinois South Project, Inc., v. Hodel, 844 F.2d 1286 (7th Cir. 1988). Since there are very few cases on bad faith within the context of SCMRA, it will be instructive to see what other bodies of law say about bad faith. Bad faith is frequently litigated issue in lender liability and wrongful discharge cases.

- 1. Did OSM fail to follow its own regulatory and statutory enforcement procedures?**

While there is a dearth of authority about what constitutes "bad faith" under SMCRA, Courts generally hold that a party's failure to follow its own policies and procedures is evidence of the party's bad faith. K.M.C. Co., Inc. v. Irving Trust Co., 757 F. 2d 752 (6th Cir., 1983) (Lender's termination of debtor's financing without notice was contrary to its policies and was evidence of lender's bad faith foreclosure), Clearly v. American Airlines, Inc., 168 Cal. Rptr. 722 (1980) (Employer's failure to follow its express policy of specific procedures for adjudicating employee disputes supported cause of action for bad faith discharge).

As previously noted in SCA's first post hearing brief, there are several instances of OSM failing to follow its own regulatory process. In summary fashion, those procedural processes violated by OSM are (1) the process for resolving program differences between State and Federal programs, 30 CFR Parts 732, 733 and 842; (2) the requirement to find requisite environmental harm or threat thereof before issuing a cessation order, 30 CFR 843.11; (3) the failure to issue a notice of violation allowing 90 days to abate a violation, 30 CFR 843.12, and perhaps most basic of all, (4) the issuance a violation for not having a permit, when in fact, OSM knew that SCA had a permit.

OSM raised the issue that it was justified by 30 CFR 842 for its actions based on a Federal inspection. (OSM Brief, pg 15-17). A detailed review of this process reveals that OSM did not follow its own procedures for Federal Inspections or Monitoring. The U.S. District

Court for the District of Columbia in a decision dated September 16, 1994, entitled Nat'l. Coal Assc. et al., v. Robert C. Uram, et al., & Bruce Babbitt, et al., & National Wildlife Federation, et al., vs Bruce Babbitt, et al., Civil # 88-2076, 88-2273 & 88-2416 thoroughly reviewed the relationships between OSM and State regulators, attached as Exhibit B. Much of the case discussed what primacy really meant. Chief Judge, John Garrett Penn, the author of the opinion, ruled that OSM could issue a Notice of Violation in a primacy State. However, he also ruled that in primacy States, that unless a state's administration was found to be arbitrary, capricious or an abuse of discretion, OSM is required to defer to primacy states.

The issues in the Nat'l. Coal Assc., focused on the validity of two relatively new regulations that have been cited by both of the parties in this matter. The two are: 30 CFR 843.12(a)(2) which purports to authorize, on the basis of any federal inspection, OSM's issuance of Notices of Violation in primacy states. The Court concluded that OSM has that right. This is not an issue in this case.

The second rule is 30 CFR 842.11(b)(1), the Ten Day Notice Rule. The TDN Rule was promulgated in 1988, and defines for the first time the statutory terms "appropriate action" and "good cause". In addition, the rules provide for a revised standard of review of state responses to TDNs. OSM is required to review the State's response under the "arbitrary and capricious, abuse of discretion" standard. The TDN rule also provides an informal review process. This new rule provides

mechanisms for resolving disagreements between states and OSM. The rules attempt to eliminate the possibility of penalizing operators caught in the middle of disputes between primacy states and the federal government over SMCRA compliance. Under the 1988 TDN procedures, operators should no longer be issued a federal NOV because the state regulatory authority and the federal regulators disagree, and in the present case they clearly disagreed. (TRV-II, page 182 and TRV-I, page 117)

In complete disregard of the Part 842 process, OSM conducted the second federal inspection on June 2, 1994. This blatant disregard for Federal policy is evidence of OSM's bad faith.

2. **Is there a pattern of recent enforcement actions conducted by OSM in Utah that demonstrate a pattern of harassment, embarrassment, and bad faith SMCRA enforcement against other permit holders?**

In Knight Coal Mine, #DV 93-11-R, (September 26, 1994), OSM cited BHP PETROLEUM (AMERICAS) INC., for the failure to fulfill reclamation backfilling and grading requirements in the reclamation of the Knight Coal Mine. The mine had closed in 1980. The reclamation work had been completed by late 1987 under the direction of DOGM. In 1992, a OSM field inspector visited the site and in 1993, OSM issued a NOV requiring additional reclamation work. In the review, it became apparent that a high wall that the federal inspector wanted reclaimed did not even exist. ALJ John R. Rampton, Jr. vacated OSM's NOV.

In the Trail Canyon Mine case, #DV 94-4-R, (June 6, 1994), OSM cited CO-OP MINING COMPANY for failure to reclaim as required by SMCRA. The Trail Canyon Mine closed in 1980, and Co-op obtained a reclamation permit from DOGM in 1989. The reclamation work pursuant to the Utah permit was completed and approved by DOGM by the end of 1989. In June of 1993, an OSM field inspector visited the mine and then issued a NOV citing Co-op for violating the Utah Program. OSM wanted the existing reclamation work to be redone, destroying vegetation that had been growing for four years. Once again, what the OSM inspectors demanded made no sense, DOGM had properly exercised its primacy and OHA invalidated the NOV.

In September of this year, OSM issued a Cessation Order to PacifiCorp for operating an off site coal processing plant without a permit. The PacifiCorp Hunter Power Plant is not adjacent to the mine supplying its coal. PacifiCorp was not required by DOGM to permit its fuel preparation area at the power plant for the same reason that DOGM did not require SCA to permit the disputed area. Once again, the Cessation Order was issued without regard to DOGM's primacy interpretation. PacifiCorp filed both Judicial and Administrative Applications for Review and Temporary Relief. The Federal District Court granted the request Temporary Relief, which is the same Temporary Relief as SCA's. The Cessation Order is stayed under Federal District Court Order while OHA investigates the validity of the Cessation Order and makes its determination on the vacation requested by PacifiCorp.

These cases reflect deliberate attempt on the part of OSM's Albuquerque Field Office to disregard SMCRA rules and procedures to resolve disputes with a primary State. This repeated disregard of the Federal/State dispute resolution process is evidence of both bad faith and a harassing type of enforcement not sanctioned by SCMRA.

3. Does a Notice of Violation requiring a cessation of mining embarrass and damage the reputation of a SMCRA permit holder?

Statutory construction requires one look first to the clear meaning of the statute or regulation. Embarrass is defined in Webster's Ninth New Collegiate Dictionary as "to place in doubt, perplexity, or difficulties", "to hamper the movement of", "to make intricate". Synonyms are "impede", "hinder", and "complicate". Embarrassment is further defined as "the state of being embarrassed: as a: confusion or disturbance of mind". Embarrassment in this case therefore is a subjective impact on the permittee resulting from OSM's enforcement action.

In the present case, OHA should determine if the invalid OSM enforcement action causes definable events that can be objectively discernable, and then see if embarrassment to the permittee really exists. This process is perhaps better illustrated by one of the definitions in Webster, "to cause to experience a state of self-conscious distress (bawdy stories embarrassed her)". The action was the telling of a story, or in OSM's case, the issuance of an invalid cessation order. The embarrassment was the impact of the bawdy story on

the woman hearing the story; or in the present case, the impact of SCA's citation for causing a serious threat to the environment.

As pointed out in SCA's previous brief, having to deal with a future proposed penalty process, a terminated Notice of Violation is treated just as though the person had committed the actual violation and a penalty is assessed for the previous violation. As noted before, these actions certainly have created doubt as to SCA's ability to operate in an environmentally sound condition, increased perplexity, hindered and impeded SCA's opportunities for refinancing or possible sale, created tremendous intricacy and complication. In short, being cited for an invalid Notice of Violation is an embarrassment to a permit operator.

- 4. Did OSM harass SCA by utilizing the most stringent enforcement option provided by SMCRA when OSM knew that SCA had requested and DOGM had approved the incidental boundary change?**

Harass is defined in Websters as "to worry and impede by repeated raids" to "exhaust", "fatigue" and "to annoy persistently". It comes from a Middle French word "harer" meaning to "set a dog on". Dealing with OSM is like being attacked by a junk yard dog. The Federal Government provides its own inspectors, experts and legal counsel, all paid for by the tax payers, while SCA must divert its precious and scarce resources to counter the Federal ship of state. Marshalling this effort is certainly exhausting and fatiguing.

Perhaps the most telling evidence of harassment in this case are the clear facts that OSM knew when the NOV requiring the Cessation of Mining was issued that SCA had applied for the incidental boundary change and that DOGM had approved the revision of the permit. (TRV-I, pages 89-93 and TRV-II, pages 118-122) Even if it had been compelled by SMCRA to issue a NOV, OSM could have issued a NOV requiring the abatement of the alleged violation within the 90 days without the CO as DOGM did. (R-22 and TRV-I, page 86) OSM clearly exercised the most stringent enforcement action that it had. OSM knowingly issued an order requiring the shutting down of a power plant producing \$50,000 of revenue a day, over the simple issue of whether bond review had been completed. This unwarranted action certainly created "worry" for SCA, like the loss of revenue and the potential for lost income for its employees.

These very actions certainly go beyond enforcement of SCMRA to protect the environment. These actions are deliberately calculated to harass, exhaust, fatigue to annoy persistently, to worry and impede by repeated raids or in this case, unwarranted federal inspections.

FINDINGS OF FACT

Based on the pleadings, and the evidence submitted at the hearing, and for good cause appearing therefrom, the following findings of fact are hereby decree:

1. SCA had a revised surface mining permit that on June 1, 1994, included the disputed area.

2. The disputed area was more properly a part of the existing SCA surface mining permit rather than an off site coal processing plant.
3. OSM failed to show that the existence of the requisite threat to the environment, public health or safety necessary to for regulatory jurisdiction to issue a cessation order.
4. The criteria to be used in determining if it is proper for SCA to receive its costs for prevailing against OSM include (a) obtaining an order issued under SMCRA §525(e), (b) approving the reasonableness of the costs, (c) substantially prevailing and (d) finding bad faith enforcement which embarrassed or harassed the permittee.
5. SCA substantially prevailed on all of the issues associated with its application for review and temporary relief in both the judicial and administrative forums.
6. SCA incurred costs in obtaining such substantially prevailing orders and the costs set forth in Exhibit A are reasonable.
7. OSM did not follow the SCMRA regulatory enforcement procedure.
8. The enforcement actions conducted by OSM in Utah demonstrates a pattern of harassment, embarrassment, and bad faith enforcement of SMCRA against other permit holders.
9. The record of an invalid NOV requiring cessation of mining does embarrass and damage the reputation of SCA.

10. The selection of the most stringent enforcement option provided by SMCRA when OSM knew that SCA had requested and DOGM had already approved the incidental boundary was a harassment of SCA.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the following Conclusions of Law are hereby decreed:

1. SCA is entitled to receive an order vacating the NOV requiring the cessation of mining because SCA had a revised surface mining permit that on June 1, 1994 included the disputed area, the disputed area was properly a part of the existing SCA surface mining permit rather than an off site coal processing plant, and OSM failed to show the existence of the requisite threat to the environment, public health or safety necessary to authorize the issuance of a cessation order.
2. SCA is entitled to receive an order awarding its reasonable costs, including attorney fees, because OSM's issuance of an invalid NOV requiring a cessation order constitutes bad faith enforcement, harassing and causing embarrassment to the permittee for the following reasons:
 - a. SCA substantially prevailed on all of the issues associated with its Application for Review and Temporary Relief in either the judicial or administrative forums.
 - b. SCA incurred costs in obtaining such substantially prevailing orders and the costs set forth in Exhibit A are reasonable.
 - c. OSM did not follow its own regulatory enforcement procedures.

- d. The enforcement actions conducted by OSM in Utah demonstrate a pattern of harassment, embarrassment, and bad faith enforcement of SMCRA against other permit holders.
- e. The record of an invalid NOV requiring a cessation order does embarrass and damage the reputation SCA.
- f. The selection of the most stringent enforcement option provided by SMCRA when OSM knew that SCA had requested and DOGM had approved the incidental boundary was harassment of SCA.

ORDER

Based on the FINDINGS OF FACT and CONCLUSIONS OF LAW set forth herein, ORDERED, ADJUDGED AND DECREED as follows:

1. The NOV of June 2, 1994 was not validly issued and it is hereby vacated.
2. OSM's enforcement action in issuing the invalid NOV constitutes bad faith and both harassed and embarrassed SCA, and OSM is ordered to pay to SCA its reasonable costs, including attorneys' fees.
3. SCA is given 30 days from date hereof to submit its affidavit of costs for review by OHA for the determination of proper and reasonable costs.

Respectfully submitted this 14th day of November, 1994.


Fred W. Finlinson
Brian W. Burnett
CALLISTER NEBEKER & McCULLOUGH
ATTORNEYS FOR THE APPLICANT
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7353

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPLICATION FOR REVIEW AND TEMPORARY RELIEF was mailed, postage prepaid, on this 14th day of November, 1994 to the following:

Judge Ramon M. Child (Hand Delivered original
U.S. Department of Interior plus courtesy copy of
Office of Hearing and Appeals brief and cases cited)
Federal Building
125 South State St.
Salt Lake City, Utah 84111

James W. Carter (Mailed)
Division of Oil, Gas & Mining
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1023

DeAnn L. Owen (Mailed)
U.S. Department of the Interior
Office of the Solicitor
Division of Surface Mining
Denver Field Office
P.O. Box 25007 (D-105)
Denver, CO 80225-0007

John Heider, Chief (Mailed)
Standards & Evaluation Branch
U.S. Department of the Interior
Office of Surface Mining
1020 15th Street
Denver, CO 80202

Margaret McQuinn

EXHIBIT A

Sunnyside Cogeneration Assoc.
Attn: Bart Kraft
P.O. Box 45
Manchester, Vermont 05254

For Legal Services in Connection With:

OSM Application for Review and Temporary Relief

PHASE 1 Initial Temporary Relief

06/02/94 - 06/03/94

06/02/94 B. Burnett	Telephone conference with Jim Jensen and Savage; telephone conference with Alane Boyd, discuss issues with R. Willis Orton, John B. Lindsay and Zachary Shields; telephone conferences with Jim Carter-DOGM; research issues; draft pleadings for TRD; telefax documents to Alane Boyd and David Pearce	7.25
06/02/94 W. Orton	Conference with Brian Burnett; preparation of federal complaint against Department of Interior and affidavit of Brian Burnett	6.00
06/02/94 Z. Shields	Met with Willis Orton, Brian Burnett and John Lindsay; discussed Motion for Temporary Restraining Order; researched Temporary Restraining Order issues; standard for Cessation Orders; Right to Object; A.L.J. US District Court; right to temporary immediate relief; reported findings to Willis Orton, etc., reviewed annotation and cases regarding Section 1276	2.25
06/02/94 J. Lindsay	Legal research regarding Temporary Restraining Order; conference with Willis Orton and Brian Burnett regarding Cessation Order; draft Memorandum in Support of Temporary Restraining Order	6.00

06/03/94 B. Burnett	Telephone conferences with Jim Jensen - Savage; telephone conferences with Alane Boyd; telephone conferences with OSM, Solicitor's office, U.S. Attorney's office, ALJ Rampton, Federal District Court, Judge Sam; edit, file and serve complaint, temporary restraining order, etc.; application for temporary relief and expedited hearing; discuss issues with Fred W. Finlinson, R. Willis Orton, John B. Lindsay and Zachary Shields; telephone conference with Joe Cresci, Andy Livingston, David Pearce and Bart Kraft; conference with Jim Carter - DOGM	9.50
06/03/94 J. Lindsay	Revised Memorandum in Support of Motion for TRO and other pleadings; conference with Zach Shields, Brian Burnett and Willis Orton regarding same	4.50
06/03/94 F. Finlinson	Telephone call with Brian re: Order to Cease and Desist; telephone conference with Judge John Rampton; preparation of AML filing and filing in Federal District Court; telephone conference with Jim Carter; deliver papers and conference with Jim Carter; telephone conference with Federal District Court with Chief Judge Winder and Judge Sam; telephone conference with Judge Sam, Solicitor's Office and U.S. Attorney Steve Hunt; telephone conference with Bart Kraft, David Pearce, Joe Cresci offices of SCA; telephone conference with Dee Ann Owen, Davidson and Joe Anderson, U.S. Attorney's office	8.00

06/03/94 W. Orton	Correct, edit and finalize federal court filings; assist working up and filing of appeal with ALJ; calls with Fred W. Finlinson, Brian W. Burnett and ALJ; call to and from Judge Winder and Judge Sam re: federal action; call with ALJ and DeAnne Owen	6.00
06/03/94 Z. Shields	Discussed with Willis Orton	2.50
	the draft of the Motion for Temporary Relief and Preliminary Injunction; drafted Order granting relief for Judge's signature; called the Court (Clerk's office, Judge's chambers) regarding hearing on Motion	
Total Hours		52.00
Legal Services PHASE 1		6,071.25
Disbursements:		
06/02/94 Photocopies		11.20
06/03/94 Telecopies		14.00
06/03/94 Telecopies		30.00
06/03/94 Telecopies		13.00
06/03/94 Telecopies		27.00
06/03/94 Filing Complaint		120.00
06/03/94 Photocopies		98.80
06/03/94 Postage		.52
06/06/94 Photocopies		1.40
Disbursements Total:		\$314.52

PHASE II: Temporary Relief and Preparation for and hearing
06/06/94 - 06/15/94

06/06/94 B. Burnett	Telephone conference with ALJ Harvey Sweitzer, Fred W. Finlinson, R. Willis Orton and DeAnn Owen - Office of the Field Solicitor; telephone conference with Jim Carter and Fred W. Finlinson; telephone conference with Bill Richards, Assistant Attorney General; telephone conference	5.00
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	with Fred W. Finlinson and David Pearce; telephone conference with Alane Boyd; review faxes from DOGM; fax document to DeAnn Owen; telephone conference with Joe Cresci; discuss strategy with Fred W. Finlinson and R. Willis Orton	
06/06/94 W. Orton	Conference call with Fred W. Finlinson, DeAnn Owen and Judge Rampton re: hearing; conference with Fred W. Finlinson and Brian W. Burnett re: strategy for hearing	3.00
06/06/94 F. Finlinson	Preparation with Willis; telephone conference with Judge Switzer, Dee Anne Owen and others; telephone conference with Jim Carter; telephone conference with Margaret; update with Brian	2.00
06/07/94 B. Burnett	Telephone conferences with Joe Cresci and David Pearce; telephone conference with ALJ Roy Child and DeAnn Owen-OSM; discuss issues with R. Willis Orton	1.75
06/07/94 W. Orton	Preparation for administrative hearing; office conferences with Brian W. Burnett re: issues	1.50
06/08/94 B. Burnett	Telephone conferences with Bill Richards, Assistant Attorney General, regarding OSM hearing; prepare for OSM hearing; telephone conference with DeAnn Owen-OSM and ALJ Ray Child	2.75
06/09/94 B. Burnett	Telephone conference with Joe Cresci and David Pearce; conference with Jim Carter, Lowell Braxton, Tom Mitchell, Bill Richards and Joe Helfrich, preparing for OSM hearing; telephone conference with DeAnn Owen; telephone conference with Jim Carter	4.00

	regarding OSM hearing; telephone conferences with Scott Carlson, re exhibit for hearing	
06/10/94 B. Burnett	Telephone conference with Judge Child and DeAnn Owen; telephone conference with Jim Carter regarding hearing; review DOGM issues; telephone conference with Joe Cresci; discuss research issues with John B. Lindsay	2.00
06/10/94 J. Lindsay	Reviewed Application for Temporary Relief and an Expedited Hearing conference with Brian Burnett	.25
06/13/94 W. Orton	Conference with Brian Burnett regarding strategy for hearing.	.25
06/13/94 B. Burnett	Telephone conference with DeAnn Owen; discuss research issues with Fred W. Finlinson and John B. Lindsay; prepare, fax and mail witness and exhibit lists to DeAnn Owen, Judge Child, DOGM and Department of Interior; telephone conference with Tom Mitchell; review exhibit and witness list from DeAnn Owen	7.75
06/13/94 J. Lindsay	Draft Memorandum to Brian Burnett regarding appropriate authority for attorney's fees; researched other OSM inforcement cases; conference with Brian Burnett and Fred Finlinson; legal research regarding Motion in Limine on June 3, 1994 letter	5.75
06/13/94 F. Finlinson	Research other OSM enforcement cases; conference with Dee Ann Owen re OSM case	1.25
06/14/94 W. Orton	Conference with Brian Burnett regarding evidentiary matters for Wednesday's hearing.	.50

06/14/94 B. Burnett	Telephone conference with Joe Cresci; telephone conference with DOGM-Jim Carter, Joe Helfrich, Tom Mitchell and Bill Richards; prepare for hearing with OSM; review and prepare exhibits; prepare cross-examination and direct witnesses, numerous telephone conferences with Alane Boyd, EWP and others; discuss issues with Fred W. Finlinson, R. Willis Orton and John B. Lindsay	9.50
06/14/94 J. Lindsay	Legal research regarding conditions for Motion in Limine under Federal Administration Procedures; conference with Brian Burnett; legal research regarding permitting requirements; prepare Exhibits; draft Memorandum in Support of Motion for Attorney's fees; assisted Brian Burnett in preparation of Oral Argument	7.25
06/14/94 F. Finlinson	Preparation for trial against OSM with Brian Burnett and Willis Orton	1.00
06/15/94 W. Orton	Attend administrative hearing; conference with Fred Finlinson, Jr. regarding hearing strategy.	1.00
06/15/94 B. Burnett	Prepare for hearing; attend hearing regarding OSM's Notice of Violation; discuss issues with Alane Boyd, Jim Carter and Bill Richards, the Assistant Attorney General	7.50
06/15/94 J. Lindsay	Attended Hearing and assisted Brian Burnett at Hearing on Vacating Cessation Order	5.75
06/15/94 F. Finlinson	Conference with Brian and attend hearing; before the Department of Interior, ALJ Ray Childs; Alane Boyd and Director of DOGM, Jim Carter were on the stand	7.50

Total Hours	77.25
Legal Services Phase 2	10,220.00
Disbursements:	
06/06/94 Photocopies	1.40
06/08/94 Runner Expense	7.50
06/10/94 Postage	.29
Disbursements Total:	\$9.19

PHASE III: First Post Hearing and Briefing

06/16/94 - 07/22/94

06/16/94 B. Burnett	Telephone conference with DeAnn Owen of OSM, send documents to DeAnn; telephone conference with Joe Cresci; review issues	2.75
06/20/94 B. Burnett	Review Answer from Interior Department; telephone conference with Jim Carter of DOGM; telephone conference with Alane Boyd	1.50
06/21/94 B. Burnett	Telephone conferences with Alan Boyd regarding legal description review document from DOGM	1.00
06/22/94 B. Burnett	Telephone conference with Jim Carter; draft and fax letter to Joe Cresci; telephone conference with Pam Grubaugh-Littig regarding boundary issues	1.35
06/24/94 B. Burnett	Telephone conference with EWP regarding boundary description	.50
06/27/94 B. Burnett	Review Findings, Conclusions and Order re: NOV's and CO's; telephone conference with DOGM; telephone conference with Alane Boyd	1.50
07/11/94 F. Finlinson	Preparation on OSM case; telephone conference with David Pearce, Alane Boyd and Brian	1.25
07/12/94 F. Finlinson	Review transcript in preparation for OSM brief	1.00
07/13/94 F. Finlinson	Preparation on case; review transcript in preparation for Brief due August 1	3.25

07/14/94 B. Burnett	Discuss OSM briefing issues with Fred Finlinson; telephone conference with Jim Carter of DOGM; telephone conference with Alane Boyd	1.25
07/14/94 F. Finlinson	Review transcript with Brian and study issues; preparation of Brief	5.00
07/21/94 F. Finlinson	Preparation of Brief in OSM case	2.25
07/22/94 F. Finlinson	Preparation of Brief in OSM case	4.50
Total Hours		26.85
Legal Services Phase III		\$4,104.00
Disbursements:		
07/12/94 Telecopies		.60
07/12/94 Photocopies		1.20
07/12/94 Copies (Outside) of transcript		328.10
07/13/94 Postage		.29
07/21/94 Postage		.29
Disbursements Total		\$330.48

Phase IV Jurisdiction Briefing
07/26/94 - 08/10/94

07/26/94 F. Finlinson	Review of OSM's Motion to Dismiss and preparation of brief	4.00
07/26/94 B. Burnett	Telephone conference with Ray Child and DeAnn Owen of OSM re: Motion to Dismiss; discuss response with Fred Finlinson	1.25
07/27/94 F. Finlinson	Review Court Order; preparation for response to OSM	.75
07/28/94 F. Finlinson	Preparation of brief	.50
07/29/94 F. Finlinson	Conference with John Lindsay re: research for Dismissal of NOV; review OSM case; conference with John Lindsay	3.25
07/29/94 J. Lindsay	Legal research regarding subject multi jurisdiction;	1.75
08/01/94 F. Finlinson	Preparation on brief; research on SMCRA, regs, OSM's testimony	5.50
08/02/94 J. Lindsay	Legal research regarding case, Universal Coal Company cited in Brief; consultation with Fred Finlinson regarding same	2.00

08/02/94 F. Finlinson	Editing on OSM brief; conference with John Lindsay; preparation with Willis Orton; conference with John Lindsay; research and organization of outline	6.75
08/03/94 F. Finlinson	Preparation of brief	5.25
08/04/94 B. Burnett	Discuss briefing issues with Fred Finlinson	.50
08/04/94 F. Finlinson	Preparation on brief	8.00
08/05/94 J. Lindsay	Reviewed and revised Reply Brief in Opposition of Memorandum to Dismiss; consultation with Fred Finlinson regarding same	4.25
08/05/94 F. Finlinson	Editing OSM draft brief; telephone conference with Lowell Braxton re: drafting; conference with John Lindsay; send letter to John Reed re: OSM penalties; work with John Lindsay on editing	2.75
08/08/94 F. Finlinson	Preparation on OSM brief	3.50
08/08/94 J. Lindsay	Consultation with Fred Finlinson regarding Reply Brief to Motion to Dismiss	.25
08/08/94 J. Holbrook	Review and revision of SCA's memorandum in opposition to OSM's motion to dismiss	1.00
08/08/94 B. Burnett	Edit answer to OSM Motion	1.00
08/09/94 F. Finlinson	Telephone conference with Tom Mitchell at DOGM; preparation on OSM brief; final editing of brief	5.75
Total Hours		58.00
Legal Services Phase IV		8,637.50
Disbursements:		
08/01/94 Computer Research (Aug)		20.43
08/01/94 Computer Research (Aug)		23.62
08/01/94 Computer Research (Aug)		244.37
08/02/94 Postage		2.78
08/02/94 Photocopies		9.60
08/05/94 Photocopies		15.80
08/05/94 Runner Expense		5.00
08/05/94 Postage		1.16
08/09/94 Photocopies		51.90
08/10/94 Photocopies		2.80
08/10/94 Runner Expense		5.00
08/10/94 Postage		11.60
Disbursements Total		\$394.06

Phase V Penalty Phase Assessment

08/15/94 - 09/19/94

08/15/94	F. Finlinson	Review file and penalties; research on civil penalty; telephone conference with DeAnn Owens at Denver OSM office	2.00
08/16/94	F. Finlinson	Review DSM Penalty proposal and review regulations to protect appeal right	2.25
08/16/94	B. Burnett	Telephone conference with David Pearce; telephone conference with Joe Cresci; discuss issues with Fred Finlinson	1.00
08/17/94	F. Finlinson	Preparation of letter to OSM, Mr. Heide and Judge Child re proposed penalties	2.75
08/17/94	B. Burnett	Discuss issues with Fred Finlinson; edit letter to OSM; telephone conference with Alane Boyd	1.50
08/25/94	B. Burnett	Telephone conference with Alane Boyd and Scott Carlson; discuss issues with Fred Finlinson	.50
08/31/94	B. Burnett	Telephone conference with Alane Boyd; telephone conference with Bart Kraft; draft and send letter and documents for changing the DOGM permit boundary to Frontier Insurance; discuss OSM issues with Fred Finlinson	2.75
08/31/94	F. Finlinson	Review of OSM penalty phase time period	.50
09/01/94	F. Finlinson	Review notes and research the issue; preparation of Application for Formal Review on proposed penalty assessment	3.50
09/02/94	F. Finlinson	Preparation on Application for Review of NOV proposed penalty; telephone conference with Michael Hickey; telephone conference with Phillip Kiko; further preparation on issue	5.25

09/02/94 B. Burnett	Discuss OSM issues with Fred Finlinson and John Lindsay; edit brief and send to OSM re: NOV penalty filing; telephone conference with OSM	3.75
09/13/94 F. Finlinson	Conference with Brian; review OSM's Answer; telephone conference with OSM in Denver	.75
09/14/94 F. Finlinson	Discuss strategy with Brian W. Burnett	.50
09/19/94 F. Finlinson	Phone conference with John Kirkham and Brian W. Burnett re: OSM penalty review issues	.50
09/19/94 B. Burnett	Telephone conference with John Kirkham and Fred Finlinson re: OSM issues penalty review	.50
Total Hours		22.75
Legal Services Phase V		4280.00
Disbursements:		
09/01/94 Computer Research (Aug)		6.81
09/02/94 Notice of violation dated 6/2/94		600.00
09/09/94 Photocopies		6.40
09/13/94 Postage		.52
Disbursements Total		\$613.73

Phase VI Renewal of First Post Hearing Briefing

09/20/94 - 10/17/94

09/20/94 F. Finlinson	OSM - review of similar action by OSM against UP&L	.25
09/27/94 B. Burnett	Review Judge Child's decision against OSM; discuss with Fred Finlinson	.50
09/27/94 F. Finlinson	Review documents	.25
10/07/94 F. Finlinson	OSM research; telephone conference with Judge Child and DeAnn Owen; telephone conference with DeAnn Owen re: management of penalty and NOV; review applications	.75
10/10/94 F. Finlinson	Review research on Motion to Consolidate; draft Motion; edit; fax to DeAnn Owen	2.75
10/11/94 F. Finlinson	Telephone conference with DeAnn Owen; preparation on Motion to Consolidate and fax to DeAnn; research for Brief; telephone conference with Karl	4.75

	Johnson and DeAnn Owens re: motion; preparation of Brief; conference with John Lindsay	
10/11/94 J. Lindsay	Consult with Fred Finlinson about "bad faith" issuance of cessation order; legal research regarding same	.50
10/12/94 F. Finlinson	Preparation on OSM Brief; conference with John Lindsay	1.75
10/13/94 F. Finlinson	Preparation on OSM Brief	9.00
10/14/94 F. Finlinson	Preparation of OSM Brief	5.25
10/14/94 B. Burnett	Edit brief for OSM NOV matter;	2.00
10/17/94 F. Finlinson	Telephone conference with Margaret re: OSM Brief instructions; conference with John Lindsay and Brian; preparation and editing Brief	4.00
10/17/94 B. Burnett	Discuss OSM Brief with Fred Finlinson edit and file brief with OSM	2.00
Total Hours		33.50
Legal Services Phase VI		5240.00
Disbursements:		
10/03/94 Postage		.29
10/10/94 Telecopies		5.00
10/11/94 Photocopies		3.20
10/11/94 Telecopies		.80
10/11/94 Telecopies		5.00
10/11/94 Express Mail		10.85
10/11/94 Express Mail		8.35
10/12/94 Photocopies		16.20
10/14/94 Postage		.75
10/17/94 Postage		4.32
Disbursements Total		\$54.76

Phase VII Preparation of 2nd Post Hearing Brief

10/19/94 - 10/31/94

10/21/94 F. Finlinson	Telephone conference with Judge Child and DeAnn Owen and telephone conference with DeAnn Owen as follow up	.50
10/25/94 F. Finlinson	Review attorneys fee cases - research for next brief	1.75
10/26/94 J. Lindsay	Legal research regarding History of 43 CFR 4.1283	.50

10/26/94 F. Finlinson	Telephone conference with DeAnn Owen; preparation on brief; conference with Judy Rowberry re A.H. fee; research; preparation with John Lindsay on brief; research regs and preparation on brief	2.50
10/26/94 B. Burnett	Discuss OSM briefing with Fred Finlinson	.50
10/27/94 J. Lindsay	Consult with Fred Finlinson regarding OSM's Post Hearing Brief; reviewed Post Hearing Brief and cases cited therein	1.75
10/27/94 F. Finlinson	Conference with John Lindsay re: award of fees; work on brief	1.75
10/28/94 J. Lindsay	Reviewed cases cited in Hearing Brief; consultation with Fred W. Finlinson	2.25
10/28/94 F. Finlinson	Research; conference with John Lindsay on research; review of attorney fee cases	2.75
10/28/94 B. Burnett	Discuss OSM brief with Fred Finlinson and John Lindsay	.25
10/31/94 F. Finlinson	Review of OSM Motion	.25
10/31/94 B. Burnett	Review Motion from OSM; DOG DOGM Permit	.25
Total Hours		15.00
Legal Services Phase VII		2110.00
10/20/94 Photocopies		17.40
10/26/94 Photocopies		45.60
10/27/94 Express Mail		10.85
10/28/94 Photocopies		11.00
10/31/94 Photocopies		14.80
Disbursements Total		\$99.65

SUMMARY

<u>PHASE</u>	<u>TOTAL</u>
Phase I: Initial Temporary Relief	6,385.77
Phase II: Temporary Relief/Preparation for Hearing	10,229.19
Phase III: First Post hearing and briefing	4,434.48
Phase IV: Jurisdiction Briefing	9,031.56
Phase V : Penalty Phase Assessment	4,893.73
Phase VI: Renewal of First Post Hearing Briefing	5,294.76
Phase VII: Preparation of 2nd Post Hearing Brief	2,209.65
	\$42,479.14

0187r

CALLISTER, NEBEKER & McCULLOUGH
Fred W. Finlinson (A1078)
Brian W. Burnett (A3772)
800 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
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RECEIVED
OCT 17 1994

Attorneys for Sunnyside Cogeneration Associates

UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARINGS AND APPEALS

SUNNYSIDE COGENERATION)	
ASSOCIATES, a Utah)	
joint venture,)	
)	
Applicant,)	
)	
vs.	)	Civil No. DV-94-11-R
)	
THE UNITED STATES OF	)	APPLICANT'S PROPOSED
AMERICA, Department of the	)	FINDINGS OF FACT,
Interior, Office of Surface	)	CONCLUSIONS OF LAW,
Mining Reclamation and	)	and ORDER
Enforcement,)	
)	
Respondent.)	

I

Statement of the Case

Sunnyside Cogeneration Associates, a Utah joint venture, ("SCA" or "Permittee") filed an Application for Review and Temporary Relief regarding Notice of Violation ("NOV") 94-020-370-003 issued to SCA by the Office of Surface Mining Reclamation and Enforcement ("OSM") on June 2, 1994. The NOV charges SCA, the Permittee of the Sunnyside "wastecoal mine", with "failure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program," in alleged violation of provisions R645-302-261 and R645-302-263 of the Utah Administrative Code (Utah Program). The NOV issued required "the cessation of mining expressly or in practical effect" by 5:30 p.m., June 3, 1994. The NOV required that SCA obtain a validly issued permit from

the Utah Division of Oil, Gas, and Mining ("DOGM") addressing all parts of the Utah Program, including the bonding requirements.

The Application for Review and Temporary Relief was assigned to the Salt Lake Office of the Office of Hearings and Appeals ("OHA"). The matter came on regularly for hearing on June 15, 1994, and OSM and SCA stipulated that the Application for Temporary Relief was moot because OSM terminated the NOV effective June 3, 1994, and therefore, the temporary relief issue should be dismissed. The parties further stipulated at the hearing that the remaining issues before the Administrative Law Judge ("ALJ") were whether the NOV should be vacated and whether OSM should be ordered to pay SCA's costs, including attorney's fees, of defending against the NOV.

The parties have filed proposed decisions, including proposed findings of fact and proposed conclusions of law, and responses in support of their respective positions. The matter is now ripe for decision. To the extent proposed findings of fact or conclusions are consistent with those entered herein, they are accepted; to the extent they are not so consistent or are irrelevant, they are rejected.

The issues to be here determined are:

I. Did SCA have a valid permit for the disputed area on the 1st of June, 1994?

II. Did OSM's enforcement action relating to the June 2, 1994 NOV requiring cessation of mining constitute sufficient bad faith and harassment or embarrassment to SCA so that OSM should pay the permittee's costs incurred in defending the NOV?

A. Was SCA operating a special category off site processing plant on June 2, 1994 without a DOGM permit?

B. Before issuing the NOV on June 2, 1994, did the OSM Field Inspector have knowledge of the June 1, 1994 DOGM action approving the inclusion of the disputed area into the SCA permit?

C. Was OSM aware that the practical effect of NOV would require the SCA power plant to stop operating in order to comply with NOV?

D. Was the Temporary Relief afforded SCA, (the fact that the power plant was able to keep operating), the result of SCA's appeal for both Judicial and Administrative Review of the NOV?

E. Was OSM's August 11, 1993 Ten Day Notice ("TDN") issued to DOGM for allowing SCA to mine without a permit, an appropriate foundation to justify ordering the power plant to shut down on June 3, 1994 for operating an off site coal processing plant without a permit?

F. Did OSM commit the following procedural and jurisdictional errors in its series of enforcement actions relative to this boundary dispute so that its enforcement actions are marred with bad faith and harassment?

1. Failure to resolve a Federal/State dispute over the ultimate site exemption, as provided by both SMCRA and its regulations, even when requested directly by DOGM?

2. Failure by OSM to follow the enforcement provisions of the ACT.

3. Failure to recognize an exemption to the presumption of environmental harm provided by both the Act and its regulations.

G. Was OSM's concern regarding uncertainty of bonding coverage sufficient justification to order the cessation of the power plant in good faith?

H. Was SCA's compliance with the DOGM regulatory requirements completed in good faith when required by DOGM?

I. Does the NOV issued during September 1994 against PacifiCorp's Hunter Power Plant for the same alleged violation demonstrate a pattern of bad faith and harassment in OSM enforcement actions?

J. Unless an NOV is vacated, a terminated NOV with a very small fine will cause a higher assessed penalty for any future violation pursuant to current OSM regulations for penalty assessment and unless the NOV is vacated, SCA would appear on the public records of OSM as being cited for a serious injury to the environment and the public health and safety.

II

Statement of Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or the "Act"), 30 U.S.C. §§ 2353(a) and 1273(c), has assumed primary responsibility for the regulation and control of surface coal mining and reclamation operations on State and Federal lands within its borders.

See 30 CFR Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining ("DOGMA").

SCA is the owner of a waste coal fueled electrical generating facility with a gross output of 58 megawatts ("Mw's") of electricity. The plant is located in Carbon County in the City of Sunnyside, Utah. The SCA facility supplies power to PacifiCorp pursuant to an 1987 Power Purchase Agreement and currently employs approximately 55 people. The waste coal pile providing the primary source of fuel for the plant was produced from the Kaiser Coal Mine at Sunnyside, Utah. The total volume of waste coal currently in the "pile" is approximately 9,000,000 tons with an average ash content of 50% or slightly less. (TR V-1, pages 16-18, 109)

The fuel preparation area, which is referred to as the coal processing area by OSM, is located at the power plant site and while adjacent to the permitted mining area was not originally included in the SCA approved mining permit. This fuel preparation area of approximately 3 acres, consists of a loop road, belly dump hopper, waste coal storage area, primary and secondary crushers, conveyor belts, a run of mine coal storage area, a sedimentation pond and three fuel silos. See R-10 and R-16 for photographs of this fuel preparation area. From these silos, the prepared fuel is fed into the plant's fluidized circulating boiler for the production of steam and the generation of electricity. The silos hold enough fuel to operate the plant for approximately 24 hours. (See Exhibit R-1 for a map of fuel preparation/coal processing area.)

On June 18, 1993, SCA was informed by MSHA that the fuel preparation area, with the exception of the fuel silos, would be required to be permitted under MSHA rather than OSHA. This started a

jurisdictional dispute between MSHA and UOSHA which was not resolved until December 7, 1993. (R-5)

On August 11, 1993, Mitch Rollins, an inspector for OSM visited the SCA power plant site and waste coal permit area. Mr. Rollins observed that the fuel preparation area was not in the permit area and believed that the area was a coal mining operation that should be included in the SCA mining permit. (TR V-1, pages 66-71) Mr. Rollins caused to be issued a Ten Day Notice ("TDN"), R-15, to the State of Utah for the Permittee's failure to conduct all coal mining activity and reclamation operations only on those lands designated as the permit area, citing Utah Admin. Code R645-300-112.400 and R645-300-141 as the regulations alleged to have been violated. (R-8) The TDN triggered a series of interchanges between OSM and DOGM that can be best characterized as a difference of opinion as to program requirements. (TR-II, page 117)

On September 9, 1993, DOGM requested additional time from OSM to review the fuel preparation area. (R-18)

On September 30, 1993, OSM claimed the DOGM letter was an inappropriate response because the fuel processing area was not required to be permitted. (R-19)

On October 8, 1993, DOGM requested DOGM to reconsider because of the "ultimate use" exception in the Utah approved program which exempted the fuel processing area from permitting. (R-20)

On October 14, 1993, OSM orally notified DOGM that it would not change its September 30, 1993 letter and further, that a federal inspection would be conducted at the SCA site. (R-21)

On October 15, 1993, OSM Field Inspector, Mitch Rollins arrived in Salt Lake City, Utah for the purpose of conducting the federal inspection. He visited DOGM and informed them of his pending

inspection. After discussion with DOGM, Rollins returned to New Mexico without making an inspection. DOGM caused its own inspection to take place and issued a Notice of Violation identifying the boundary issue and nine (9) other violations. (TR V-1, pages 80 and 81)

On December 3, 1993, DOGM issued a Cessation Order C93-13-1-1, against SCA, over a part of the fuel preparation area which did not require the cessation of the power plant operation. (R-22)

On December 7, 1993, the U.S. Department of Labor ruled in favor of MSHA in the jurisdictional dispute. (R-5)

On December 8, 1993, SCA submitted an application to include the eastern 1.5 acres fuel processing area in its permit and supplied additional supplement information to DOGM on December 21, 1993 and December 30, 1993. (R-23)

On January 21, 1994, DOGM amended SCA's permit by approving a boundary change that incorporated into the SCA permit area approximately 1.5 acres of the fuel preparation area that was closely related to mining activities. At the same time, DOGM also determined that the remaining 2.0+ acres did not require permitting. It is this remaining 2.0+ that is the current "disputed" area. DOGM then terminated its Cessation Order, C93-13-1-1. R-23. (TR V-11, page 171)

Sometime in April, 1994, OSM Field Inspector Rollins claims to have become aware that all of the disputed area had not been included in the permit by DOGM. (TR V-1, page 88)

On May 4, 1994, DOGM requested OSM for formal consultation pursuant to CFR regulations to resolve the program dispute between OSM and DOGM, suggesting also that the CFR dispute procedure needed to be followed before OSM could take independent action against SCA. (A-27, TR V-11, 172)

On May 13, 1994, DOGM informed SCA that OSM officials at a meeting with DOGM in Denver, Colorado, May 12, 1994, had stated that OSM would issue a cessation order ("CO") if the current disputed area was not permitted. DOGM also indicated that it disagreed with this OSM decision and reaffirmed its January 21, 1994 decision that permitting was not required. SCA informed DOGM that, in order to avoid conflict with OSM, SCA would amend its permit boundary to include the disputed area in its mining and reclamation permit. (TR V-11, pages 172-174)

On May 16, 1994, SCA caused a permit amendment application to be filed with DOGM including the disputed area. (A-29) On May 20, 1994, additional information was supplied to DOGM to complete its evaluation of the application to include the disputed area. (A-30, TR V-11, page 175)

On June 1, 1994, DOGM approved the amendment thereby including the disputed area into the SCA permit. (R-24, TR V-11, pages 176 and 180)

On June 2, 1994, DOGM notified the permittee that the amendment had been approved and that the disputed area as of June 1, 1994 was a part of the SCA permit. (R-24)

On June 2, 1994, an OSM inspector arrived at the SCA power plant in Sunnyside, Utah. He received a copy of the DOGM permit approval and analysis documents, talked with DOGM, talked with SCA consultants, reviewed SCA's applications of May 16, and May 20, 1994 and then, in spite of the fact that he knew the disputed area was permitted, nevertheless issued a NOV requiring the cessation of the coal processing activity in the disputed area by 5:30 pm on June 3, 1994, knowing that the practical effect of the CO would require the power plant to shut down. (R-24, A-28, TR V-1, pages 57, 58, 91, 92)

On June 2, 1994, SCA's attorneys were notified at 5:15 p.m. of the NOV issued earlier in the afternoon. Steps were immediately taken to obtain temporary relief from the CO in order to avoid the irreparable damage associated with shutting down the power plant. Requests for review and temporary relief were prepared pursuant to the provisions of SMCRA § 525 and 526. (TR V-11, page 196)

On June 3, 1994, a COMPLAINT AND TEMPORARY RESTRAINING ORDER were filed in Federal District Court and an application entitled APPLICATION FOR TEMPORARY RELIEF AND AN EXPEDITED HEARING was submitted to the OHA. The Application was reviewed in the Washington Office and assigned to the Office of Hearings and Appeals, 6432 Federal Building, Salt Lake City, UT 84138.

On June 3, 1994, OSM rejected SCA's informal request to modify the NOV by removing the CO requirement to shut down the power plant. (TR V-11, pages 201-202)

On June 3, 1994, SCA filed with DOGM additional material which had been requested by DOGM on June 1, 1994, well ahead of its June 30, 1994 deadline. DOGM also issued a second approval of the SCA boundary change amendment, dated June 3, 1994. It was not until Federal District Court Judge David Sam, was on the phone in the late afternoon, that OSM attorneys finally joined in a conference call with SCA attorneys and Judge Sam. Earlier in the day, OSM attorneys had not joined in a similar conference call requested by ALJ John R. Rampton, Jr. In response to Judge Sam's inquiry as to whether OSM would require the power plant to shut down, OSM attorneys resisted such temporary relief, but finally agreed to issue and did issue its NOV Modification delaying the CO requirement to shut down the power plant until June 14, 1994 at 4:00 pm. (R-11) As a result of the conference with Judge Sam, SCA

obtained temporary relief from the CO until the 14th of June, 1994, and the parties agreed to pursue the administrative remedy provided by § 525 of SMCRA with the OHA. (TR V-11, pages 201-202)

On June 3, 1994, ALJ John R. Rampton, Jr., District Chief, issued his order setting forth the review of the SCA application to be held on Tuesday, June 7, 1994 at 9:00 am. (Order previously filed)

On Monday, June 6, 1994, after a conference with the OSM and SCA attorneys, ALJ Harvey C. Sweitzer entered an Amended Notice of Hearing setting the hearing for June 15, 1994, instead of June 7, 1994. Judge Sweitzer also ordered OSM to cause the "Time for Abatement" to be extended to at least June 17, 1994 at 5:30 pm. This was the second extension of the temporary relief that the Applicant had requested in its Application of June 3, 1994. (Order previously filed)

On June 6, 1994, after the telephone conference with Judge Sweitzer, OSM caused its second Modification of the June 2, 1994 NOV to be issued, reflecting the fact that the extension, or temporary relief, had been ordered by the ALJ. (R-12)

On June 7, 1994, another conference was held with the attorneys of OSM, SCA and ALJ Ramon M. Child, who had now been assigned the responsibility for the review of the SCA application. Judge Child issued an Order identifying the issues to be addressed at the June 15, 1994 Hearing. (Order previously filed)

On June 10, 1994, OSM issued its third Modification of the June 2, 1994 NOV by terminating it effective June 3, 1994. (R-6)

On June 15, 1994, the SCA application for review was heard before Judge Child on the merits of the validity of the June 2, 1994 NOV requiring the CO. Witnesses testified, including the OSM Inspector, the Director of DOGM and the engineering consultant for SCA. Both sides

made closing arguments and the Court issued from the bench its briefing schedule which was reduced to writing on the 18th of July, 1994.

On July 21, 1994, OSM raised the issue of the alleged lack of subject matter jurisdiction in its Motions to Dismiss and to Delay the Briefing Schedule. (Motions previously filed)

On July 26, 1994, the Court issued its stay of the briefing schedule and provided the Applicant until August 12, 1994 to file responsive pleadings to the Respondent's Motion for Dismissal. (Order previously filed)

On September 26, 1994, an Order was issued by ALJ Child denying OSM's Motion to Dismiss for lack of subject matter jurisdiction and establishing a new briefing schedule. (Order previously filed)

Discussion

I.

Did SCA have a valid permit for the disputed area on the 1st of June, 1994?

SCA contends that the NOV should be vacated because DOGM had issued a permit amendment on June 1, 1994, which had added the remaining fuel preparation area to the SCA permit area. Regardless of the dispute between OSM and DOGM, when notified by DOGM on the 13th of May, 1994 of the threat of pending OSM action, SCA took immediate steps to include the fuel preparation area in its permit boundary to avoid the very process initiated by OSM. (TR V-11, pages 173-175)

SCA caused to be filed with DOGM its application with supporting information with DOGM on May 16, 1994. (A-29) SCA caused additional information to be filed with DOGM supporting its application for incidental boundary change on the 20th of May, 1994. (A-30) The information contained in these two filings was extensive. DOGM reviewed

this application for boundary amendment and on June 1, 1994 approved the boundary change amendment. (A-26) Notice of the approval was sent by DOGM to SCA on June 2, 1994. (R-24) DOGM also issued a findings document that the application was complete and met the requirements of the Utah program. (A-28) The Director of DOGM, James W. Carter, testified that as far as the State of Utah was concerned, SCA had a valid permit issued pursuant to the Utah Program as of June 1, 1994. (TR V-11, page 180)

While OSM has the initial burden of going forward to establish a prima facie case as to the validity of the NOV, the ultimate burden of persuasion rests with SCA, 43 CFR 4.1171. Assuming, without deciding, that OSM established a prima facie case, SCA met its burden of persuasion in that on June 2, 1994 SCA had a valid permit issued by DOGM pursuant to the Utah Program.

II.

Did OSM's enforcement action related to the June 2, 1994 NOV requiring the cessation of mining order constitute sufficient bad faith and harassment or embarrassment to SCA so that OSM should pay the permittee's cost incurred in defending the NOV?

SMCRA provides that when an enforcement action is brought and results in an Order being issued from either Judicial or Administrative review, that costs, including the payment of attorney fees, may be awarded when deemed proper. SMCRA § 525(E). The regulation, 43 CFR 4.1290 et al., states that a permittee may recover costs from OSM when it is demonstrated that OSM has issued an order of cessation in bad faith and for the purpose of harassing or embarrassing the permittee.

SCA's Application for Review and Temporary Relief petitioned for its costs associated with the defense of the NOV. If the NOV is not

valid, the following issues have to be reviewed in relation to SCA's request for attorney fees:

A. Was SCA operating a special category off site processing plant on June 2, 1994 without a DOGM permit?

The provisions of the Utah program (R-8) that are alleged by OSM to have been violated by SCA on June 2, 1994 are R645-302-261 and R645-302-263. The provisions cited by OSM in the NOV differ from those cited in the August 11, 1993 TDN. These provisions come from the part of the Utah Program for Special Categories of Mining. The specific category that was cited by OSM comes from a special category for Coal Processing Plants Not Located Within the Permit Area of a Mine. R645-302-260. This special category permit is required when a permittee creates a coal processing plant off site (outside of the permit area). The regulatory scheme for the special category of "off site coal processing plants" is not as stringent as the broader category for the regular mining and reclamation permit. Many of the mining requirements are not imposed for "off site coal processing plants".

Much was said during the hearing about the difference between OSM and DOGM on whether R645-302-261's exception for coal processing sites that are located at the "site of ultimate coal use" was acceptable to OSM. Under the DOGM interpretation of its rule, the fuel preparation area was the "site of ultimate coal use" and did not require a permit. (R-23 and A-27) OSM disagreed apparently by authorizing the issuance of the NOV on June 2, 1994. However, the whole Federal/State dispute over the "ultimate site" exemption is not relevant in this case because on May 16, 1994, SCA applied for a boundary amendment to include the fuel preparation area in its mining permit area. (A-29 and A-30) On June 1, 1994, DOGM approved the boundary change, incorporating the fuel

preparation site into the mining permit. (R-24 and A-28) Therefore as of June 1, 1994, the fuel preparation area was a part of the mining/reclamation permit for the entire area and actually subject to a stiffer degree of regulation than if it had been separately permitted as an off site coal processing plant under the provision of R645-302-260.

The regulations alleged to be violated in the NOV do not apply regardless of the exception because the contested area was now a part of the SCA permit. By strict construction of the Utah program, SCA was not in violation of the provisions for "off site coal processing" cited by OSM on June 2, 1994.

B. Before issuing the NOV on June 2, 1994, did the OSM Field Inspector have knowledge of the June 1, 1994 DOGM action approving the inclusion of the disputed area into the SCA permit?

While OSM was not aware of the issuance of the June 1, 1994 permit amendment when the Inspector left the New Mexico office on June 2, 1994, he was aware that SCA had applied on May 16, 1994 to include the fuel preparation site in its permit. The OSM inspector was also notified by the Consultant's engineer, Jim Comas, that the DOGM had approved the amendment adding the 2.0+ acres to the permit area. A faxed copy of the letter, R-24, was given to OSM. The same inspector was also shown a copy of the application and supplemental filing presented to the DOGM on May 16, and 20, 1994. (TR V-1, page 92)

While at the SCA site on June 2, 1994, Mr. Rollins of OSM contacted DOGM by phone and was informed that the permit had been issued. (TR V-1, pages 57, 58, 91, 92) While there was a discussion between OSM and some of the DOGM personnel about bonding requirements being met, it is clear that when the NOV was issued, OSM had knowledge that DOGM had approved the requested boundary change and that the fuel preparation area was now a part of the mining permit area and that the disputed area

was no longer an "off site coal processing plant", if it had ever been one, without a permit.

C. Was OSM aware that the practical effect of the NOV would require the SCA power plant to stop operating in order to comply with the NOV?

The NOV on its face requires the cessation of mining activity, and the second page of the NOV also required as a compliance measure that the mining activity on the fuel preparation area must cease by 5:30 pm on June 3, 1994. (R-6) At first, OSM indicated that it had never ordered the SCA power plant to cease its operation, but as the hearing progressed, OSM testified that it was aware that the practical effect of the CO would stop the operation of the entire power plant. (TR V-1, pages 123-124)

The waste coal refuse, simply cannot be converted into fuel for the SCA power plant boiler without the sizing that takes place in the fuel preparation area. The power plant maintains a supply of properly sized fuel that will last for 24 hours of normal operation.

OSM pointed out that the NOV provided for an informal appeal sometime in the next 30 days. (R-9) However, the power plant would have had to cease operation during this informal appeal. The NOV as written also gave SCA until August 2, 1994, to receive an appropriate permit for the fuel preparation processing area. Thus the NOV as written had the impact of allowing SCA 60 days to correct the permit issue while the power plant would be shut down, thus potentially causing SCA to suffer the loss of \$3,000,000 (60 x \$50,000). The shutting down of the plant in effect would penalize SCA far in excess of the penalty finally proposed by OSM of \$600.

D. Was the Temporary Relief afforded SCA, (the fact that the SCA power plant was able to keep operating), the result of SCA's appeal for both Judicial and Administrative Review of the NOV?

When SCA contacted OSM early on June 3, 1994, SCA informally requesting temporary relief to allow the continued operation of the power plant. This informal request was denied. The first granting of the petitioned temporary relief was obtained during a conference call of the parties' counsel with Federal District Court Judge Sam. An extension for cessation was granted until June 14, 1994. A second extension of the temporary relief until June 17, 1994 for shut down was ordered by ALJ Sweitzer. On June 10, 1994, OSM terminated the NOV effective June 3, 1994. Therefore at the June 15, 1994 hearing, the need for temporary relief had been eliminated and the ALJ so ordered. (TR V-1, pages 6, 7)

Thus, it is clear that without SCA's requests for both judicial and administrative reviews and for the associated temporary relief, the power plant would have been shut down until a permit for the disputed area had been obtained.

E. Was the OSM's August 11, 1993 Ten Day Notice ("TDN") issued to DOGM for allowing SCA to mine without a permit, an appropriate foundation to justify ordering the power plant to shut down on June 3, 1994 for operating an off site coal processing plant without a permit?

The TDN issued August 11, 1993, R-15, cited SCA for conducting coal mining operations in an unpermitted area. The exact provisions that were alleged to have been violated were R645-300-112.400 and R645-300-141. (R-8)

DOGM and OSM disagreed over the application of these provisions to the SCA operation. This controversy was not an issue during the application and approval of the original SCA permit. It became controversial in part because of a separate Federal/State jurisdiction

dispute which started in June of 1993 between the Federal Mining Safety Health Agency ("MSHA") and the Occupational Safety and Health Agency ("OSHA") over the same fuel preparation area. As a general rule, fuel preparation areas at power plants are regulated by either OSHA or the state OSHA agency. Mining activities at mines and those activities dealing with the sizing of coal to market specifications are traditionally the jurisdictional territory of MSHA.

SCA designed the coal preparation facilities to comply with OSHA requirements and was surprised when MSHA officials threatened to shut down the power plant because it did not have a MSHA permit. UOSHA disagreed and felt that this fuel preparation area should be under its jurisdiction as are the other fuel preparation areas at other Utah power plants, including the PacifiCorp power plant in Emery County. The initial MSHA decision to assert jurisdiction was reached without the consultation required by Federal law with UOSHA or OSHA. The power plant was not shut down during the time the two federal agencies finally utilized the correct federal procedure for jurisdiction dispute resolutions. The final decision, which SCA and UOSHA had opposed, was made December 7, 1993, and MSHA was granted jurisdiction of this disputed area by the U.S. Department of Labor. The latter is reflective of the time period of resolution. The entire dispute ran from June 18, 1993 until December 7, 1993. (TR V-1, pages 50, 51 and R-5)

The TDN of August 11, 1993 was issued for the failure to include all coal mining operations in a permitted area. Eventually, DOGM issued a cessation order to SCA requiring SCA to include the coal mining related portion of the disputed area, a waste coal haul road, in its permit effective January 19, 1994. (R-23) The 1.5 acres were added and the CO was terminated.

The NOV issued on June 2, 1994, was for the failure to permit an "off site coal processing plant" under the special category provisions of the Utah Program which was not mentioned in the August 11, 1993 TDN. The issue had now shifted from the technical definition of coal mining to the special category for an off site coal processing plant. The provisions of the TDN related to mining without a permit are not applicable to the special categorical permit requirements of "off site coal processing".

It should also be noted that had a NOV been issued after the TDN in August 1993, that the violation would have to be corrected within 90 day period required by SMCRA § 521(a)(3). In Universal Coal Co., 3 IBSMA 218 (1981), a case cited by OSM in an earlier brief, the proposed OSM enforcement action being reviewed was vacated because the action being required by OSM was far beyond the 90 day period required by the Act for abatement of a violation. Thus the August 11, 1993 TDN, because of the expiration of time and different violation, can not be used as a basis for a violation of off site coal processing in June of 1994.

F. Did OSM commit the following procedural and jurisdictional errors in its series of enforcement actions relative to this boundary dispute so that its enforcement actions are marred with bad faith and harassment?

1. Failure to resolve a Federal/State dispute over the ultimate site exemption, as provided by both SMCRA and its regulations, even when requested directly by DOGM?

In the June 15, 1994, hearing it became clear that there is a difference of opinion between DOGM and OSM over whether the disputed 2.0+ acres should be permitted. OSM wanted it permitted, although it asked for it to be permitted under two different permits, first as a mining area in 1993, and then as a special category, off site coal processing plant, in 1994. SMCRA § 521(b) Inadequate State enforcement;

notice and hearing establishes a process for resolution of these types of differences. The process protects the rights of the federal, state and permittee interests. This process does allow the OSM to enforce a federal standard if the state will not, but it provides protection to the permittee as follows:

...Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit.

SMCRA 521(b).

This process has been further refined by regulation set forth in 30 CFR Part 732 Procedures and Criteria for Approval or Disapproval of State Program Submissions., and in Part 733, Maintenance of State Programs and Procedures for Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs. These parts provide the procedures for approving state plans and then amending them after approval when necessary and then, if that process fails to work, procedures for substituting federal enforcement of state programs and withdrawing approval of state programs. The process is formal. Each side is given notice and a chance to fully evaluate the differences between the federal and state regulators.

The regulations are intended to be sequential. Part 732 provides first for the adoption of a state program so that primacy can be transferred to the various states. Utah's program was approved with the "ultimate site" exemption for off site coal process facilities, R645-302-260 included. DOGM clearly stated its position on January 21, 1994, R-23, and reaffirmed its position with a request for OSM to either accept its program interpretation or to institute a Part 732 proceeding.

(A-27) OSM failed to initiate a Part 732 proceeding to resolve the difference between the Federal and State regulators. This procedural failure puts the permittee in the untenable position of not knowing which interpretation is correct and how to comply. This position of uncertainty between regulators is exactly what the Act as cited above is trying to avoid. A Part 732 proceeding would have determined whether or not the "ultimate site" exemption was appropriate.

A Part 732 proceeding may have determined that the exemption was appropriate, and then SCA would have been in compliance. The Applicant should not be penalized by OSM's failure to follow the prescribed Part 732 proceeding. If the OSM's interpretation had prevailed, the notice provisions, including publishing in the Federal Register would have provided SCA time to comply. If DOGM had still refused to modify its state program, then OSM would have been authorized by Part 733 to substituted Federal enforcement, although the permittee is still protected by the provisions of 30 CFR 733.12(f)(3) which restates the provision of SMCRA § 521(b) cited above by allowing a reasonable time for the operator to comply with the federal standard.

If there is a disagreement between regulators, SMCRA requires resolution before the permittee is subject to enforcement by the Secretary and then, once the difference has been resolved, the permittee is to be given a reasonable time to comply with the resolved enforcement provision. OSM's failure to comply with the Act demonstrates action which is not only unauthorized, but also constitutes bad faith selective enforcement that should not be condoned.

2. Failure by OSM to follow the enforcement provisions of the ACT.

The enforcement provisions of SMCRA § 521(a) create a menu of

enforcement alternatives: (1) Ten Day Notices ("TDN"), (2) Cessation Orders ("CO"), (3) Notice of Violations ("NOV") and (4) Revocations. The procedure starts generally with the issuance of a TDN unless there is proof of imminent danger of significant environmental harm. The TDN is to be issued to give notice of a pending federal inspection. OSM did not issue a TDN for violation of the failure to obtain a special category permit for an off site plant under the Utah Program.

After the inspection pursuant to a TDN, the federal inspector has an option, if a violation is found, to issue either a CO or a NOV. A CO may not be issued unless the violation "creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." (SMCRA § 521(a)(2)) If the violation does not qualify for a CO, then the federal inspector is directed by 30 CFR 843.12 to issue a NOV to rectify the violation.

Both the federal inspector and the DOGM Director testified that the 2.0+ acres was not constituting a threat to the environment or the public health and safety. (TR V-1, page 126 and TR V-11, page 184) Thus the conditions precedent for issuing a CO had not been met and OSM did not have subject matter jurisdiction to issue an CO as part of the June 2, 1994 NOV.

3. Failure to recognize an exemption to the presumption of environmental harm provided by both the Act and its regulations.

The OSM Inspector testified that the reason that OSM a NOV requiring the cessation of mining when there was no threat of harm to the environment or public safety was because the regulation made him do it, referring to 30 CFR 834.11(a)(2) which states that mining operations conducted without a permit constitute a condition or practice which can

be reasonably expected to cause significant harm to the environment. (TR V-1, page 127) However, the OSM inspector either did not read the rest of this regulation or deliberately failed to recognize an exception to this policy which fully exempted this 2.0+ disputed area from this presumption of environmental harm. The full text with the exceptions underlined is set forth:

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Where conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

30 CFR 834,11(a)(2).

DOGGM had ordered, on January 21, 1994, that no permit was necessary for the disputed 2.0+ acres. Even assuming the dispute between DOGM and OSM is resolved in favor of OSM such that the disputed 2.0+ acres does require a permit, on May 16, 1994, SCA had filed a application to include the disputed 2.0+ acres in its permit and DOGM issued its approval of the application on June 1, 1994. Therefore, on June 2, 1994, SCA was exempt from the presumption of environmental harm created in the above cited regulation and OSM did not have a real finding of harm either to the environment or the public safety or health to qualify for authorization to issue an NOV. Thus OSM did not have subject matter jurisdiction to issue an NOV.

G. Was OSM's concern regarding uncertainty of bonding coverage sufficient justification to order the cessation of the power plant in good faith?

The issue of bonding was not raised by OSM during its field inspection on August 11, 1993. Nor was it raised prior to June 2, 1994. It only became an issue when the OSM Field Inspector learned on June 2, 1994 that the fuel processing area has already been permitted. (TR V-I, page 62) Bonding then became the sole justification for not accepting the DOGM permit as valid. Insufficient bonding is an alleged violation that was never cited as a violation on either the TDN or the NOV. The alleged insufficient bonding became OSM's justification for issuing a termination of its NOV effective on June 3, 1994. (R-13)

A thorough review by OSM of the application findings supplied by the permittee to DOGM would have revealed that SCA was over bonded by almost \$100,000. SCA had already discussed this over bonding with DOGM. The acreage added, 2.0+, is .6% of the existing 320 acres already covered by the existing bond. With knowledge of the permit, DOGM was assured that the bonding requirement of the Utah Program was adequate and was willing to issue the permit. SCA's consultant testified that the additional reclamation cost associated with the 2.0+ acres was \$22,000. (TR V-II, pages 159-160) The DOGM Director testified that the bonding requirements were established very conservatively and that the existing \$1,500,000 bond had a conservative cushion already built in, and that the bonding requirement had been met when the permit was approved on June 1, 1994. (TR V-II, pages 177-180)

To have jurisdiction to issue an NOV requiring the cessation of mining, OSM must be able to show threat to the environment or public health. SMCRA §521(a)(2 & 3). Since this bonding issue did not create

a threat to either the environment or public health, it can not be used to justify the shutting down of the power plant.

H. Was SCA compliance with the DOGM regulatory requirements completed in good faith when required by DOGM?

The facts indicate that SCA had in good faith worked closely with DOGM to avoid this regulatory battle with OSM. (TR V-11, page 186) The SCA and DOGM had in response to the TDN added part of the disputed fuel processing area into the Permit. DOGM had also specifically ruled on January 21, 1994, that the remaining disputed area did not require permitting. (R-23) SCA responded timely to each DOGM request related to the boundary issue and even went beyond that which was considered necessary for compliance with the approved Utah Program.

I. Does the NOV issued during September 1994 against PacifiCorp's Hunter Power Plant for the same alleged violation demonstrate a pattern of bad faith and harassment in OSM enforcement actions?

SCA requests that the ALJ take judicial notice of the pending application for review and temporary relief filed by PacifiCorp for the identical enforcement action issued by OSM at the Hunter Power Plant, located in Emery County. PacifiCorp has filed both Judicial Review and Administrative Reviews. The Federal District Court has granted the same temporary relief, (no cessation) pending the administrative review of the validity of the NOV requiring cessation. DOGM did not require the permitting of the disputed fuel processing area in this case because it was located at the power plant, a substantial distance from the mine.

While some facts may differ, OSM has exercised its enforcement action with the same disregard for the procedures for resolving disputes between federal and state regulators to the irreparable harm of the permittee. This enforcement action, following closely behind the SCA action, while the issue of validity is still being decided by OHA shows

a callous disregard for the OHA review process and the regulations requiring resolution of federal/state disputes over the interpretation of the requirements of the ACT.

J. Unless an NOV is vacated, a terminated NOV with a very small fine will cause a higher assessed penalty for any future violation pursuant to current OSM regulations for penalty assessment and unless the NOV is vacated, SCA would appear on the public records of OSM as being cited for a serious injury to the environment and the public health and safety.

OSM is required by regulation to treat a terminated NOV, even with a small penalty, as a violation which will increase the amount of a penalty for a future violation. (30 CFR 845, 13(b)(1)) Vacation of the same NOV would allow SCA to keep its record of compliance with the Act clean. A violation would be an embarrassment because its record would be part of the public record and subject to review by the public. The whole process of seeking temporary relief to keep the power plant running and review in order to not be cited for failing to have a permit for an area that had already been permitted is a classic example of governmental harassment. Tremendous amounts of effort, energy and costs have been expended by SCA to protect its record from the embarrassment of having a cessation order on its record. The environment has not been threatened during this entire enforcement proceeding. In fact, SCA's ability to comply with the provisions of SMCRA have been reduced because of the necessary allocation of time and resource to fight this invalid NOV. This could have been avoided if OSM had followed the provisions of the ACT and its regulations.

FINDINGS OF FACT

Based on the pleadings, and the evidence submitted at the hearing, and for good cause appearing therefrom, the following findings of fact are hereby decreed:

1. SCA had a valid mining reclamation permit for the disputed area on June 1, 1994.
2. SCA was not operating a special category offsite processing coal plant without a permit on June 2, 1994.
3. The OSM Field Inspector had full knowledge of the DOGM action approving the inclusion of the disputed area into the SCA permit on June 1, 1994 before issuing the Cessation Order on June 2, 1994.
4. OSM was aware that the practical effect of the NOV would require SCA to stop operating its electrical power plant in order to comply with the NOV.
5. SCA applied for temporary relief in order to keep its power plant in operation and was able to avoid a \$50,000 a day loss as a direct result of its judicial and administrative applications for review and temporary relief.
6. OSM's August 10, 1993 TDN issued for mining without a permit triggered a DOGM NOV and a CO. DOGM then approved a boundary amendment and terminated its CO on January 21, 1994. The NOV issued June 2, 1994 was for operating an offsite coal processing plant, almost a year after DOGM issued the August 10, 1993 TDN.
7. OSM failed to follow the procedure outlined in both the Act and the Regulations for resolving federal/state disputes, failed to follow the enforcement provisions of the Act, and failed to recognize an exemption to the presumption of environmental harm provided by both the Act and its regulations.
8. SCA was adequately bonded as of June 1, 1994.

9. SCA timely complied with all DOGM requirements related to the disputed area.
10. OSM issued an NOV requiring cessation of mining against PacifiCorp without following 30 CFR §§732 and 733 procedures.
11. A terminated NOV with a very small fine will cause a higher assessed penalty for any future violation pursuant to current regulations for penalty assessment, and SCA would appear on the public records of OSM as being cited for a serious injury to the environment and the public health and safety.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the following Conclusions of Law are hereby decreed:

1. SCA is entitled to receive an order vacating the NOV because it had a valid permit for the disputed area on June 1, 1994 and was not operating a special category offsite processing coal plant without a permit on June 2, 1994.
2. OSM's enforcement action of an invalid NOV constitutes bad faith and is both embarrassing and harassing and entitles SCA to receive its costs and attorneys fees for receiving an order vacating the NOV for the following reasons:
 - a. SCA had a valid permit when it was cited for not having a permit.
 - b. The OSM Field Inspector had full knowledge of the DOGM action approving the inclusion of the disputed area into the SCA permit before issuing the Cessation Order on June 2, 1994.
 - c. OSM was aware that the practical effect of the NOV would require SCA to stop operating its electrical power plant in order to comply with the NOV.

d. SCA applied for temporary relief in order to keep its power plant in operation and was able to keep its power plant in operation as a direct result of its judicial and administrative applications for review and temporary relief.

e. OSM's August 10, 1993 TDN issued for mining without a permit triggered a DOGM NOV and a CO. DOGM then approved a boundary amendment and terminated its CO on January 21, 1994. The NOV issued June 2, 1994 was for operating an offsite coal processing plant, almost a year later and can not be justified by the August TDN.

f. OSM committed the following procedural errors in the process of issuing its NOV by:

- (1) Failing to follow the procedural outline in both the Act and the Regulations for resolving Federal/State disputes.

- (2) Failing to follow the enforcement provisions of the Act.

- (3) Failing to recognize an exemption to the presumption of environmental harm provided by both the Act and its regulations.

g. Since SCA was adequately bonded on June 1, 1994, OSM was not justified in its issuance of the NOV requiring cessation of mining on June 2, 1994.

h. SCA timely complied with all DOGM requirements related to the disputed area.

i. OSM's issuance of an NOV requiring cessation of mining against PacifiCorp demonstrates a pattern of disregard for the procedural requirements of the Act.

j. Issuance of the invalid NOV would have caused SCA to incur higher assessed penalties for any future violations and public notice of a serious injury to the environment and the public health and safety which would in this circumstance constitute an embarrassment and harassment.

ORDER

Based on the FINDINGS OF FACT and CONCLUSIONS OF LAW set forth herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The NOV of June 2, 1994 was not validly issued and it is hereby vacated.

2. OSM's enforcement action in issuing the invalid NOV when SCA had a DOGM permit constitutes bad faith and both harassed and embarrassed the SCA and OSM is ordered to pay to SCA its costs, including attorneys' fees, for the cost incurred in the review of the NOV in an amount approved by OHA.

Respectfully submitted this 17th day of October, 1994.



Fred W. Finlinson
Brian W. Burnett
CALLISTER, NEBEKER & McCULLOUGH
ATTORNEYS FOR THE APPLICANT
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 520-7353

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPLICANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was either mailed, postage prepaid, or hand delivered on the 17th day of October, 1994 as indicated below to the following:

Judge Ramon M. Child (Hand Delivered)
U.S. Department of Interior
Office of Hearing and Appeals
Federal Building
125 South State St.
Salt Lake City, Utah 84111

James W. Carter (Mailed)
Division of Oil, Gas & Mining
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1023

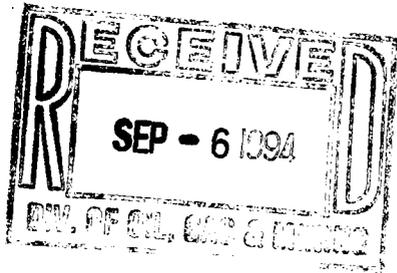
DeAnn L. Owen (Mailed)
U.S. Department of the Interior
Office of the Solicitor
Division of Surface Mining
Denver Field Office
P.O. Box 25007 (D-105)
Denver, CO 80225-0007

John Heider, Chief (Mailed)
Standards & Evaluation Branch
U.S. Department of the Interior
Office of Surface Mining
1020 15th Street
Denver, CO 80202



cc: Jwe [signature]
TAM/BR 9-6-94
Orig file

CALLISTER, NEBEKER & McCULLOUGH
FRED W. FINLINSON 1078
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Attorneys for Applicant

UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARINGS AND APPEALS

* * * * *

SUNNYSIDE COGENERATION)
ASSOCIATES, a Utah joint)
venture,)
)
Applicant,)
)
vs.)
)
THE UNITED STATES OF)
AMERICA, Department of the)
Interior, Office of Surface)
Mining Reclamation and)
Enforcement,)
)
Respondent.)

Notice of Violation No.
94-020-370-003

Permit No. ACT\007\035
Sunnyside Cogeneration
Associates - Carbon
County, Utah

APPLICATION FOR REVIEW
OF THE VALIDITY OF NOV,
AND FORMAL REVIEW OF
PROPOSED PENALTY
ASSESSMENT, IF
NECESSARY.

* * * * *

Sunnyside Cogeneration Associates ("SCA") hereby
applies for review of the validity of the NOTICE OF
VIOLATION # 94-020-370-003, dated June 2, 1994, ("NOV" or
"CO"), the award of its costs, or if the NOV is valid for a
formal revision of the amount of the proposed penalty
determined by the OSM penalty branch pursuant to 43 C.F.R.
§4.1150 et seq. for the reasons set forth below:

STATEMENT OF THE CASE

SCA owns a waste coal fired electrical generating power plant in Sunnyside, Utah. SCA has also been issued a Surface Mining Control Reclamation Act ("SMCRA") permit to operate the waste refuse pile generated by the Sunnyside coal mine which pile provides the fuel for SCA's power plant. A disagreement developed between the regional Office of Surface Mining Reclamation and Enforcement ("OSM") located in Albuquerque, New Mexico and the State of Utah, Division of Natural Resources, acting through the Division of Oil, Gas and Mining ("DOGM") over whether a 2.+ acre area which was adjacent to the permit area and part of the fuel processing area of the power plant, should be included within the permit.

As the disagreement between OSM and DOGM intensified, SCA determined to permit the disputed area by filing an amendment that when approved by DOGM would include the disputed area in the SCA permit. On June 1, 1994, DOGM approved the SCA amendment including the disputed area in SCA's permit. On June 2, 1994, OSM issued an NOV which required the cessation of the fuel processing operation, with full knowledge that this would require the cessation of the power plant operation. See Testimony of OSM Inspector at June 15, 1994 hearing, TR V-1, page 124. On June 10, 1994, OSM terminated its NOV with an effective date of June 3, 1994.

SCA on June 3, 1994, applied to the Office of Hearings & Appeals ("OHA") for a SMCRA Section 525 review of the validity of the NOV and for temporary relief from the Cessation Order contained in the NOV. A SMCRA Section 526 judicial review was also filed in Federal District Court for the State of Utah. The Section 525 matter was assigned to the Salt Lake City, Utah office of OHA and is assigned Docket No. DV94-11-R. The Section 526 matter, after help from Judge Sam in persuading OSM to grant initial temporary relief, has been held in abeyance while the Section 525 administrative process was being utilized. A hearing was held by OHA on June 15, 1994, over the validity of the NOV and SCA application for the award of costs. While the main issues were being briefed for the Administrative Law Judge ("ALJ"), OSM filed a motion to dismiss the matter for lack of subject matter jurisdiction. The briefing schedule earlier ordered was stayed so that the parties could brief the jurisdiction issue. Those briefs have been submitted by the parties to the ALJ.

In the meantime, pursuant to SMCRA Section 518, OSM, through its Standards & Evaluation Branch located in Denver, Colorado, has issued its proposed penalty which was received by SCA on August 5th, 1994, a copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference. SCA, in order to preserve its right to a SMCRA Section 525 review of the validity of the NOV and to

preserve its opportunity to have its costs awarded pursuant to Section 525, is once again requesting the formal review of NOV validity, the award of attorneys fees and in the alternative, a review of the proposed amount of fine.

For a detailed and precise explanation of the reasons beyond those expressed by SCA witnesses at the June 15, 1994 hearing, please refer to SCA's Memorandum in Opposition to Respondent's Motion to Dismiss without exhibits, which is attached as Exhibit "B" and incorporated herein by this reference.

OBJECTIONS TO PROPOSED PENALTY

In the event OHA determines that the NOV was valid, SCA objects to the points assigned by OSM in the proposed findings dated August 1, 1994, in the following areas:

a. History of previous violations.

Since there has not been a violation, OSM assigned 0 points and SCA agrees with this assessment.

b. Seriousness.

OSM assigned a total of 24 points out of a total of 30 possible for a violation which the OSM field inspector testified at the June 15, 1994 hearing, did not create a threat to the environment or public health or safety. TR V-1, page 126. The DOGM Director testified that on June 2, 1994, SCA was in full compliance with the approved Utah program TR V-4, page 180. Still, OSM assigned 15 points because the ticket was issued. The whole SMCRA Section 525

review process is being utilized to determine whether a violation actually occurred. On June 2, 1994, when SCA was cited for not having the area permitted, SCA had DOGM permit approval, including the disputed area in its permit. Accordingly, this 15 point total should be reduced to 0.

OSM also assigned another 9 points for the extent of potential or actual damage. Once again, both the OSM Inspector and DOGM Inspector testified about the lack of environmental harm. DOGM is on record that this disputed area does not need a permit; therefore, the assignment of 9 points is excessive, based on the evidence presented to the ALJ at the June 15, 1994 hearing. The 9 points should be reduced to 0.

c. Negligence.

OSM assigned a total of 2 points out of 25 possible for SCA's negligence in the violation. On June 2, 1994, the date of the violation, SCA had already obtained DOGM approval including the disputed area in its permit on June 1, 1994, even though DOGM did not require the area to be permitted. The assignment of even 2 points does not reflect SCA's complete lack of negligence. If there is any negligence in the matter, it belongs to OSM for its failure to resolve disputes with states over program interpretations of its own regulations. See SCA's Memorandum in Opposition to OSM's Motion to Dismiss for Lack of Subject Matter

Jurisdiction, attached hereto as Exhibit "B" and incorporated herein by this reference.

d. Good Faith Compliance.

Under the provisions of 30 CFR 845.13, a credit of up to 10 points can be given for rapid compliance with a validly issued NOV or CO. SCA compliance was so rapid, that OSM terminated its NOV effective June 3, 1994, exactly one day after the NOV was issued. However, the NOV terminated 2 days after the disputed area had already been included in SCA's permitted area, which was one day before the NOV was issued. To say that SCA is not entitled to any good faith compliance is not a reasonable assessment of a tremendous amount of work the SCA had completed to permit the disputed area. On May 13, 1994, SCA notified DOGM that it would include the disputed area in its permit. SCA filed its application for amendment to include the disputed area on the 16th of May, 1994. Supplemental information was supplied to DOGM on May 20, 1994. Approval was obtained on June 1, 1994. As a result of the Section 525 application and the Section 526 judicial intervention, OSM voluntarily granted the temporary relief requested by SCA and then finally terminated the NOV effective June 3, 1994. It would appear that SCA should receive at least 10 points of credit for its effort to comply with a permit condition that the approved Utah Program as administered by the State of Utah did not require.

In summary, although 26 points might appear minor compared with most SMCRA violations, it is entirely too high for the facts of this matter and should be reduced to 0 accordingly.

NOV IDENTITY

The NOV in question for this requested review is NOV # 94-020-370-003, dated June 2, 1994. A copy of the same is attached hereto as exhibit "C" and incorporated herein by this reference.

PREPAYMENT OF PENALTY

Pursuant to the provisions of 43 CFR 4.1152 and 30 CFR 845.19, a check in the amount of \$600.00, payable to the Office of Surface Mining has been sent by Federal Express this day to the U.S. Department of Interior, Office of Surface Mining Reclamation and Enforcement, P. O. Box 360292 M, Pittsburgh, PA 15251, as directed by correspondence from the Denver OSM office proposing the fine. A copy of the transmittal letter, the check and the Federal Express receipt is marked as Exhibit "D." It is SCA understanding that these funds will be deposited into escrow by OSM to await the final decision as to the validity of the NOV. If the NOV is found to be valid, the amount of the appropriate penalty should be determined by the OHA. In the event that the NOV is not valid, SCA will expect to have this money, plus interest at 6% returned to SCA.

REQUEST FOR A HEARING

1. SCA hereby requests that this matter be held in abeyance until the OHA determines whether or not it has jurisdiction to hear SCA's June 3, 1994 Section 525 application for review and request for the award of costs.

2. In the event that OHA has jurisdiction to hear SCA's application for review, SCA requests that this matter be further held in abeyance, until the validity of the NOV is determined.

3. In the event that OHA determines under the Section 525 application that the NOV was invalid, then SCA requests OHA to award its costs and to dismiss this proceeding to assess and collect a fine pursuant to 30 CFR 845 and that OSM be ordered to return the payment tendered above, plus interest at the rate of 6%.

4. In the event that OHA determines that it does not have subject matter jurisdiction to review the validity of the NOV, under the SCA June 3, 1994 application for review, SCA requests that a hearing under this proceeding be held before the OHA to determine the validity of the NOV pursuant to the provisions of Section 525, and if the NOV is invalid, to so order and to then consider SCA's request for the award of costs as previously requested in its June 3, 1994 application.

5. In the event that OHA determines that the NOV was valid, either under the June 2, 1994 SCA Application or

under this application of September 2, 1994, then SCA requests a reduction of the 26 points assigned by OSM to the June 3, 1994 NOV for the reasons set forth herein.

DATED this 2nd day of September, 1994.

By *Fred W. Finlinson*
Fred W. Finlinson
Brian W. Burnett
John B. Lindsay
Attorneys for Sunnyside
Cogeneration Associates

EXHIBIT LIST

- A. Proposed Assessment of Points and Penalties
- B. SCA Memorandum
- C. NOV, 6/2/94
- D. Payment Transmittal Letter

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Application for APPLICATION FOR REVIEW OF THE VALIDITY OF NOV, AND FORMAL REVIEW OF PROPOSED PENALTY ASSESSMENT, IF NECESSARY was either mailed, postage prepaid, or express mailed or federal expressed on this 2nd day of September, 1994 as indicated below to the following:

U.S. Department of Interior (Mailed and
Office of Hearing and Appeals Federal Express)
Attn: Michael Hickey
4015 Wilson Building
Arlington, Virginia 22203

Judge Ramon M. Child (Mailed)
U.S. Department of Interior
Office of Hearing and Appeals
Federal Building
125 South State St.
Salt Lake City, Utah 84111

Office of Surface Mining Reclamation (Mailed)
and Enforcement
Attn: Steve Rathbun
505 Marquette N.W., Suite 1200
Albuquerque, New Mexico 87102

James W. Carter (Mailed)
Division of Oil, Gas & Mining
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1023

DeAnn L. Owen (Mailed)
U.S. Department of the Interior
Office of the Solicitor
Division of Surface Mining
Denver Field Office
P.O. Box 25007 (D-105)
Denver, CO 80225-0007

John Heider, Chief
Standards & Evaluation Branch
U.S. Department of the Interior
Office of Surface Mining
1020 15th Street
Denver, CO 80202

(Mailed)

Barbara Horton

G:\CDN\Publ\FWF\PLDX\118052-1



United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement
1999 Broadway, Suite 3320
Denver, Colorado 80202-5733

*Received
8/5/94*

IN REPLY REFER TO:

August 1, 1994

NOTICE OF PROPOSED CIVIL PENALTY ASSESSMENT (NOPA)

Sunnyside Cogeneration Associates
PO Box 58087
Salt Lake City, UT 84158

Callister Nebeker
& McCullough

AUG 05 1994

RE: Citation: N94-020-370-3
Operation/Permit: Coal Processing Plant

Dear Sir/Madam:

RECEIVED

Under the authority of THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977, 30 U.S.C. 1201 et seq., on June 2, 1994, you were issued **Notice of Violation N94-020-370-3.**

In accordance with 30 CFR Part 845, you are hereby issued a proposed civil penalty assessment for this violation, in the amount of:

\$600.00.

Carefully read this letter and the enclosed information concerning the requirements for payment of civil penalty assessments. Information regarding the requirements for obtaining informal and formal administrative review of the proposed penalty is also enclosed.

If the enclosed Assessment Worksheet shows that good faith in achieving compliance was not considered in making the assessment, you may request a modified assessment based on consideration of good faith. To request consideration of good faith, you must show that extraordinary measures were taken to abate the violation(s) in the shortest possible time and that abatement was achieved before the time set for abatement. Your request should be made in writing, after the violation(s) have been abated, and should be addressed to the Program Support Division, Standards & Evaluation Branch at the address above.

If you have any questions, you may call Randal Pair of our Field Assessment Unit, at (303) 672-5549.

Sincerely,

John Heider
John Heider, Chief
Standards & Evaluation Branch

Enclosures

ASSESSMENT WORKSHEET

NOV # N94-020-370-3PERMIT # ACT/007/035Company Name / Permittee: Sunnyside Cogeneration Associates

VIOLATION <u>1</u> of <u>1</u>	POINTS
1. History of Previous Violations:	<u>0</u>
2. Seriousness (Part A (Event) or Part B (obstruction))	
A. Event violations	
(1) Probability of Occurrence:	<u>15</u>
(2) Extent of Actual or Potential Damage:	<u>9</u>
TOTAL Event Seriousness:	<u>24</u>
B. Obstruction to Enforcement:	<u>N/A</u>
3. Negligence:	<u>2</u>
4. Good Faith:	<u>0</u>
	TOTAL POINTS: <u>26</u>
	ASSESSMENT: <u>\$ 600.00</u>

OSM regulations at 30 CFR 845.12(c) provide that the Office may assess a penalty when the point total is 30 points or less; in making that decision, the Office is to consider each of the four assessment criteria separately.

In the case of N94-020-370-3, 24 points under the "seriousness" criterion exceeds the threshold that indicates a violation which merits the imposition of a penalty.

ASSESSMENT EXPLANATION

NOV # N94-020-370-3Company Name / Permittee: Sunnyside Cogeneration AssociatesViolation # 1 of 1 PointsHistory of Previous Violations: 0

No previous Federal citations on this site were identified.

Seriousness: (Part A or B)

A. Event standard is designed to prevent:

Conducting surface mining operations without regulatory approval and permit, which approval and permit are necessary to prevent or minimize adverse impacts of surface coal mining and reclamation operations on the environment and on public health and safety.

(1) **Probability of Occurrence:** 15

Surface coal mining operations were conducted without the issuance of a permit; hence the event has occurred.

(2) **Extent of Actual or Potential Damage:** 9

No actual damage was evidenced. Potential damages from the unpermitted operations would be in an area for which no assessment of potential impacts had been made, and no mitigating measures specified, or a determination made whether surface coal mining operations might be allowed [e.g., right-of-entry]. Without operations plans, reclamation plans, and reclamation bond, the land's productivity might potentially have been destroyed [while the operator's other bond was eventually decided to be adequate to cover this operation, until the permit was issued there was no legal obligation to connect that bond money to this site]. The potential damage is out of a permitted area; however, the area had been previously disturbed by mining operations, minimizing the natural resources that might be affected by this operation; thus the lower part of the range (8-15 points) is assigned.

TOTAL Seriousness: 24B. **Obstruction to Enforcement:** N/A

Negligence:

2

Information from the inspector indicates that the operator had been informed by the State of Utah that the processing operation need not be permitted. However, operators are obligated to comply with SMCRA requirements even if misinterpreted and/or misapplied by a regulatory authority. Therefore there is a degree of negligence in not adhering to the definition of surface coal mining operations, but because of the State's action, the degree of fault is considered to be low. The low end of the range (1-12 points) is assigned.

Good Faith:

0

The violation was terminated almost immediately, but the inspector did not indicate that any extraordinary actions were taken. It appears from the record that the operator took no action after the citation was issued; therefore, no good faith can be granted.

CALLISTER NEBEKER & McCULLOUGH
FRED W. FINLINSON 1078
BRIAN W. BURNETT 3772
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

Attorneys for Applicant

UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION

* * * * *

SUNNYSIDE COGENERATION	:	Docket No. DV 94-11-R
ASSOCIATES, a Utah joint venture,	:	
	:	Application for Review and
Applicant	:	Relief
	:	
v.	:	NOV # 94-020-370-003
	:	
OFFICE OF SURFACE MINING	:	Permit No. ACT\007\035
RECLAMATION AND	:	
ENFORCEMENT (OSMRE),	:	Carbon County, Utah
	:	
Respondent	:	

APPLICANT'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

The Applicant, Sunnyside Cogeneration Associates, a Utah joint venture ("SCA"), hereby submits this memorandum in opposition to the Respondent's Motion to Dismiss filed in the above captioned matter because this Court has subject matter jurisdiction over this dispute for the reasons stated below.

I. Preliminary Statement of Procedural History

Respondent has already set forth in great detail most of the relevant procedural history. In reality, Respondent's Motion to

Dismiss for lack of subject matter jurisdiction is a procedural argument, because the jurisdiction over review of Surface Mining Control and Reclamation Act of 1977, U.S.C.A. § 1201, et. al., ("SMCRA" or the "Act") enforcement actions is clearly vested in the U.S. Department of Interior, Office of Hearings and Appeals ("OHA"), SMCRA § 525, and 43 CFR 4.1160, et al., 4.1180, et al. and 4.1260, et al. The Applicant now sets forth certain material facts relating to the procedural history of this case which Respondent failed to cite. The controversy centers on approximately 3.5 acres ("original disputed area") of the SCA power plant site that were not included in the original permit issued February 4, 1993 to SCA.

On January 21, 1994, the State of Utah, Department of Natural Resources, Division of Oil, Gas and Mining ("DOGM") as the Federally authorized agent amended SCA's permit by approving a boundary change that incorporated into the SCA permit area approximately 1.5 acres of the originally disputed area. At the same time, DOGM also determined that the remaining 2.0+ acres did not require permitting. This area is called the "fuel preparation" area by SCA and the "coal processing" area by the Albuquerque office of OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT ("OSM"). It is this remaining 2.0+ that is the current "disputed" area.

On May 13, 1994, DOGM informed SCA that OSM would issue a cessation order ("CO") if the current disputed area was not

permitted. DOGM also indicated that it disagreed with this OSM decision and reaffirmed its January 21, 1994 decision that permitting was not required. SCA informed DOGM that, in order to avoid conflict with OSM, it would amend its permit boundary to include the disputed area in its mining and reclamation permit.

On May 16, 1994, SCA caused a permit amendment application to be filed with DOGM including the disputed area. On May 20, 1994 additional information was supplied to DOGM to complete its evaluation of the application to include the disputed area.

On June 1, 1994, DOGM approved the amendment thereby including the disputed area into the SCA permit. See Exhibit R-24, TR V-1.

On June 2, 1994, DOGM notified the permittee that the amendment had been approved and that the disputed area as of June 1, 1994 was a part of the SCA permit.

On June 2, 1994, an OSM inspector arrived at the SCA power plant in Sunnyside, Utah. He received a copy of the DOGM approval, talked with DOGM, talked with SCA consultants, reviewed SCA's applications of May 16, and May 20, 1994 to have the disputed area included in the SCA permit and then nevertheless issued a NOV requiring the cessation of the coal processing activity in the disputed area by 5:30 pm on June 3, 1994, knowing that the practical effect of the CO would require the power plant to shut

down.

On June 2, 1994, SCA's attorneys were notified at 5:30 pm of the NOV issued earlier in the afternoon. Steps were immediately taken to obtain temporary relief from the CO in order to avoid the irreparable damage associated with shutting down the power plant. The power plant produces revenues of approximately \$50,000 per day, employs 45 people and supplies approximately 50 megawatts ("Mws") of electric power to the Pacificorp. network as a base loaded power production facility. Requests for review and temporary relief were prepared pursuant to the provisions of SMCRA § 525 and 526.

On June 3, 1994, a Complaint and Temporary Restraining Order were filed in Federal District Court and an application entitled APPLICATION FOR TEMPORARY RELIEF AND AN EXPEDITED HEARING was submitted to the OHA. The Application was reviewed in the Washington Office and assigned to the Office of Hearings and Appeals, 6432 Federal Building, Salt Lake City, UT 84138. The Assignment was made by Phillip G. Kiko, Deputy Director of the Office of Hearings and Appeals. A copy of the assignment letter is marked as Exhibit 1 and by incorporation made a part hereof. Deputy Director Kiko acknowledged the receipt of SCA's "application for review" under SMCRA §525 and directed SCA to communicate further with the Administrative Law Judges ("ALJ") in Interior's Salt Lake Office.

On June 3, 1994, OSM rejected SCA's informal request to modify the NOV by removing the CO requirement to shut down the power plant. Then SCA filed with DOGM additional material which had been requested by DOGM on June 1, 1994. DOGM also issued a second approval of the SCA boundary change amendment, dated June 3, 1994. It was not until Federal District Court Judge David Sam, was on the phone in the late afternoon, that OSM attorneys finally joined in a conference call with SCA attorneys and Judge Sam. Earlier in the day, OSM attorneys had not joined in a similar conference call requested by ALJ John R. Rampton, Jr.. In response to Judge Sam's inquiry as to whether OSM would require the power plant to shut down, OSM attorneys resisted such relief, but finally agreed to issue and did issue its NOV Modification delaying the CO requirement to shut down the power plant until June 14, 1994 at 4:00 pm. See Exhibit R-11 from the June 15th Hearing. As a result of the conference with Judge Sam, SCA obtained temporary relief from the CO until the 14th of June, 1994, and the parties agreed to pursue the administrative remedy provided by § 525 of SMCRA with the OHA.

On June 3, 1994, ALJ John R. Rampton, Jr., District Chief, issued his order setting forth the review of the SCA application to be held on Tuesday, June 7, 1994 at 9:00 am. His order addresses not only the temporary relief issue, but also states:

The hearing will be for the purpose of receiving oral testimony under oath, and documentary evidence on all

material issues. The matters of fact and law involved are set forth in the pleadings filed by the parties.

Exhibit 2, 6/3/94 Notice of Hearing.

On Monday, June 6, 1994, after a conference with the OSM and SCA attorneys, ALJ Harvey C. Sweitzer entered an Amended Notice of Hearing setting the hearing for June 15, 1994, instead of June 7, 1994. Judge Sweitzer also ordered OSM to cause the "Time for Abatement" to be extended to at least June 17, 1994 at 5:30 pm. This was the second extension of the temporary relief that the Applicant had requested in its Application of June 3, 1994. A discussion was had about the economies by all concerned about concurrently holding the hearing on the SCA application for review.

If the parties agree to do so, I contemplate receipt at the hearing of proposed findings and conclusions, and issuing a ruling from the bench, or within 24 hours (see 43 CFR 4.1266(b)(7)) on the issue of temporary relief; thereafter issuing a written decision on the application for review, following briefing opportunity. Any requests for alternative handling will be considered.

Exhibit 3, 6/6/94 Amended Notice of Hearing. (Emphasis added)

On June 6, 1994, after the telephone conference with Judge Sweitzer, OSM caused its second Modification of the June 2, 1994 NOV to be issued, reflecting the fact that the extension, or temporary relief, had been ordered by the ALJ. See Exhibit 4, OSM Modification of NOV dated 6/6/94.

On June 7, 1994, another conference was held with the

attorneys of OSM and SCA and ALJ Ramon M. Child, who had now been assigned the responsibility for the review of the SCA application. Judge Child issued an Order identifying the issues to be addressed at the June 15, 1994 Hearing:

...it was confirmed and agreed by both counsel that the hearing on June 15, 1994, will address the issues in both the application for review and the application for temporary relief as contemplated in the final paragraph of the Amended Notice of Hearing issued herein on June 7, 1994.

See Exhibit 5, Issues to Be Addressed At Hearing. (Emphasis added)

On June 10, 1994, OSM issued its third Modification of the June 2, 1994 NOV by terminating it effective June 3, 1994. See Exhibit 6, Termination of NOV dated 6/10/94.

On June 13, 1994, the parties exchanged lists of witnesses and exhibits that would be presented at the June 15, 1994 hearing and filed the same with OHA.

On June 15, 1994, the SCA applications for review and temporary relief were heard before Judge Child. The parties were present and represented by counsel. Prior to opening statements, stipulations were presented by the parties and accepted by the Court and various orders were issued orally by the Judge, including the following:

1. Since OSM has issued its Termination of the NOV on June,

10, 1994, and the effective date of such termination was June 3, 1994, the applicant's request for temporary relief to avoid the necessity of shutting down the power plant as required by the CO, was no longer necessary. It was moot and the Court so ordered. TR V-I pages 6 & 7.

2. Because the CO requiring the shutting down of the power plant had been terminated, it was no longer necessary for the Judge to decide the case within the 5 days provided by SMCRA § 525 and the various temporary relief regulations and both parties told the Court that the 5 day provision was waived and that each party would like to brief the remaining issues involved with the validity of the original NOV. TR V-I, page 9.

3. The parties agreed to proceed on the merits of whether the original NOV requiring the CO was valid. There was a discussion about whether an application for review had been filed or, if it had been filed, whether OSM had responded. SCA pointed out that its application was a combined application containing an application for review of the validity of the original NOV, applying also for temporary relief and requesting the Court to order OSM to pay costs of such review, if it found that SCA qualified for such a request under the provisions of SMCRA § 525(e) and 43 CFR 4.1294(c). The Court also noted that OSM had failed to file an Answer to SCA's Application as required by 43 CFR 4.1166. After this exchange, the Court once again indicated that the sole

purpose of this hearing was to respond to SCA's application to review the validity of the NOV, with SCA specially requesting that the NOV be vacated and that costs, including reasonable attorney fees, be awarded. Counsel for both sides agreed to such limited purpose. TR V-I, pages 7-9.

The hearing was then held on the merits of the validity of the June 2, 1994 NOV requiring the CO. Witnesses testified, including the OSM Inspector, the Director of DOGM and the engineering consultant for SCA. Both sides made closing arguments and the Court issued from the bench its briefing schedule which was reduced to writing on the 18th of July, 1994. A copy of the briefing order is marked as Exhibit 7.

On June 16, 1994, OSM caused its Answer to SCA's application to be filed. OSM specifically responded to SCA's requests for temporary relief, the vacation of the NOV and the award of costs. This Answer does not assert a defense of lack of subject matter jurisdiction.

On July 21, 1994, OSM raised the issue of the alleged lack of subject matter jurisdiction in its Motions to Dismiss and to Delay the Briefing Schedule.

On July 26, 1994, the Court issued its stay of the briefing schedule and provided the Applicant until August 12, 1994 to file

responsive pleadings to the Respondent's Motion for Dismissal.

II. ARGUMENT

1. The Provisions for Review of SMCRA § 525 have been met by the SCA's June 3, 1994 Application.

The issuance of a cessation order is a serious matter. SMCRA §525 clearly outlines how challenges to such orders will be reviewed. Any permittee issued such an order may apply for review within 30 days of the issuance of the order. SCA applied the very next day. The Secretary shall cause an investigation into the matter, providing the applicant with an opportunity for a hearing before OHA. The application for review does not constitute a stay of cessation order, and to provide for this opportunity, a temporary relief process is provided so that a stay can be obtained while the investigation of the issued order is being reviewed. The Secretary has the obligation to decide issues of temporary relief within 5 days after the receipt of an application requesting such relief and the Secretary must, unless the parties otherwise agree, complete the investigation and rule on the application for review within 30 days. In SMCRA § 525 orders, the Secretary may award costs including attorney fees as appropriate.

The Department of Interior has set forth criteria that must be

included in any application for review, whether under 43 CFR 4.1160, et al., 4.1180, et al., or 4.1260, et al. These regulations identify who may file, where they may file, and what should be included in review applications. The content required for each application is basically the same. The application process for temporary relief is perhaps the most restrictive and is set forth as follows:

The application shall include-

- (a) A detailed written statement setting forth the reasons why relief should be granted;
- (b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;
- (c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources;
- (d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the act, a statement of whether the requirement of section 525(c) of the act for decision on the application within 5 days is waived; and
- (e) A statement of the specific relief requested.

43 CFR 4.1263

The application filed on June 3, 1994 by SCA clearly provided each of these items.

On June 15, 1994, when the parties stipulated and the Court ordered that the Applicant's temporary relief requests were rendered moot by OSM's termination of the NOV, the court then ordered the parties to proceed on the merits of the validity of the NOV. At this point, the requirements for the review application as set forth in 43 CFR 4.1164 became the operable conditions which

have to be complied with. Those conditions are set forth herein:

Any person filing an application for review shall incorporate in that application regarding each claim for relief-

- (a) A statement of facts entitling that person to administrative relief;
- (b) A request for specific relief;
- (c) A copy of any notice or order sought to be reviewed;
- (d) A statement as to whether the person requests or waives the opportunity for an evidentiary hearing; and
- (e) Any other relevant information.

43 CFR 4.1164.

The content of the June 3, 1994 SCA application clearly provides OHA all of the information required that is necessary for the Secretary to investigate the claim contained in the application. Each of the criteria required by either regulation cited above is included in SCA's June 3, 1994 Application. The Applicant has met the requirements of a SMCRA § 525 application for review in the following manner:

- (a) A Statement of the facts was included in the application, including an affidavit.
- (b) SCA requested the specific relief that the NOV be vacated, see Paragraph 5 of the SCA application.
- (c) SCA attached to it's application as Exhibit A, a copy of the June 2, 1994 NOV.
- (d) SCA requested an evidentiary hearing in the very first sentence of its application.
- (e) SCA also included as Exhibit B to its application, a copy of the DOGM June 1, 1994 approval letter which included the disputed area into SCA's permitted area.

2. OHA did not go to "extra lengths to construe" SCA's application as sufficient.

OSM has characterized the OHA's designation of the application to cover both review and temporary relief as a "clerical error" that was the precisely the type of "extra lengths to construe" which are to be avoided by OHS. Respondent's Motion to Dismiss, page 4.

OSM attempts to support it's position by citing Universal Coal Co., 3 IBSMA 218 (1981). See Exhibit 8 for a copy of the full text of the decision. The facts in this case when applied to SCA's application require the rejection of OSM's motion for the following reasons:

(a) In Universal Coal Co., OSM had originally issued a NOV requiring the company to resolve (fix) some reclamation projects on a stream in the company's permit area. OSM had modified the requirements of its NOV three different times and the company had complied with each modification. When OSM modified the abatement provisions the fourth time, requiring work on a portion of the stream outside of the permit area, the company applied for temporary relief. The modification was not only out of the permit area, it was well beyond the 90 day abatement period before the OSM had even raised the issue of additional work. The Board of Appeals upheld the decision of the ALJ who had granted both the review and

temporary relief requested by the company, which was the vacation of the fourth modification requiring the additional work.

(b) The Board in Universal Coal Co. did indicate that "Parties should not depend on (OHA or IBLA) going to extra lengths to construe them as sufficient (applications for temporary relief construed as sufficient applications for review) when they are not apparently so." However, the full text of this quote produces a totally different context:

The Administrative Law Judge's acceptance of Universal's application for temporary relief can only be justified by construing pages 3 and 4 of the document as also being an application for review sufficient under 43 CFR 4.1164. Such applications, however, should conform to the requirements of the regulations; parties should not depend on our going to extra lengths to construe them as sufficient when they are not apparently so.

Universal Coal Co., 3 IBSMA 218, 222-223 (1981).

The Board found that Universal's application for temporary relief contained sufficient information to meet the requirements of 43 CFR 4.1164 because it then rendered both the temporary relief and general relief requested by ruling that the OSM Fourth Modification was not effective and Universal was not required to comply with it. Universal's application contained sufficient information to investigate the basis for the claim, OSM did not have the required authority, and Universal's requested relief was granted.

In the present case, the OHA Deputy Director, clearly a non

clerical person, treated SCA's application as a SMCRA § 525 application and assigned the case to the OHA office in Salt Lake City, Utah. Three different ALJs in Salt Lake City have treated SCA's application as requesting both review and temporary relief as mentioned above. The content of SCA's June 3, 1994 application meets the requirements of both the act and the regulation for the content necessary for the Secretary to investigate and determine the validity of whether OSM's June 2, 1994 CO was appropriately issued.

3. OHA does have subject matter jurisdiction over the validity of OSM's June 2, 1994 CO.

OSM argues that SCA did not file an "Application for Review" and that, pursuant to 43 CFR 4.1162 which requires such an application to be filed within 30 days after the issuance of an order or modification thereof, there is no subject matter jurisdiction before the OHA. OSM is confused between procedure, subject matter jurisdiction and personal jurisdiction.

Subject matter jurisdiction is clearly vested in OHA by SMCRA §525 to review applications relative to OSM issued cessation orders and notices of violations. The procedure for filing a SMCRA §525 application for review has been set forth in the regulations cited before: 43 CRF 4.1160, et al., 4.1180, et al. and 4.1260, et al. These regulations define criteria and content which, when included,

procedurally places the issues of review and temporary relief before OHA. The SCA application of June 3, 1994 is timely, one day after the issuance of the NOV, and meets the established criteria.

The case cited by OSM, Insurance Corporation of Ireland v. Compañi Des Bauzites De Guinee, 456 U.S. 694, 702 (1982) is a case dealing with personal jurisdiction, which only mentioned subject matter jurisdiction as dicta. In the case, the Supreme Court affirmed the decision of the District Court by ruling that the Federal District Court did have personal jurisdiction over the Defendant and further that the Court had not abused its discretion by awarding the plaintiff certain remedies because the defendant had refused to participate in discovery, if even in a limited way to dispute the jurisdiction. See Exhibit 9.

The dicta cited by OSM says that subject matter jurisdiction cannot be waived by failing to challenge jurisdiction early in the proceedings. Because this is dicta there is no fact situation in the cited case to define what is early in the proceedings. However, OSM did not raise this issue until July 21, 1994, after the application was filed, after the matter was assigned by the Deputy Director of OHA, after repeated conferences with a Federal District Judge and three different Administrative Law Judges and after OSM has stipulated to the dismissal of the CO and to the proceeding at the hearing on the merits of the validity of the NOV, after its answer to the SCA application which it specifically

responded to all three issues raised in the SCA application, review, temporary relief and award of costs with out raising the defense of lack of subject jurisdiction; and then with only nine days left for OSM to file its brief pursuant to the briefing schedule, OSM raised lack of subject matter jurisdiction in its July 21, 1994 Motion to Dismiss.

OSM by waiting this long, certainly is beyond "failing to challenge jurisdiction early in the proceedings". However, even this argument becomes moot because the June 3, 1994 Application for Review and Temporary Relief contains all of the requirements for review as established in the Act and the regulations cited above.

4. OSM's Motion to Dismiss is an other example of bad faith and harassment of SCA that justifies an award to SCA of its costs of bringing this application.

OSM issued an order of cessation, requiring the shutting down of a 58 Mw power plant over the issue of whether the disputed area of 2.0+ acres was included in an off site coal processing plant permit when it knew that DOGM had approved SCA's application to include the disputed area in its permit.

When it became clear that its CO could not stand alone, OSM delayed the effective date of cessation twice because of the involvement of a Federal District Court Judge and two

Administrative Law Judges, and then terminated its own NOV effective one day after it was issued. During the hearing, several instances were pointed out that OSM had not complied with its own procedure as set forth both in SMCRA and its regulations. It would appear that OSM does not want the ALJ to deal with OSM's own apparent failure to comply with procedural and subject matter jurisdiction issues that have come to light as a result of SCA exercising its right to review a SMCRA CO expeditiously. Not only would these procedural errors jeopardize the validity of the June 2, 1994 CO, these failures by OSM may in fact be considered by the Court as justification to issue an order requiring OSM to pay SCA's cost.

Based on evidence submitted during the hearing, OSM appears to have committed the following procedural and jurisdictional errors:

- a. Failure to resolve a dispute with a State in the Administration of an Approved Program as provided in regulation.

In the hearing it became clear that there is a difference of opinion between DOGM and OSM over whether the disputed 2.0+ acres should be permitted. OSM wanted it permitted, although it asked for it to be permitted under two different permits, as a mining area in 1993, and then as an off site coal processing plant in 1994. SMCRA § 521(b) Inadequate State enforcement; notice and hearing establishes a process for resolution of these types of

differences. The process protects the rights of the Federal, State and permittee interests. This process does allow the OSM to enforce a Federal Standard if the State will not, but it provides protection to the permittee as follows:

...Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit.

SMCRA 521(b).

This process has been further refined by regulation set forth in 30 CFR Part 732 Procedures and Criteria for Approval or Disapproval of State Program Submissions., and in Part 733, Maintenance of State Programs and Procedures for Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs. These parts provide the procedures for approving State plans and then amending them after approval when necessary and then, when that process fails to work, procedures for substituting Federal enforcement of State programs and withdrawing approval of State programs. The process is formal, each side is given notice and a chance to fully evaluate the differences between the Federal and State regulators.

The regulations are intended to be sequential in nature. Part 732 provides first for the adoption of a State Program so that primacy can be transferred to the various States. Utah's program

was approved with the "ultimate site" exemption for off site coal process facilities, R645-302-260 included. DOGM clearly stated its position on January 21, 1994, Hearing Exhibit R-23, and reaffirmed its position with a request for OSM to either accept its program interpretation or to institute a Part 732 proceeding, Hearing Exhibit A-27. OSM failed to initiate a Part 732 proceeding to resolve the difference between the Federal and State regulators. This failure puts the permittee in the untenable position which interpretation to comply with. This position of uncertainty between regulators is exactly what the Act as cited above is trying to avoid. A Part 732 proceeding would have determined whether or not the "ultimate site" exemption was appropriate.

A Part 732 proceeding may have determined that the exemption was appropriate, and then SCA would have been in compliance. The Applicant should not be penalized by OSM's failure to follow the prescribed Part 732 proceeding. If the OSM's interpretation had prevailed, the notice provisions, including publishing in the Federal Register would have provided SCA time to comply. If DOGM had still refused to modify its State Program, then OSM would have been authorized by Part 733 to substituted Federal enforcement, although the permittee is still protected by the provisions of 30 CFR 733.12(f)(3) which restates the provision of SMCRA § 521(b) cited above by allowing a reasonable time for the operator to comply with the Federal standard.

If there is a disagreement between regulators, SMCRA requires resolution before the permittee is subject to enforcement by the Secretary and then, once the difference has been resolved, the permittee is to be given a reasonable time to comply with the resolved enforcement provision. OSM's failure to comply with the Act demonstrates action which is not only unauthorized, for which OSM has no subject matter jurisdiction, but also bad faith selective enforcement that should not be condoned.

b. Failure by OSM to follow the enforcement provisions of SMCRA 521.

The enforcement provisions of SMCRA § 521(a) create a menu of enforcement alternatives: (1) Ten Day Notices ("TDN"), (2) Cessation Orders ("CO"), (3) Notice of Violations ("NOV") and (4) Revocations. The procedure starts generally with the issuance of a TDN unless there is proof of imminent danger of significant environmental harm. The TDN is to be issued to give notice of a pending Federal Inspection. OSM did not issue a TDN for violation of the failure to obtain a special category permit for an off site plant under the Utah Program.

After the inspection pursuant to a TDN, the Federal Inspector has an option, if a violation is found, to issue either a CO or a NOV. A CO may not be issued unless the violation "creates an imminent danger to the health or safety of the public, or is

causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." SMCRA § 521(a)(2). If the violation does not qualify for a CO, then the Federal Inspector is directed by 30 CFR 843.12 to issue a NOV to rectify the violation.

The Federal Inspector testified that the 2.0+ acres was not constituting a threat to the environment or the public health and safety. TR V-1, page 126. Thus the conditions precedent for issuing a CO had not been met and OSM did not have subject matter jurisdiction to issue an CO as part of the June 2, 1994 NOV.

c. Failure to recognize an exception to the definition in the regulation as to what constitutes Imminent Harm to the environment.

The OSM Inspector testified that the reason that OSM issued a CO instead of a NOV when there was no threat of harm to the environment or public safety was because the regulation made him do it, referring to 30 CFR 834.11(a)(2) which states that mining operations conducted without a permit constitute a condition or practice which can be reasonably expected to cause significant harm to the environment. However, the OSM inspector either did not read the rest of this regulation or deliberately failed to recognize an exception to this policy which fully exempted this 2.0+ disputed area from this presumption of environmental harm. The full text

with the exceptions underlined is set forth:

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Where conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

30 CFR 834,11(a)(2).

DOGM had ordered on January 21, 1994 that no permit was necessary for the disputed 2.0+ acres and, therefore, the exemption of (ii) seems to apply SCA. Even assuming the dispute between the State and OSM is resolved in favor of OSM such that the disputed 2.0+ acres does require a permit, on May 16, 1994, SCA had filed a application to include the disputed 2.0+ acres in its permit and the application was complete enough for DOGM to have issued its approval of the application on June 1, 1994; therefore, on June 2, 1994, SCA was exempt from the presumption of environmental harm created in the above cited regulation and OSM did not have a real finding of harm either to the environment or the public safety or health to qualify for authorization to issue a CO.

d. Failure of OSM to recognize that permittees issued a CO have the right to an expeditious review of the validity of the issuance of the CO.

OSM in its Motion to Dismiss seems to give the impression that only issues related to applications for temporary relief are entitled to expeditious review and that for SCA to have an expeditious review on the merits of the validity of the original NOV requiring the shutting down of a 58 Mw power plant would somehow be unfair to other applicants requesting similar review.

This position seems to fly directly in the face of the provisions of SMCRA § 525 and § 526. The Secretary is required to issue his opinion within 30 days after the receipt of an application for review on the issuance of a CO. Applications for temporary relief are required to be resolved within 5 days, unless the applicant waives the expeditious requirements of the Act.

When OSM issues a CO, which is a very draconian enforcement action, SMCRA in the sections identified herein provides the accused permittee to receive an expeditious resolution. OSM's attempt to reroute this entire dispute to a penalty phase hearing, which it may never bring, is just one more attempt by OSM to avoid its own procedures. This classic example of bad faith justifies the award of costs to the Applicant.

III. CONCLUSION

SCA did file an application requesting review, temporary

relief and the award of its costs in this action. The application was properly characterized by the Deputy Director of OHA as an application for review and temporary relief. Subject matter jurisdiction of such applications is properly vested in OHA. SCA has met the requirements of such applications as required by SMCRA and its regulations. The Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction should be dismissed.

Dated this 9 day of August, 1994.

Respectfully submitted,



CALLISTER NEBEKER AND McCULLOUGH
Fred W. Finlinson
Attorneys for the Applicant, SCA
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

U.S. DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement
NOTICE OF VIOLATION

1. Office of Violation Number
94-020-370-003

TV 1

2. Name Permittee No Permit

Sunnyside Cogeneration Associates

Originating Office Address

**O.S.M.
505 Marquette NW
Suite 1200**

3. Mailing Address:

P.O. Box 58087, Salt Lake City, UT 84158-0087

**Albuquerque NM
87102**

4. Name of Mine Surface Other (Specify) Underground

Coal processing plant

Telephone Number

505-766-1486

5. Telephone Number 6. County State

801-888-4476

Carbon

State

UT

7. Operator's Name (if other than permittee)

Shawco Industries Inc

9. Date of Inspection

6/2/94

8. Mailing Address

5250 South 900 West, Suite 200, Salt Lake City, Utah 84107

10. Time of Inspection

From **1:30** ^{a.m.} _{p.m.} To _____ a.m. p.m.

1. State Permit Number

ACT/007/035

12. NPDES Number

13. MSHA ID Number

14. OSM Mine Number

UNDER THE AUTHORITY OF THE SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977 (P.L. 95-87; 30 U.S.C. 1201), THE UNDERSIGNED AUTHORIZED REPRESENTATIVE OF THE SECRETARY OF THE INTERIOR has conducted an inspection of the above mine on the above date and has found violation(s) of the Act, the regulations or required permit condition(s) listed in the attachment(s). This Notice constitutes a separate Notice of Violation for each violation listed.

You must abate each of these violation(s) within the designated abatement time. You are responsible for doing all work in a safe and workmanlike manner.

THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THIS NOTICE DOES NOT DOES REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT. Therefore, you are are not entitled to an informal public hearing on request, within 30 days after service of this notice (30 CFR 722.15).

This Notice shall remain in effect until it expires as provided on the reverse or is modified, terminated, or vacated by written notice of an authorized representative of the Secretary. The time for correction may be extended by an authorized representative for good cause. If you need additional time to correct the violation(s), please contact the field office named above.

IMPORTANT—Please Read Information on the Back of this Page

15. Print Name of Person Served

SHAWN REDDINGTON
Shawn Reddington

18. Date of Service

6/2/94

16. Print Title of Person Served

PROJECT MANAGER

19. Print Name of Authorized Representative

MITCHELL S. ROLLINGS

17. Signature of Person Served

Shawn Reddington

20. Signature of Authorized Representative

M. S. Rollings

ID Number

370

NOTICE OF VIOLATION (CONTINUATION)

NATURE OF PERMIT CONDITION VIOLATED, PRACTICE OR VIOLATION

Failure to obtain a validly issued permit for a coal processing plant in accordance with the approved Utah program.

PROVISION(S) OF THE REGULATIONS, ACT OR PERMIT VIOLATED

R 645-302-261
R 645-302-263

PORTION OF THE OPERATION TO WHICH NOTICE APPLIES

The coal processing facilities (crushers, conveyors, etc.) adjacent to the refuse mixing operation.

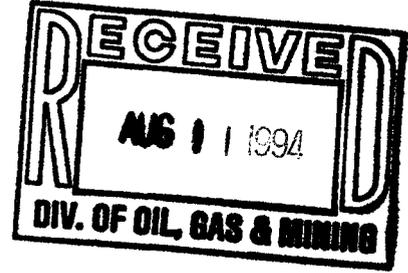
CORRECTIVE ACTION REQUIRED (Including Interim Steps, If Any)

1. Cease all coal processing activities
2. Obtain a validly issued permit from the Utah Division of Oil, Gas, and Mining addressing all parts of the Utah program. (including the bonding requirements)

TIME FOR ABATEMENT (Including Time for Interim Steps, If Any)

1. Complete this step by 6/3/94 at 5³⁰ pm. (Operator requested 24 hours to comply in a safe manner)
2. Complete this step by 8/2/94 at 8:00 am

CALLISTER NEBEKER & McCULLOUGH
FRED W. FINLINSON 1078
BRIAN W. BURNETT 3772
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300



Attorneys for Applicant

UNITED STATES DEPARTMENT OF INTERIOR
OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION

* * * * *

SUNNYSIDE COGENERATION	:	Docket No. DV 94-11-R
ASSOCIATES, a Utah joint venture,	:	
	:	Application for Review and
Applicant	:	Relief
	:	
v.	:	NOV # 94-020-370-003
	:	
OFFICE OF SURFACE MINING	:	Permit No. ACT\007\035
RECLAMATION AND	:	
ENFORCEMENT (OSMRE),	:	Carbon County, Utah
	:	
Respondent	:	

APPLICANT'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

The Applicant, Sunnyside Cogeneration Associates, a Utah joint venture ("SCA"), hereby submits this memorandum in opposition to the Respondent's Motion to Dismiss filed in the above captioned matter because this Court has subject matter jurisdiction over this dispute for the reasons stated below.

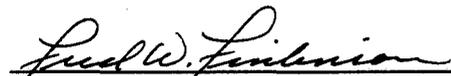
I. Preliminary Statement of Procedural History

Respondent has already set forth in great detail most of the relevant procedural history. In reality, Respondent's Motion to

Mr. John Heider
August 5, 1994
Page 2

If we can be helpful in expediting this stay or providing additional information, please call.

CALLISTER NEBEKER & McCULLOUGH


Fred W. Finlinson

FWF:mm

cc: Judge Ramon M. Child
DeAnn L. Owen, US Solicitor's Office
Jim Carter, Director DOGM ✓

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*cc to [unclear] 8-8-94
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& McCULLOUGH**

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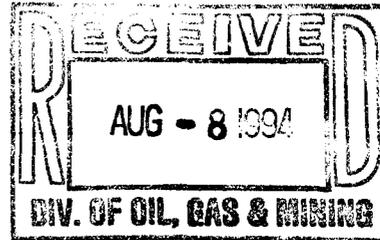
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August 5, 1994

TO CALL WRITER DIRECT



Mr. John Heider, Chief
Standards & Evaluation Branch
Office of Surface Mining
1999 Broadway, Suite 3320
Denver, Colorado 80202-5733

RE: Citation: N94-020-370-3
Operation/Permit: Coal Processing Plant

Dear Mr. Heider:

Our client, Sunnyside Cogeneration Associates ("SCA") was issued the above mentioned NOV on June 2, 1994. On June 3, SCA applied to the Office of Hearings & Appeals ("OHA") for review, temporary relief and the award of costs. A copy of the SCA Application is attached. A hearing before Administrative Law Judge Ramon M. Child was held on June 15, 1994. A briefing schedule has been ordered by the Court. OSM has filed a motion seeking dismissal. The Judge has stayed the briefing schedule while the Permittee is allowed to respond to OSM's motion for dismissal. In the event that the Judge Child determines that OHA has jurisdiction, Judge Child may decide that the NOV should be vacated and that SCA should be awarded its costs, including attorney fees, for obtaining the order of vacation.

While the application for review is pending before Judge Child, I think it would be prudent for OSM to stay the action on the proposed civil penalty assessment. It may be another example of the bad faith enforcement by OSM that is currently being evaluated by Judge Child. If SCA does not receive notice of such a stay by August 10, 1994, our client will petition Judge Child for such an order. Our client feels very strongly that the NOV should not have been issued and that OSM acted in bad faith, in violation of the provisions of SMCRA and its attendant regulations. Once Judge Child has ruled, if OSM has any continuing jurisdiction to warrant the assessment of civil penalty, SCA intends to protest even the award of the 26 points and the \$600 fine, since as a result of SCA's extraordinary effort, OSM terminated its Cessation Order after one day.

Mr. John Heider
August 17, 1994
Page 2

review provided by SMCRA in the event that the Solicitor's Motion to Dismiss for lack of subject matter jurisdiction is granted. It is my understanding that in a formal review proceeding before OHA under 30 CFR 845 both the validity and amount if any of a penalty can be reviewed by OHA.

In the event that OHA rules on any of the matters currently pending before the end of the 30 day period, we would plan to modify our application for the formal review under 30 CFR Part 845 accordingly. Once again, thank you for the courtesy and helpful information in your letter.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH



Fred W. Finlinson

FWF:mm

cc: Judge Ramon M. Child
DeAnn L. Owen, US Solicitor's Office
Jim Carter, Director DOGM
David Pearce

*cc dwc
TAM
JFB
AGZ*
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aug. file

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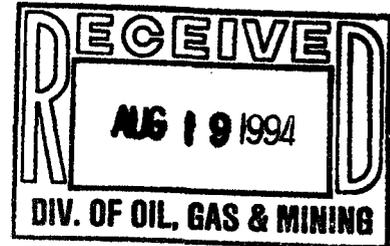
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August 17, 1994

TO CALL WRITER DIRECT



Mr. John Heider
Chief, Standards & Evaluation Branch
Office of Surface Mining
Reclamation & Enforcement
1999 Broadway, Suite 3320
Denver, Colorado 80202-5733

Re: Sunnyside Cogeneration Associates (SCA)
Citation: N94-020-370-3
Operation: Coal Processing Plant

Dear Mr. Heider:

Thank you very much for your response and the information contained in your August 15, 1994 letter responding to my August 5, 1994 letter requesting a stay in the proceeding assessing a civil penalty for the above mentioned citation.

Your letter indicated that the process for the assessment of civil penalties, 30 CFR Part 845, does not provide for a stay while the application for review of the validity of the citation is proceeding with OHA under the enforcement provisions of 30 CFR Part 843. However, as you pointed out, SCA will not need to pay the proposed penalty until a Final Order is issued on SCA's formal appeal of the fact of the violation.

As I pointed out in my August 5, 1994 letter, our client, SCA, feels very strongly that the Notice of Violation requiring cessation of mining activity ("NOV") was issued by the OSM Field Inspector in violation of the provisions of SMCRA and SCA that was in compliance with the provisions of the approved Utah program. This is why we have applied to OHA for a review of the validity of the issued NOV, for temporary relief and for the award of costs.

It is our intent to apply for the formal review before OHA within 30 days from August 5, 1994, the date your proposed assessment was received at our office, as provided in 30 CFR Part 845 so that the issues of validity and amount of the penalty will have the formal

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Head Office
P.O. Box 30709
Salt Lake City, Utah 84130

No. 00634

9/2 19 94 31-5/1240

PAY The sum of 600 and 00/100ths DOLLARS \$ 600.00*

TO
THE
ORDER
OF

U S Department of Interior
Office of Surface Mining



⑈000634⑈ ⑆124000054⑆ 02 13816 2⑈

Callister Nebeker & McCullough

DETACH AND RETAIN THIS STATEMENT
THE ATTACHED CHECK IS IN PAYMENT OF ITEMS DESCRIBED BELOW.
IF NOT CORRECT PLEASE NOTIFY US PROMPTLY. NO RECEIPT DESIRED.

No. 00634

DATE	DESCRIPTION	AMOUNT
9/2/94	15285/27 Notice of violation dated 6/2/94 # 94-020-370-003 BWB issued for failure to obtain a valid permit as required by Utah Regulations R 645-302-261 + R 645-302-263	600.00

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& McCULLOUGH

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TO CALL WRITER DIRECT

September 2, 1994

Express Mailed

U. S. Department of Interior
Office of Surface Mining
Reclamation and Enforcement
P.O. Box 360292 M
Pittsburgh, PA 15251

Re: Prepayment of Proposed Penalty
Permit # ACT\007\ -035
Sunnyside Cogeneration Associates, Carbon County, Utah
Notice of Violation # 94-020-370-003

TO WHOM IT MAY CONCERN:

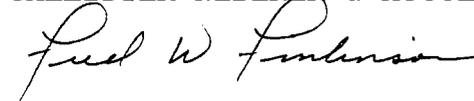
Our firm represents Sunnyside Cogeneration Associates ("SCA") who has been issued the Notice of Violation ("NOV") cited above. SCA is presently seeking review of the validity of the NOV in two actions presently before the Office of Hearing & Appeals ("OHA"). The first application was dated June 3, 1994. Before OHA could rule on this request, a proposed assessment of points and penalties was issued by the Denver office of Office of Surface Mining Reclamation and Enforcement ("OSM").

SCA has applied for a formal review of the proposed assessment. A copy of the application without exhibits is enclosed for your information and marked as exhibit A. Also enclosed is a check, payable to the U. S. Department of Interior, Office of Surface Mining for the sum of Six Hundred Dollars (\$600.00) which is to be deposited into escrow until a final decision is made by OHA.

If you have any question please call.

Sincerely,

CALLISTER NEBEKER & McCULLOUGH



Fred W. Finlinson

Dismiss for lack of subject matter jurisdiction is a procedural argument, because the jurisdiction over review of Surface Mining Control and Reclamation Act of 1977, U.S.C.A. § 1201, et. al., ("SMCRA" or the "Act") enforcement actions is clearly vested in the U.S. Department of Interior, Office of Hearings and Appeals ("OHA"), SMCRA § 525, and 43 CFR 4.1160, et al., 4.1180, et al. and 4.1260, et al. The Applicant now sets forth certain material facts relating to the procedural history of this case which Respondent failed to cite. The controversy centers on approximately 3.5 acres ("original disputed area") of the SCA power plant site that were not included in the original permit issued February 4, 1993 to SCA.

On January 21, 1994, the State of Utah, Department of Natural Resources, Division of Oil, Gas and Mining ("DOGM") as the Federally authorized agent amended SCA's permit by approving a boundary change that incorporated into the SCA permit area approximately 1.5 acres of the originally disputed area. At the same time, DOGM also determined that the remaining 2.0+ acres did not require permitting. This area is called the "fuel preparation" area by SCA and the "coal processing" area by the Albuquerque office of OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT ("OSM"). It is this remaining 2.0+ that is the current "disputed" area.

On May 13, 1994, DOGM informed SCA that OSM would issue a cessation order ("CO") if the current disputed area was not

permitted. DOGM also indicated that it disagreed with this OSM decision and reaffirmed its January 21, 1994 decision that permitting was not required. SCA informed DOGM that, in order to avoid conflict with OSM, it would amend its permit boundary to include the disputed area in its mining and reclamation permit.

On May 16, 1994, SCA caused a permit amendment application to be filed with DOGM including the disputed area. On May 20, 1994 additional information was supplied to DOGM to complete its evaluation of the application to include the disputed area.

On June 1, 1994, DOGM approved the amendment thereby including the disputed area into the SCA permit. See Exhibit R-24, TR V-1.

On June 2, 1994, DOGM notified the permittee that the amendment had been approved and that the disputed area as of June 1, 1994 was a part of the SCA permit.

On June 2, 1994, an OSM inspector arrived at the SCA power plant in Sunnyside, Utah. He received a copy of the DOGM approval, talked with DOGM, talked with SCA consultants, reviewed SCA's applications of May 16, and May 20, 1994 to have the disputed area included in the SCA permit and then nevertheless issued a NOV requiring the cessation of the coal processing activity in the disputed area by 5:30 pm on June 3, 1994, knowing that the practical effect of the CO would require the power plant to shut

down.

On June 2, 1994, SCA's attorneys were notified at 5:30 pm of the NOV issued earlier in the afternoon. Steps were immediately taken to obtain temporary relief from the CO in order to avoid the irreparable damage associated with shutting down the power plant. The power plant produces revenues of approximately \$50,000 per day, employs 45 people and supplies approximately 50 megawatts ("Mws") of electric power to the Pacificorp. network as a base loaded power production facility. Requests for review and temporary relief were prepared pursuant to the provisions of SMCRA § 525 and 526.

On June 3, 1994, a Complaint and Temporary Restraining Order were filed in Federal District Court and an application entitled APPLICATION FOR TEMPORARY RELIEF AND AN EXPEDITED HEARING was submitted to the OHA. The Application was reviewed in the Washington Office and assigned to the Office of Hearings and Appeals, 6432 Federal Building, Salt Lake City, UT 84138. The Assignment was made by Phillip G. Kiko, Deputy Director of the Office of Hearings and Appeals. A copy of the assignment letter is marked as Exhibit 1 and by incorporation made a part hereof. Deputy Director Kiko acknowledged the receipt of SCA's "application for review" under SMCRA §525 and directed SCA to communicate further with the Administrative Law Judges ("ALJ") in Interior's Salt Lake Office.

On June 3, 1994, OSM rejected SCA's informal request to modify the NOV by removing the CO requirement to shut down the power plant. Then SCA filed with DOGM additional material which had been requested by DOGM on June 1, 1994. DOGM also issued a second approval of the SCA boundary change amendment, dated June 3, 1994. It was not until Federal District Court Judge David Sam, was on the phone in the late afternoon, that OSM attorneys finally joined in a conference call with SCA attorneys and Judge Sam. Earlier in the day, OSM attorneys had not joined in a similar conference call requested by ALJ John R. Rampton, Jr.. In response to Judge Sam's inquiry as to whether OSM would require the power plant to shut down, OSM attorneys resisted such relief, but finally agreed to issue and did issue its NOV Modification delaying the CO requirement to shut down the power plant until June 14, 1994 at 4:00 pm. See Exhibit R-11 from the June 15th Hearing. As a result of the conference with Judge Sam, SCA obtained temporary relief from the CO until the 14th of June, 1994, and the parties agreed to pursue the administrative remedy provided by § 525 of SMCRA with the OHA.

On June 3, 1994, ALJ John R. Rampton, Jr., District Chief, issued his order setting forth the review of the SCA application to be held on Tuesday, June 7, 1994 at 9:00 am. His order addresses not only the temporary relief issue, but also states:

The hearing will be for the purpose of receiving oral testimony under oath, and documentary evidence on all

material issues. The matters of fact and law involved are set forth in the pleadings filed by the parties.

Exhibit 2, 6/3/94 Notice of Hearing.

On Monday, June 6, 1994, after a conference with the OSM and SCA attorneys, ALJ Harvey C. Sweitzer entered an Amended Notice of Hearing setting the hearing for June 15, 1994, instead of June 7, 1994. Judge Sweitzer also ordered OSM to cause the "Time for Abatement" to be extended to at least June 17, 1994 at 5:30 pm. This was the second extension of the temporary relief that the Applicant had requested in its Application of June 3, 1994. A discussion was had about the economies by all concerned about concurrently holding the hearing on the SCA application for review.

If the parties agree to do so, I contemplate receipt at the hearing of proposed findings and conclusions, and issuing a ruling from the bench, or within 24 hours (see 43 CFR 4.1266(b)(7)) on the issue of temporary relief; thereafter issuing a written decision on the application for review, following briefing opportunity. Any requests for alternative handling will be considered.

Exhibit 3, 6/6/94 Amended Notice of Hearing. (Emphasis added)

On June 6, 1994, after the telephone conference with Judge Sweitzer, OSM caused its second Modification of the June 2, 1994 NOV to be issued, reflecting the fact that the extension, or temporary relief, had been ordered by the ALJ. See Exhibit 4, OSM Modification of NOV dated 6/6/94.

On June 7, 1994, another conference was held with the

attorneys of OSM and SCA and ALJ Ramon M. Child, who had now been assigned the responsibility for the review of the SCA application. Judge Child issued an Order identifying the issues to be addressed at the June 15, 1994 Hearing:

...it was confirmed and agreed by both counsel that the hearing on June 15, 1994, will address the issues in both the application for review and the application for temporary relief as contemplated in the final paragraph of the Amended Notice of Hearing issued herein on June 7, 1994.

See Exhibit 5, Issues to Be Addressed At Hearing. (Emphasis added)

On June 10, 1994, OSM issued its third Modification of the June 2, 1994 NOV by terminating it effective June 3, 1994. See Exhibit 6, Termination of NOV dated 6/10/94.

On June 13, 1994, the parties exchanged lists of witnesses and exhibits that would be presented at the June 15, 1994 hearing and filed the same with OHA.

On June 15, 1994, the SCA applications for review and temporary relief were heard before Judge Child. The parties were present and represented by counsel. Prior to opening statements, stipulations were presented by the parties and accepted by the Court and various orders were issued orally by the Judge, including the following:

1. Since OSM has issued its Termination of the NOV on June,

10, 1994, and the effective date of such termination was June 3, 1994, the applicant's request for temporary relief to avoid the necessity of shutting down the power plant as required by the CO, was no longer necessary. It was moot and the Court so ordered. TR V-I pages 6 & 7.

2. Because the CO requiring the shutting down of the power plant had been terminated, it was no longer necessary for the Judge to decide the case within the 5 days provided by SMCRA § 525 and the various temporary relief regulations and both parties told the Court that the 5 day provision was waived and that each party would like to brief the remaining issues involved with the validity of the original NOV. TR V-I, page 9.

3. The parties agreed to proceed on the merits of whether the original NOV requiring the CO was valid. There was a discussion about whether an application for review had been filed or, if it had been filed, whether OSM had responded. SCA pointed out that its application was a combined application containing an application for review of the validity of the original NOV, applying also for temporary relief and requesting the Court to order OSM to pay costs of such review, if it found that SCA qualified for such a request under the provisions of SMCRA § 525(e) and 43 CFR 4.1294(c). The Court also noted that OSM had failed to file an Answer to SCA's Application as required by 43 CFR 4.1166. After this exchange, the Court once again indicated that the sole

purpose of this hearing was to respond to SCA's application to review the validity of the NOV, with SCA specially requesting that the NOV be vacated and that costs, including reasonable attorney fees, be awarded. Counsel for both sides agreed to such limited purpose. TR V-I, pages 7-9.

The hearing was then held on the merits of the validity of the June 2, 1994 NOV requiring the CO. Witnesses testified, including the OSM Inspector, the Director of DOGM and the engineering consultant for SCA. Both sides made closing arguments and the Court issued from the bench its briefing schedule which was reduced to writing on the 18th of July, 1994. A copy of the briefing order is marked as Exhibit 7.

On June 16, 1994, OSM caused its Answer to SCA's application to be filed. OSM specifically responded to SCA's requests for temporary relief, the vacation of the NOV and the award of costs. This Answer does not assert a defense of lack of subject matter jurisdiction.

On July 21, 1994, OSM raised the issue of the alleged lack of subject matter jurisdiction in its Motions to Dismiss and to Delay the Briefing Schedule.

On July 26, 1994, the Court issued its stay of the briefing schedule and provided the Applicant until August 12, 1994 to file

responsive pleadings to the Respondent's Motion for Dismissal.

II. ARGUMENT

1. The Provisions for Review of SMCRA § 525 have been met by the SCA's June 3, 1994 Application.

The issuance of a cessation order is a serious matter. SMCRA §525 clearly outlines how challenges to such orders will be reviewed. Any permittee issued such an order may apply for review within 30 days of the issuance of the order. SCA applied the very next day. The Secretary shall cause an investigation into the matter, providing the applicant with an opportunity for a hearing before OHA. The application for review does not constitute a stay of cessation order, and to provide for this opportunity, a temporary relief process is provided so that a stay can be obtained while the investigation of the issued order is being reviewed. The Secretary has the obligation to decide issues of temporary relief within 5 days after the receipt of an application requesting such relief and the Secretary must, unless the parties otherwise agree, complete the investigation and rule on the application for review within 30 days. In SMCRA § 525 orders, the Secretary may award costs including attorney fees as appropriate.

The Department of Interior has set forth criteria that must be

included in any application for review, whether under 43 CFR 4.1160, et al., 4.1180, et al., or 4.1260, et al. These regulations identify who may file, where they may file, and what should be included in review applications. The content required for each application is basically the same. The application process for temporary relief is perhaps the most restrictive and is set forth as follows:

The application shall include-

- (a) A detailed written statement setting forth the reasons why relief should be granted;
- (b) A showing that there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant;
- (c) A statement that the relief sought will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air or water resources;
- (d) If the application relates to an order of cessation issued pursuant to section 521(a)(2) or section 521(a)(3) of the act, a statement of whether the requirement of section 525(c) of the act for decision on the application within 5 days is waived; and
- (e) A statement of the specific relief requested.

43 CFR 4.1263

The application filed on June 3, 1994 by SCA clearly provided each of these items.

On June 15, 1994, when the parties stipulated and the Court ordered that the Applicant's temporary relief requests were rendered moot by OSM's termination of the NOV, the court then ordered the parties to proceed on the merits of the validity of the NOV. At this point, the requirements for the review application as set forth in 43 CFR 4.1164 became the operable conditions which

have to be complied with. Those conditions are set forth herein:

Any person filing an application for review shall incorporate in that application regarding each claim for relief-

- (a) A statement of facts entitling that person to administrative relief;
- (b) A request for specific relief;
- (c) A copy of any notice or order sought to be reviewed;
- (d) A statement as to whether the person requests or waives the opportunity for an evidentiary hearing; and
- (e) Any other relevant information.

43 CFR 4.1164.

The content of the June 3, 1994 SCA application clearly provides OHA all of the information required that is necessary for the Secretary to investigate the claim contained in the application. Each of the criteria required by either regulation cited above is included in SCA's June 3, 1994 Application. The Applicant has met the requirements of a SMCRA § 525 application for review in the following manner:

(a) A Statement of the facts was included in the application, including an affidavit.

(b) SCA requested the specific relief that the NOV be vacated, see Paragraph 5 of the SCA application.

(c) SCA attached to it's application as Exhibit A, a copy of the June 2, 1994 NOV.

(d) SCA requested an evidentiary hearing in the very first sentence of its application.

(e) SCA also included as Exhibit B to its application, a copy of the DOGM June 1, 1994 approval letter which included the disputed area into SCA's permitted area.

2. OHA did not go to "extra lengths to construe" SCA's application as sufficient.

OSM has characterized the OHA's designation of the application to cover both review and temporary relief as a "clerical error" that was the precisely the type of "extra lengths to construe" which are to be avoided by OHS. Respondent's Motion to Dismiss, page 4.

OSM attempts to support it's position by citing Universal Coal Co., 3 IBSMA 218 (1981). See Exhibit 8 for a copy of the full text of the decision. The facts in this case when applied to SCA's application require the rejection of OSM's motion for the following reasons:

(a) In Universal Coal Co., OSM had originally issued a NOV requiring the company to resolve (fix) some reclamation projects on a stream in the company's permit area. OSM had modified the requirements of its NOV three different times and the company had complied with each modification. When OSM modified the abatement provisions the fourth time, requiring work on a portion of the stream outside of the permit area, the company applied for temporary relief. The modification was not only out of the permit area, it was well beyond the 90 day abatement period before the OSM had even raised the issue of additional work. The Board of Appeals upheld the decision of the ALJ who had granted both the review and

temporary relief requested by the company, which was the vacation of the fourth modification requiring the additional work.

(b) The Board in Universal Coal Co. did indicate that "Parties should not depend on (OHA or IBLA) going to extra lengths to construe them as sufficient (applications for temporary relief construed as sufficient applications for review) when they are not apparently so." However, the full text of this quote produces a totally different context:

The Administrative Law Judge's acceptance of Universal's application for temporary relief can only be justified by construing pages 3 and 4 of the document as also being an application for review sufficient under 43 CFR 4.1164. Such applications, however, should conform to the requirements of the regulations; parties should not depend on our going to extra lengths to construe them as sufficient when they are not apparently so.

Universal Coal Co., 3 IBSMA 218, 222-223 (1981).

The Board found that Universal's application for temporary relief contained sufficient information to meet the requirements of 43 CFR 4.1164 because it then rendered both the temporary relief and general relief requested by ruling that the OSM Fourth Modification was not effective and Universal was not required to comply with it. Universal's application contained sufficient information to investigate the basis for the claim, OSM did not have the required authority, and Universal's requested relief was granted.

In the present case, the OHA Deputy Director, clearly a non

clerical person, treated SCA's application as a SMCRA § 525 application and assigned the case to the OHA office in Salt Lake City, Utah. Three different ALJs in Salt Lake City have treated SCA's application as requesting both review and temporary relief as mentioned above. The content of SCA's June 3, 1994 application meets the requirements of both the act and the regulation for the content necessary for the Secretary to investigate and determine the validity of whether OSM's June 2, 1994 CO was appropriately issued.

3. OHA does have subject matter jurisdiction over the validity of OSM's June 2, 1994 CO.

OSM argues that SCA did not file an "Application for Review" and that, pursuant to 43 CFR 4.1162 which requires such an application to be filed within 30 days after the issuance of an order or modification thereof, there is no subject matter jurisdiction before the OHA. OSM is confused between procedure, subject matter jurisdiction and personal jurisdiction.

Subject matter jurisdiction is clearly vested in OHA by SMCRA §525 to review applications relative to OSM issued cessation orders and notices of violations. The procedure for filing a SMCRA §525 application for review has been set forth in the regulations cited before: 43 CFR 4.1160, et al., 4.1180, et al. and 4.1260, et al. These regulations define criteria and content which, when included,

procedurally places the issues of review and temporary relief before OHA. The SCA application of June 3, 1994 is timely, one day after the issuance of the NOV, and meets the established criteria.

The case cited by OSM, Insurance Corporation of Ireland v. Compani Des Bauzites De Guinee, 456 U.S. 694, 702 (1982) is a case dealing with personal jurisdiction, which only mentioned subject matter jurisdiction as dicta. In the case, the Supreme Court affirmed the decision of the District Court by ruling that the Federal District Court did have personal jurisdiction over the Defendant and further that the Court had not abused its discretion by awarding the plaintiff certain remedies because the defendant had refused to participate in discovery, if even in a limited way to dispute the jurisdiction. See Exhibit 9.

The dicta cited by OSM says that subject matter jurisdiction cannot be waived by failing to challenge jurisdiction early in the proceedings. Because this is dicta there is no fact situation in the cited case to define what is early in the proceedings. However, OSM did not raise this issue until July 21, 1994, after the application was filed, after the matter was assigned by the Deputy Director of OHA, after repeated conferences with a Federal District Judge and three different Administrative Law Judges and after OSM has stipulated to the dismissal of the CO and to the proceeding at the hearing on the merits of the validity of the NOV, after its answer to the SCA application which it specifically

responded to all three issues raised in the SCA application, review, temporary relief and award of costs with out raising the defense of lack of subject jurisdiction; and then with only nine days left for OSM to file its brief pursuant to the briefing schedule, OSM raised lack of subject matter jurisdiction in its July 21, 1994 Motion to Dismiss.

OSM by waiting this long, certainly is beyond "failing to challenge jurisdiction early in the proceedings". However, even this argument becomes moot because the June 3, 1994 Application for Review and Temporary Relief contains all of the requirements for review as established in the Act and the regulations cited above.

4. OSM's Motion to Dismiss is an other example of bad faith and harassment of SCA that justifies an award to SCA of its costs of bringing this application.

OSM issued an order of cessation, requiring the shutting down of a 58 Mw power plant over the issue of whether the disputed area of 2.0+ acres was included in an off site coal processing plant permit when it knew that DOGM had approved SCA's application to include the disputed area in its permit.

When it became clear that its CO could not stand alone, OSM delayed the effective date of cessation twice because of the involvement of a Federal District Court Judge and two

Administrative Law Judges, and then terminated its own NOV effective one day after it was issued. During the hearing, several instances were pointed out that OSM had not complied with its own procedure as set forth both in SMCRA and its regulations. It would appear that OSM does not want the ALJ to deal with OSM's own apparent failure to comply with procedural and subject matter jurisdiction issues that have come to light as a result of SCA exercising its right to review a SMCRA CO expeditiously. Not only would these procedural errors jeopardize the validity of the June 2, 1994 CO, these failures by OSM may in fact be considered by the Court as justification to issue an order requiring OSM to pay SCA's cost.

Based on evidence submitted during the hearing, OSM appears to have committed the following procedural and jurisdictional errors:

- a. Failure to resolve a dispute with a State in the Administration of an Approved Program as provided in regulation.

In the hearing it became clear that there is a difference of opinion between DOGM and OSM over whether the disputed 2.0+ acres should be permitted. OSM wanted it permitted, although it asked for it to be permitted under two different permits, as a mining area in 1993, and then as an off site coal processing plant in 1994. SMCRA § 521(b) Inadequate State enforcement; notice and hearing establishes a process for resolution of these types of

differences. The process protects the rights of the Federal, State and permittee interests. This process does allow the OSM to enforce a Federal Standard if the State will not, but it provides protection to the permittee as follows:

...Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit.

SMCRA 521(b).

This process has been further refined by regulation set forth in 30 CFR Part 732 Procedures and Criteria for Approval or Disapproval of State Program Submissions., and in Part 733, Maintenance of State Programs and Procedures for Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs. These parts provide the procedures for approving State plans and then amending them after approval when necessary and then, when that process fails to work, procedures for substituting Federal enforcement of State programs and withdrawing approval of State programs. The process is formal, each side is given notice and a chance to fully evaluate the differences between the Federal and State regulators.

The regulations are intended to be sequential in nature. Part 732 provides first for the adoption of a State Program so that primacy can be transferred to the various States. Utah's program

was approved with the "ultimate site" exemption for off site coal process facilities, R645-302-260 included. DOGM clearly stated its position on January 21, 1994, Hearing Exhibit R-23, and reaffirmed its position with a request for OSM to either accept its program interpretation or to institute a Part 732 proceeding, Hearing Exhibit A-27. OSM failed to initiate a Part 732 proceeding to resolve the difference between the Federal and State regulators. This failure puts the permittee in the untenable position which interpretation to comply with. This position of uncertainty between regulators is exactly what the Act as cited above is trying to avoid. A Part 732 proceeding would have determined whether or not the "ultimate site" exemption was appropriate.

A Part 732 proceeding may have determined that the exemption was appropriate, and then SCA would have been in compliance. The Applicant should not be penalized by OSM's failure to follow the prescribed Part 732 proceeding. If the OSM's interpretation had prevailed, the notice provisions, including publishing in the Federal Register would have provided SCA time to comply. If DOGM had still refused to modify its State Program, then OSM would have been authorized by Part 733 to substituted Federal enforcement, although the permittee is still protected by the provisions of 30 CFR 733.12(f)(3) which restates the provision of SMCRA § 521(b) cited above by allowing a reasonable time for the operator to comply with the Federal standard.

If there is a disagreement between regulators, SMCRA requires resolution before the permittee is subject to enforcement by the Secretary and then, once the difference has been resolved, the permittee is to be given a reasonable time to comply with the resolved enforcement provision. OSM's failure to comply with the Act demonstrates action which is not only unauthorized, for which OSM has no subject matter jurisdiction, but also bad faith selective enforcement that should not be condoned.

b. Failure by OSM to follow the enforcement provisions of SMCRA 521.

The enforcement provisions of SMCRA § 521(a) create a menu of enforcement alternatives: (1) Ten Day Notices ("TDN"), (2) Cessation Orders ("CO"), (3) Notice of Violations ("NOV") and (4) Revocations. The procedure starts generally with the issuance of a TDN unless there is proof of imminent danger of significant environmental harm. The TDN is to be issued to give notice of a pending Federal Inspection. OSM did not issue a TDN for violation of the failure to obtain a special category permit for an off site plant under the Utah Program.

After the inspection pursuant to a TDN, the Federal Inspector has an option, if a violation is found, to issue either a CO or a NOV. A CO may not be issued unless the violation "creates an imminent danger to the health or safety of the public, or is

causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." SMCRA § 521(a)(2). If the violation does not qualify for a CO, then the Federal Inspector is directed by 30 CFR 843.12 to issue a NOV to rectify the violation.

The Federal Inspector testified that the 2.0+ acres was not constituting a threat to the environment or the public health and safety. TR V-1, page 126. Thus the conditions precedent for issuing a CO had not been met and OSM did not have subject matter jurisdiction to issue an CO as part of the June 2, 1994 NOV.

c. Failure to recognize an exception to the definition in the regulation as to what constitutes Imminent Harm to the environment.

The OSM Inspector testified that the reason that OSM issued a CO instead of a NOV when there was no threat of harm to the environment or public safety was because the regulation made him do it, referring to 30 CFR 834.11(a)(2) which states that mining operations conducted without a permit constitute a condition or practice which can be reasonably expected to cause significant harm to the environment. However, the OSM inspector either did not read the rest of this regulation or deliberately failed to recognize an exception to this policy which fully exempted this 2.0+ disputed area from this presumption of environmental harm. The full text

with the exceptions underlined is set forth:

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

(ii) Where conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

30 CFR 834,11(a)(2).

DOG M had ordered on January 21, 1994 that no permit was necessary for the disputed 2.0+ acres and, therefore, the exemption of (ii) seems to apply SCA. Even assuming the dispute between the State and OSM is resolved in favor of OSM such that the disputed 2.0+ acres does require a permit, on May 16, 1994, SCA had filed a application to include the disputed 2.0+ acres in its permit and the application was complete enough for DOGM to have issued its approval of the application on June 1, 1994; therefore, on June 2, 1994, SCA was exempt from the presumption of environmental harm created in the above cited regulation and OSM did not have a real finding of harm either to the environment or the public safety or health to qualify for authorization to issue a CO.

d. Failure of OSM to recognize that permittees issued a CO have the right to an expeditious review of the validity of the issuance of the CO.

OSM in its Motion to Dismiss seems to give the impression that only issues related to applications for temporary relief are entitled to expeditious review and that for SCA to have an expeditious review on the merits of the validity of the original NOV requiring the shutting down of a 58 Mw power plant would somehow be unfair to other applicants requesting similar review.

This position seems to fly directly in the face of the provisions of SMCRA § 525 and § 526. The Secretary is required to issue his opinion within 30 days after the receipt of an application for review on the issuance of a CO. Applications for temporary relief are required to be resolved within 5 days, unless the applicant waives the expeditious requirements of the Act.

When OSM issues a CO, which is a very draconian enforcement action, SMCRA in the sections identified herein provides the accused permittee to receive an expeditious resolution. OSM's attempt to reroute this entire dispute to a penalty phase hearing, which it may never bring, is just one more attempt by OSM to avoid its own procedures. This classic example of bad faith justifies the award of costs to the Applicant.

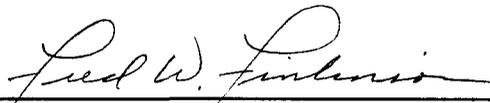
III. CONCLUSION

SCA did file an application requesting review, temporary

relief and the award of its costs in this action. The application was properly characterized by the Deputy Director of OHA as an application for review and temporary relief. Subject matter jurisdiction of such applications is properly vested in OHA. SCA has met the requirements of such applications as required by SMCRA and its regulations. The Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction should be dismissed.

Dated this 9 day of August, 1994.

Respectfully submitted,



CALLISTER NEBEKER AND McCULLOUGH
Fred W. Finlinson
Attorneys for the Applicant, SCA
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: (801) 530-7300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Applicant's Motion to Deny Respondent's Motion to Dismiss was sent by hand delivery or regular mail on August 10, 1994 to the following:

Office of Hearings & Appeals
U.S. Department of the Interior
6432 Federal Building
125 South State Street
Salt Lake City, Utah 84138

HAND DELIVERY

DeAnn L. Owen
U.S. Department of the Interior
Office of the Solicitor
Division of Surface Mining
Denver Field Office
P.O. Box 25007 (D-105)
Denver, CO 80225-0007

Director
Tulsa Field Office
Office of Surface Mining
Reclamation & Enforcement
5100 E. Skelly Dr., Suite 550
Tulsa, OK 74135-6548

G:\CDN\PubL\FWF\PLDX\115733-1


Margaret M. Quarrin

EXHIBIT LIST

1. OHA Assignment Letter
2. 6/3/94 Notice of Hearing
3. 6/6/94 Amended Notice of Hearing
4. 6/6/94 Modification of NOV
5. Issues to to Addressed at Hearing
6. 6/10/94 Termination of NOV
7. 7/18/94 Briefing Order
8. Universal Coal Company Decision
9. Insurance Corporation of Ireland Case



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

HEARINGS DIVISION

4015 Wilson Boulevard

ARLINGTON, VIRGINIA 22203



EXHIBIT 1

SUNNYSIDE COGENERATION ASSOCIATES, : Docket No. DV 94-11-R
Applicant :
v. : Application for Review and
: Temporary Relief (Expedited)
OFFICE OF SURFACE MINING RECLAMATION :
AND ENFORCEMENT (OSMRE), : Notice of Violation
Respondent : 94-020-370-003

Your application for review under section 525 of the Surface Mining Control and Reclamation Act of 1977 was received in this office on June 3, 1994.

This proceeding has been assigned the docket number shown above. Kindly refer to that docket number in all future correspondence.

This matter has been assigned to:

Office of Hearings and Appeals
U.S. Department of the Interior
6432 Federal Building
Salt Lake City, UT 84138

Please direct all pleadings, papers, and other documents relating to this matter to the Salt Lake City office. Copies must be served upon all parties involved.

Phillip G. Kiko
Deputy Director

Distribution:

Fred W. Finlinson, Esq., Callister, Duncan & Nebeker, P.C.,
Suite 800 Kennecott Building, Salt Lake City, UT 84133

Office of the Regional Solicitor, U.S. Department of the Interior,
Denver Federal Center, P.O. Box 25007, Denver, CO 80225

Associate Solicitor, Division of Surface Mining, U.S. Department of the
Interior, 18th and C Streets, NW., SOL-ER-6311-MIB,
Washington, DC 20240

John Heider, Chief, Program Support Branch, OSMRE, Western Support
Center, Brooks Towers, 1020 15th St., Denver, CO 80202
and Enforcement Section, OSMRE,



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 3, 1994

SUNNYSIDE COGENERATION	:	Docket No. DV 94-11-R
ASSOCIATED, a Utah joint venture,	:	
	:	Application for Review and Temporary
Applicant	:	Relief
	:	
v.	:	Notice of Violation
	:	No. 94-020-370-003
	:	
OFFICE OF SURFACE MINING	:	Permit No. ACT\007\035
RECLAMATION AND	:	
ENFORCEMENT (OSMRE),	:	
	:	Carbon County, Utah
Respondent	:	

NOTICE OF HEARING

In the above entitled matter a hearing on the issue of whether temporary relief should be granted is set for **9:00 a.m. on Tuesday, June 7, 1994, in Conference Room 8424, Federal Building, 125 South State Street, Salt Lake City, Utah.**

The hearing will be for the purpose of receiving oral testimony under oath, and documentary evidence on all material issues. The matters of fact and law involved are set forth in the pleadings filed by the parties.

Each party must pay the fees and other charges of its attorney and attendance fees and other costs of witnesses who, at the party's request, appear at the hearing. A verbatim stenographic record of the hearing will be made and may be purchased.


John R. Rampton, Jr.
District Chief
Administrative Law Judge

Distribution

By Certified Mail:

Brian W. Burnett, Esq.
Callister, Duncan & Nebeker
Attorneys at Law
Suite 800 Kennecott Building
Salt Lake City, Utah 84133

DeAnn L. Owen, Esq.
Office of the Field Solicitor
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Denver Federal Center
Denver, Colorado 80225-0007



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 6, 1994

SUNNYSIDE COGENERATION	:	Docket No. DV 94-11-R
ASSOCIATED, a Utah joint venture,	:	
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	Notice of Violation
	:	No. 94-020-370-003
OFFICE OF SURFACE MINING	:	
RECLAMATION AND	:	
ENFORCEMENT (OSMRE),	:	Permit No. ACT\007\035
	:	
Respondent	:	Carbon County, Utah

AMENDED NOTICE OF HEARING

In accord with discussion among the parties and me, and agreement as to certain matters, during telephone conference on the morning of June 6 (applicant represented by Messrs. Finlinson and Burnett, respondent by Ms. Owen):

1. The hearing on the issue of whether temporary relief should be granted is continued from June 7 until June 15. It will therefore be held commencing at **9:00 a.m.** on **Wednesday, June 15, 1994**, in **Room 250, Tax Court, American Towers, 46 West 300 South, Salt Lake City, Utah.**

2. Respondent will cause the "Time for Abatement" as to item "1" of the pertinent Notice of Violation to be extended to at least June 17, 1994 (at 5:30 p.m.).

3. Each party will provide the other, and this office, a list of expected witnesses and exhibits by June 9.

The hearing as now set is on the application for temporary relief. Discussion was had during the telephone conference on whether economies by all concerned could be achieved

by concurrently holding the hearing on the application for review. If the parties agree to do so, I contemplate receipt at the hearing of proposed findings and conclusions, and issuing a ruling from the bench, or within 24 hours (*see* 43 CFR 4.1266(b)(7)) on the issue of temporary relief; thereafter issuing a written decision on the application for review, following briefing opportunity. Any requests for alternative handling will be considered.


Harvey C. Sweitzer
Administrative Law Judge

Distribution

By Certified Mail and Fax:

Brian W. Burnett, Esq.
Callister, Duncan & Nebeker
Attorneys at Law
Suite 800 Kennecott Building
Salt Lake City, Utah 84133

DeAnn L. Owen, Esq.
Office of the Field Solicitor
U.S. Department of the Interior
P.O. Box 25007 (D-105)
Denver Federal Center
Denver, Colorado 80225-0007



United States Department of the Interior

EXHIBIT 5

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

June 6, 1994

ORDER

SUNNYSIDE COGENERATION ASSOCIATED, a Utah joint venture,	:	Docket No. DV 94-11-R
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	Notice of Violation
	:	No. 94-020-370-003
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE),	:	Permit No. ACT\007\035
	:	
Respondent	:	Carbon County, Utah
	:	

Issues To Be Addressed At Hearing

Telephone conference was held on June 7, 1994, by the undersigned Judge with counsel for applicant and respondent in the above captioned case wherein it was confirmed and agreed by both counsel that the hearing on June 15, 1994, will address the issues in both the application for review and the application for temporary relief as contemplated in the final paragraph of the Amended Notice of Hearing issued herein on June 6, 1994.

Ramon M. Child
Administrative Law Judge

Distribution
By Certified Mail:

Brian W. Burnett, Esq.
Callister, Duncan & Nebeker
Attorneys at Law
Suite 800 Kennecott Building
Salt Lake City, Utah 84133

DeAnn L. Owen, Esq.
Office of the Field Solicitor
U.S. Department of the Interior
P.O. Box 25007 (D-105)
Denver Federal Center
Denver, Colorado 80225-0007

U.S. DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement

EXHIBIT

6

VACATION OR TERMINATION OF NOTICE OF VIOLATION OR CESSATION ORDER

Name of Permittee <input checked="" type="checkbox"/> Permittee No Permit <input type="checkbox"/>		Originating Office Address C-S M. 505 Marquette Blvd Suite 1200 Albuquerque, NM 87102 Telephone Number 505-766-1486	
Mailing Address Box 58087, Salt Lake City, UT 84158			
Name of Mine Processing Plant Surface <input checked="" type="checkbox"/> Other (Specify) <input type="checkbox"/> Underground <input type="checkbox"/>			
Telephone Number 801-447-6	5. County Carbon	State UT	
Operator's Name Sunajidi Industries Inc.		8. Date of Inspection 6/10/94 Administrative	
Mailing Address 50 South 900 West Suite 200 Salt Lake City UT 84107		9. Time of Inspection From _____ a.m. To _____ a.m. p.m. p.m.	
State Permit Number 10071035	11. NPDES Number	12. MSHA ID Number	13. OSM Mine Number

ACTIONS TAKEN

Authority: Under the authority of the Surface Mining Control and Reclamation Act of 1977 (P.L. 95-87; 30 U.S.C. 1201) the following action is taken:

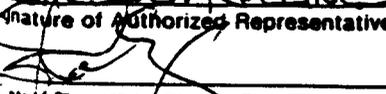
Notice of Violation Number 94-020-370-003	Dated 6/2/94	15. Cessation Order Number - - -	Dated
--	-----------------	-------------------------------------	-------

VIOLATION 1 OF 1 IS Terminated Vacated for the Following Reasons:
 violation is terminated 6/3/94. DCGM reviewed Sunajidi's
 permit and determined that adequate bond exists.

VIOLATION _____ OF _____ IS Terminated Vacated for the Following Reasons:

VIOLATION _____ OF _____ IS Terminated Vacated for the Following Reasons:

EXHIBIT R-13

Name of Authorized Representative Keith S. Rollins	Identification Number 370
Signature of Authorized Representative 	Effective Date 6/3/94

P.P.



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

EXHIBIT 7

July 18, 1994

ORDER

SUNNYSIDE COGENERATION	:	Docket No. DV 94-11-R
ASSOCIATED, a Utah joint venture,	:	
	:	
Applicant	:	Application for Review and Temporary Relief
	:	
v.	:	Notice of Violation
	:	No. 94-020-370-003
	:	
OFFICE OF SURFACE MINING	:	
RECLAMATION AND	:	Permit No. ACT\007\035
ENFORCEMENT (OSMRE),	:	
	:	
Respondent	:	Carbon County, Utah

Notice of Filing of Transcript

Parties to the above-captioned action are notified that the reporter's transcript of the hearing conducted herein at Salt Lake City, Utah, June 15, 1994, has been filed with this office.

The parties are allowed until not later than August 1, 1994, to file Proposed Decision which shall include proposed Findings of Fact, and Conclusions of Law. Proposed Findings of Fact should be supported by reference to the appropriate pages of the transcript and/or exhibits received in evidence.

Each party is allowed until not later than August 16, 1994, in which to file a response to the opponent's Proposed Decision.

Submittals in response to this notice shall be filed in original and one copy and xerox copies of texts or cases cited in the Proposed Decision or the Response other than

publications of the Department of the Interior, shall be attached to the copy of the document filed.

Dated: July 18, 1994



Ramon M. Child
Administrative Law Judge

Distribution

By Regular Mail:

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Callister, Duncan & Nebeker
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Salt Lake City, Utah 84133

DeAnn L. Owen, Esq.
Office of the Field Solicitor
U.S. Department of the Interior
P.O. Box 25007 (D-105)
Denver Federal Center
Denver, Colorado 80225-0007



United States Department of the Interior

EXHIBIT 8OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF SURFACE MINING AND RECLAMATION
APPEALS4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203RECEIVED
AUG 1 7 1981

UNIVERSAL COAL CO.

OFFICE OF HEARINGS AND APPEALS
LOUISVILLE, KENTUCKY

IBSMA 81-43

Decided July 28, 1981

Appeals by Jerry Crutchfield, Universal Coal Company, and the Office of Surface Mining Reclamation and Enforcement from the January 30, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. KC 1-2-R granting temporary relief to the company from the abatement requirements in the fourth modification of Notice of Violation No. 80-4-4-6, which alleged a violation of the hydrologic balance protection requirements of 30 CFR 715.17.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications

Because temporary relief is an extraordinary remedy that may be requested in a pending case, an application for temporary relief not preceded or accompanied by an application for review of a notice, order, or civil penalty should be dismissed.

2. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

A modification of a notice of violation can change obligations in any way necessary to ensure compliance with the Act and regulations so long as the specificity requirements of sec. 521(a)(5) of the Act are met.

3. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

OSM does not have authority to extend the abatement period in a notice of violation beyond 90 days.

APPEARANCES: Gary S. Dyer, Esq., and Stephen W. Jacobson, Esq., Lathrop, Koontz, Richter, Clagett & Norquist, Kansas City, Missouri, for Intervenor Jerry and Neta Crutchfield; N. William Phillips, Esq., Phillips & Spencer, Milan, Missouri, and George Anetakis, Esq., Frankovitch & Anetakis, Weirton, West Virginia, for Universal Coal Company; and Bruce A. Cryder, Esq., Field Solicitor, Gerald A. Thornton, Esq., Office of the Field Solicitor, Kansas City, Missouri, Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor, Branch of Litigation and Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF
SURFACE MINING AND RECLAMATION APPEALS

Review has been sought of a January 30, 1981, decision of Administrative Law Judge Frederick A. Miller in Docket No. KC 1-2-R by

all three parties below: Universal Coal Company (Universal), the Office of Surface Mining Reclamation and Enforcement (OSM), and Intervenor Jerry and Neta Crutchfield (Crutchfield). The decision appealed from granted temporary relief to Universal from the abatement measures required in the fourth modification of Notice of Violation No. 80-4-4-6, issued to Universal by OSM pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act) 1/ and its implementing regulations. Although we affirm the result reached below, we do so solely on the basis of the discussion set forth in this opinion.

Background

On July 11-12, 1979, OSM inspected Universal's pit #051 in Randolph County, Missouri. As a result of that inspection, OSM issued Notice of Violation No. 79-IV-7-9, alleging seven violations of the Act and regulations. Violation 3 charged that Universal had failed to design, construct, and maintain a stream diversion channel as required by 30 CFR 715.17(d). Universal sought review of this notice of violation in Docket No. KC 9-6-R, and the Administrative Law Judge noted that violation 3 was terminated after Universal "completed remedial action sufficient to make the structure acceptable as a temporary diversion on the understanding that the entire area would be reclaimed within 1 year" (Decision in KC 9-6-R at 7). Because OSM's authority to regulate the diversion was upheld, Universal appealed that decision to the

1/ Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201-1328 (Supp. II 1978). All citations to the Act are to Supplement II, 1978.

Board. The decision was affirmed on July 16, 1981. Universal Coal Co.,
3 IBSMA 200, 88 I.D. (1981).

The same diversion continued to cause problems and OSM inspected it again on April 15-16, 1980, after receiving a complaint from downstream landowner Crutchfield. OSM served Universal with Notice of Violation No. 80-4-4-6 by mail on April 24, 1980. The notice alleged that Universal had "failed to minimize disturbance to the prevailing hydrologic balance" in violation of 30 CFR 715.17, and required Universal either to redesign and reconstruct the diversion channel or to return the stream to its original channel. In either case plans were to be submitted to and approved by the State no later than May 19, 1980, with construction to be completed within 21 days following State approval. Because of problems with the designs submitted, OSM modified the notice on August 22, August 29, and September 18, 1980, to require specific designs and to give additional time for abatement. Universal did the work required under these modifications.

On October 30, 1980, OSM modified the notice for a fourth time and required that Universal do abatement work within the stream channel off its permit area. Universal objected to this modification and filed an application for temporary relief with the Hearings Division. A hearing limited to temporary relief was held and on January 30, 1981, temporary relief was granted. All parties, including Intervenor Crutchfield, appealed from various parts of this decision and filed briefs.

Discussion and Conclusions

[1] In seeking review of this notice of violation, Universal filed one document entitled "Application for Temporary Relief." 43 CFR 4.1261 states that "[a]n application for temporary relief may be filed by any party to a proceeding at any time prior to decision by an administrative law judge." (Emphasis added.) This regulation is based on section 525(c) of the Act, 30 U.S.C. § 1275(c), which provides that:

Pending completion of the [administrative] investigation and hearing required by * * * [sections 525(a) and (b)], the applicant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 521 of this title * * * together with a detailed statement giving reasons for granting such relief. [Emphasis added.]

Temporary relief is an extraordinary remedy that may be requested in a pending case. Therefore, a proper application for review of the merits of a notice of violation, cessation order, or civil penalty must either precede or accompany an application for temporary relief. An application for temporary relief standing alone should be dismissed.

The Administrative Law Judge's acceptance of Universal's application for temporary relief can only be justified by construing pages 3 and 4 of the document as also being an application for review sufficient under 43 CFR 4.1164. Such applications, however, should conform to the requirements of the regulations; parties should not depend on

our going to extra lengths to construe them as sufficient when they are not apparently so.

Universal has only sought review of modification 4 of the notice of violation. The Administrative Law Judge granted temporary relief from that modification on the grounds that Universal had shown that it was likely to succeed on the merits of its case.

[2] In reaching his conclusion, the Administrative Law Judge used the Webster's dictionary definition of "modification" to find that it can only decrease obligations, not increase or add new requirements. We do not agree. "Modification" under the Act and regulations encompasses any change, whether it increases or decreases obligations. 2/ The Secretary and his authorized representatives have the authority to issue notices of violation and cessation orders and to modify those notices and orders as experience and changing circumstances require. 3/ See section 521(a)(5) of the Act, 30 U.S.C. § 1271(a)(5). So long as

2/ See, e.g., American Telephone and Telegraph Co. v. FCC, 503 F.2d 612, 613-14 (2d Cir. 1974):

"The petitioner urges that the FCC statutory power to 'modify' its requirements must be construed to mean that the Commission has only the authority to shorten, but not to extend the public notice requirement. We are persuaded that the word 'modify' used in the statute plainly gives the FCC the power to alter or change the notice period whether it results in an increase or decrease of time involved."

See also the numerous cases collected under "modify" in 27 Words and Phrases 662 (1961) and the 1981 cumulative pocket part, as well as the definitions for "modification" and "modify" in Black's Law Dictionary, 905 (5th ed. 1979).

3/ If a person objects to any modification, review of that modification is possible without regard to the underlying notice or order under 43 CFR 4.1162.

a modification meets the specificity requirements of section 521(a)(5), it can change obligations in any way necessary to ensure compliance with the Act and regulations. 4/

[3] The Board notes, however, that modification 4 was written on October 30, 1980, 189 days after service of the original notice of violation. 5/ The modification states that all remedial work previously required was completed, and then orders abatement work not previously specified. Section 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3), provides that "a reasonable time but not more than ninety days" shall be fixed for abatement of a violation. However that section might have been construed, 30 CFR 722.12(d) clearly states that "[t]he total time for abatement as originally fixed and subsequently extended shall not exceed 90 days." (Emphasis added.) The preamble to the initial program regulations states that the Secretary interpreted the Act as providing no authority to extend an abatement period beyond 90 days:

4/ The Administrative Law Judge also concluded that CSM was without authority to order a permittee to take abatement action off the permit area and that such an order would force the permittee to engage in an illegal activity, i.e., to conduct surface coal mining and reclamation operations without a permit. The fact that this opinion does not reach these issues does not mean that the Board agrees with the Administrative Law Judge's conclusions.

5/ This fact was not raised by the parties or addressed by the Administrative Law Judge.

13. Numerous comments were received regarding the prohibition contained in § 722.12(c) [now (d)] of the proposed regulations against extending beyond 90 days the time for abatement as originally fixed and subsequently extended. It was stated that the 90-day limit will create unnecessarily harsh results especially when considered with the provisions of § 722.16 [now 722.17] relating to inability to comply. * * * Several commenters urge that such a result [extending the period beyond 90 days] is authorized by § 521(a)(3) of the Act.

* * * * *

These comments were rejected because § 521(a)(3) is interpreted as prohibiting the setting of an abatement time, initially or as extended, beyond 90 days. * * * Additionally, the legislative history of the Act clearly states that while an inspector may extend the initial abatement period, the total abatement period cannot exceed 90 days.

42 FR 62667 (Dec. 13, 1977).

Therefore, we hold that modification 4 of Notice of Violation No. 80-4-4-6 was not effective, and Universal is not required to comply with it. Since abatement previously ordered had been completed in this case, OSM might have issued a new notice of violation requiring the same abatement as modification 4. 6/ OSM did not have authority, however, to extend the abatement period in this notice of violation

6/ We do not decide whether such a notice would be upheld substantively after administrative review.

beyond 90 days. 7/ The January 30, 1981, decision of the Hearings

Division is affirmed as modified in this decision. 8/

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

Newton Frishberg
Newton Frishberg
Administrative Judge

Although I fully concur, even had the 90-day limitation not expired I would find it difficult to hold that OSM had anything to modify at the time it attempted the fourth modification. At that time Universal had completed everything it was asked to do. Had it not, there might have been something to modify. As it was, the only thing OSM had to do was to admit the abatement required by the notice of violation and its first three modifications had been satisfied. If something were then still amiss, it would seem to me that issuing a new notice of violation would be the proper procedure.

Malvin J. Mirkin

Malvin J. Mirkin

Administrative Judge

7/ We note that this could be a rather harsh conclusion, in this case for OSM, and in other cases for a permittee. We feel, however, that it is compelled by 30 CFR 722.12(d).

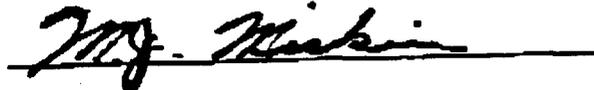
8/ Because of this disposition we do not reach the Administrative Law Judge's failure to make a finding as to whether the granting of temporary relief would adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources. Such a finding is required by section 525(c)(3) of the Act, 30 U.S.C. § 1275(c)(3), and Mauersberg Coal Co., 2 IBSMA 63, 87 I.D. 176 (1980).

We also do not address the Administrative Law Judge's decision on the merits in a temporary relief proceeding. Such a decision was vacated in Cravat Coal Co., 2 IBSMA 136, 87 I.D. 308 (1980).

3 IBSMA 227

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

Although I fully concur, even had the 90-day limitation not expired I would find it difficult to hold that OSM had anything to modify at the time it attempted the fourth modification. At that time Universal had completed everything it was asked to do. Had it not, there might have been something to modify. As it was, the only thing OSM had to do was to admit the abatement required by the notice of violation and its first three modifications had been satisfied. If something were then still amiss, it would seem to me that issuing a new notice of violation would be the proper procedure.



Melvin J. Mirkin

Administrative Judge

EXHIBIT 9

[456 US 694]

INSURANCE CORP. OF IRELAND, LTD. et al., Petitioner,

v

COMPAGNIE DES BAUXITES DE GUINEA

456 US 694, 72 L Ed 2d 492, 102 S Ct 2099

[No. 81-440]

Argued March 23, 1982. Decided June 1, 1982.

Decision: District Court's action in establishing personal jurisdiction as sanction for failure to comply with discovery order under Rule 37 of Federal Rules of Civil Procedure, held not violative of due process.

SUMMARY

A mining company, which was partially owned by a corporation operating in Pennsylvania, purchased business interruption insurance to cover its operations in a foreign country. Part of this insurance was obtained in the London insurance market. The mining company allegedly experienced mechanical problems in its foreign operation, resulting in a business interruption loss. Contending that the loss was covered under its policies, the company brought suit when the insurers refused to indemnify it for the loss. The company brought suit in United States District Court for the Western District of Pennsylvania, asserting jurisdiction based on diversity of citizenship. The foreign insurers raised a number of defenses, including lack of in personam jurisdiction. The mining company filed a discovery request in an attempt to establish jurisdictional facts. After the insurers failed to comply with discovery orders for the requested information, the court gave the insurers sixty more days to produce the requested information, and warned them that it would assume jurisdiction if they did not do so. Five months later, the court, after concluding that the requested material had not been produced, imposed the threatened sanction that the foreign insurers were subject to the in personam jurisdiction of the court under the authority of Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure, which provides that a Federal District Court, as a sanction for failure to comply with discovery orders, may order that the matters regarding which the orders were made shall be taken as established for purposes of the action in question. The United States Court of Appeals for the Third Circuit affirmed, concluding

Briefs of Counsel, p 952, *infra*.

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that the sanction was not violative of due process, and that its imposition did not constitute an abuse of the court's discretion under Rule 37(b)(2)(A). (651 F2d 877).

On certiorari, the United States Supreme Court affirmed. In an opinion by WHITE, J., joined by BURGER, Ch. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, STEVENS and O'CONNOR, JJ., it was held that (1) Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure does not violate due process when applied to enable a District Court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, to proceed on the basis that personal jurisdiction over the recalcitrant party has been established, and (2) the District Court did not abuse its discretion in applying Rule 37(b)(2) of the Federal Rules of Civil Procedure to support a finding of personal jurisdiction since (a) the defendant's course of behavior in failing to provide requested material on jurisdictional facts, coupled with ample warnings of a possible sanction, demonstrates that the sanction was "just" for purposes of the Rule, and (b) the sanction imposed by the District Court was specifically related to the "claim" at issue in the discovery order, the sanction having taken as established the jurisdictional facts that the plaintiff was seeking to establish through discovery.

POWELL, J., concurring in the judgment, expressed the view that (1) where a plaintiff has made a prima facie showing of minimum contacts, its showing is sufficient to warrant a District Court's entry of discovery orders, and where a defendant then fails to comply with these orders, the prima facie showing may be held adequate to sustain the court's finding that minimum contacts exist, either under Rule 37 or under a theory of "presumption" or "waiver", and (2) in the case at bar, the facts alone—unaided by broad jurisdictional theories—more than amply demonstrate that the District Court possessed personal jurisdiction to impose sanctions under Rule 37 and otherwise to adjudicate the case.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law §§ 748, 828 — discovery order — sanction — establishment of jurisdiction

1a-1c. Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure—which provides that a Federal District Court, as a sanction for failure to comply with discovery orders, may order that the matters regarding which the orders were made shall be taken as established for purposes of the action in question in accordance with the claim of the party obtaining the order—does not violate due process when applied to enable a District Court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts,

to proceed on the basis that personal jurisdiction over the recalcitrant party has been established; due process is violated by a rule establishing legal consequences of a failure to produce evidence only if such behavior will not support the presumption that the refusal to produce material evidence is an admission of the lack of merit of an asserted defense, and a proper application of Rule 37(b)(2)(A) supports such a presumption as a matter of law.

Courts § 228 — validity of federal court order — jurisdiction

2. The validity of an order of a federal

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

- 23 Am Jur 2d, Depositions and Discovery § 256
- 26 Federal Procedure, L Ed, Discovery and Depositions §§ 26:346, 26:351
- 8 Federal Procedural Forms, L Ed, Discovery and Depositions § 23:7
- 11 Am Jur Pl & Pr Forms (Rev), Federal Practice and Procedure, Forms 1231 et seq.
- USCS, Federal Rules of Civil Procedure, Rule 37(b)
- US L Ed Digest, Constitutional Law §§ 748, 828; Discovery and Inspection § 15
- L Ed Index to Annos, Depositions and Discovery; Due Process of law; Federal Rules of Civil Procedure
- ALR Quick Index, Discovery; Due Process of Law; Rules of Civil Procedure
- Federal Quick Index, Depositions and Discovery; Due Process of Law; Federal Rules of Civil Procedure

ANNOTATION REFERENCES

"Minimum contacts" requirement of Fourteenth Amendment's due process clause (rule of *International Shoe Company Co. v Washington*) for state court's assertion of jurisdiction over nonresident defendant. 62 L Ed 2d 853.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, for grossly negligent failure to obey discovery order. 49 ALR Fed 831.

Sanctions for failure to make discovery under Federal Civil Procedure Rule 37 as affected by defaulting party's good faith attempts to comply. 2 ALR Fed 811.

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court depends upon that court's having jurisdiction over both the subject matter and the parties.

Courts §§ 231, 243, 247 — subject matter jurisdiction — nature consequences

3. The subject matter jurisdiction of a federal court—which is a statutory as well as an Article III requirement—functions as a restriction on federal power, and contributes to the characterization of the federal sovereign; consequently, no action of the parties can confer subject matter jurisdiction upon a federal court, their consent is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Judgment §§ 333, 334 — subject matter jurisdiction — collateral attack

4a, 4b. A party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question in a collateral attack upon an adverse judgment; principles of res judicata apply to jurisdictional determinations, both subject matter and personal.

Courts § 229 — personal jurisdiction — minimum contacts

5a, 5b. There must be "minimum contacts" between a nonresident defendant and the forum state for a federal court to assert personal jurisdiction over the defendant; the test for personal jurisdiction requires that the maintenance of the suit not offend traditional notions of fair play and substantial justice, the requirement that a court have personal jurisdiction flowing not from Article III of the Federal Constitution but from the due process clause.

Courts §§ 4, 17 — personal jurisdiction — waiver and estoppel

6. The requirement that a court have personal jurisdiction can, like other individual rights, be waived, and, for various reasons, a defendant may also be estopped from raising the issue; unlike subject matter jurisdiction, which even an appellate court may review sua

sponte, a defense of lack of jurisdiction over the person is waived if not timely raised in an answer or responsive pleading.

Courts § 25; Judgment §§ 121.5, 333, 334 — collateral challenge to judgment — submission to jurisdiction — res judicata

7. A defendant is always free to ignore judicial proceedings, risk a default judgment and then challenge the judgment on jurisdictional grounds in a collateral proceeding; by submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction and that decision will be res judicata on that issue in any further proceedings.

Discovery and Inspection § 15 — discovery order — imposition of sanction — abuse of discretion

8. In determining whether Rule 37(b)(2) of the Federal Rules of Civil Procedure has been properly applied by a Federal District Court under the circumstances of a particular case, the question is not whether the United States Supreme Court, or a Federal Court of Appeals, would as an original matter have applied the Rule's sanction, but rather whether the District Court abused its discretion in so doing.

Discovery and Inspection § 15 — discovery order — sanction — abuse of discretion

9. A Federal District Court does not abuse its discretion in applying Rule 37(b)(2) of the Federal Rules of Civil Procedure to support a finding of personal jurisdiction where (1) the defendant's course of behavior in failing to provide requested material on jurisdictional facts, coupled with ample warnings of a possible sanction, demonstrates that the sanction was "just" for purposes of the Rule, and (2) the sanction imposed by the District Court was specifically related to the "claim" at issue in the discovery order, the sanction having taken as established the jurisdictional facts that the plaintiff was seeking to establish through discovery.

SYLLABUS BY REPORTER OF DECISIONS

Federal Rule of Civil Procedure 37(b)(2)(A) provides that a district court, as a sanction for failure to comply with discovery orders, may enter "[a]n order that the matters regarding which the [discovery] order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Asserting diversity jurisdiction, respondent, a Delaware corporation with its principal place of business in the Republic of Guinea, filed suit against various insurance companies in the United States District Court for the Western District of Pennsylvania to recover on a business interruption policy. When certain of the defendants (a group of foreign insurance companies, including petitioners) raised the defense of lack of personal jurisdiction, respondent attempted to use discovery in order to establish jurisdictional facts. After petitioners repeatedly failed to comply with the court's orders for production of the requested information, the court warned them that unless they complied by a specified date, it would assume, pursuant to Rule 37(b)(2)(A), that it had personal jurisdiction. When petitioners again failed to comply, the court imposed the sanction, and the Court of Appeals affirmed, concluding that imposition of the sanction fell within the trial court's discretion under Rule 37(b)(2)(A) and that the sanction did not violate petitioners' due process rights.

Held:

1. Rule 37(b)(2)(A) may be applied to

support a finding of personal jurisdiction without violating due process. Unlike subject-matter jurisdiction, which is an Art III as well as a statutory requirement, the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest. Because it protects an individual interest, it may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. Due process is violated by a rule establishing legal consequences of a failure to produce evidence only if the defendant's behavior will not support the presumption that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Hammond Packing Co. v Arkansas*, 212 US 322, 351, 53 L Ed 530, 29 S Ct 370. A proper application of Rule 37(b)(2)(A) will, as a matter of law, support such a presumption.

2. The District Court did not abuse its discretion in applying Rule 37(b)(2)(A) in this case. The record establishes that imposition of the sanction here satisfied the Rule's requirements that the sanction be both "just" and specifically related to the particular "claim" that was at issue in the discovery order. 651 F2d 877, affirmed.

White, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Marshall, Blackmun, Rehnquist, Stevens, and O'Connor, JJ., joined. Powell, J., filed an opinion concurring in the judgment.

APPEARANCES OF COUNSEL

Edmund K. Trent argued the cause for petitioners.
Cloyd R. Mellott argued the cause for respondent.
Briefs of Counsel, p 952, *infra*.

OPINION OF THE COURT

[456 US 695]

Justice White delivered the opinion of the Court.

[1a] Rule 37(b), Federal Rules of

Civil Procedure, provides that a district court may impose sanctions for failure to comply with discovery orders. Included among the available sanctions is:

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"An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Rule 37(b)(2)(A).

The question presented by this case is whether this Rule is applicable to facts that form the basis for personal jurisdiction over a defendant. May a district court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction over the recalcitrant party has been established?

[456 US 696]

Petitioners urge that such an application of the Rule would violate due process: If a court does not have jurisdiction over a party, then it may not create that jurisdiction by judicial fiat.¹ They contend also that until a court has jurisdiction over a party, that party need not comply with orders of the court; failure to comply, therefore, cannot provide the ground for a sanction. In our view, petitioners are attempting to create a logical conundrum out of a fairly straightforward matter.

1. The petition with which we deal in this case was filed as a cross-petition in response to the petition for certiorari filed in No. 81-290. *Compagnie des Bauxites de Guinee v Insurance Corp. of Ireland, Ltd.* We granted the cross-petition, limiting the grant to the question of the validity of the Rule 37(b)(2) sanction. 454 US 963, 70 L Ed 2d 377, 102 S Ct 502 (1981). We shall refer to the cross-petitioners as "petitioners" and to the cross-respondent as "respondent."

2. The District Court described these excess insurers as follows:

"Of the 21 Excess Insurers, five are English companies representing English domestic interests but insuring risks throughout the world, particularly in Pennsylvania. Seven are English companies which represent non

I

Respondent *Compagnie des Bauxites de Guinee* (CBG) is a Delaware corporation, 49% of which is owned by the Republic of Guinea and 51% is owned by Halco (Mining) Inc. CBG's principal place of business is in the Republic of Guinea, where it operates bauxite mines and processing facilities. Halco, which operates in Pennsylvania, has contracted to perform certain administrative services for CBG. These include the procurement of insurance.

In 1973, Halco instructed an insurance broker, Marsh & McLennan, to obtain \$20 million worth of business interruption insurance to cover CBG's operations in Guinea. The first half of this coverage was provided by the Insurance Company of North America (INA). The second half, or what is referred to as the "excess" insurance, was provided by a group of 21 foreign insurance companies,² 14 of which are petitioners in this action (the excess insurers).³

[456 US 697]

Marsh & McLennan requested Bland Payne to obtain the excess insurance in the London insurance market. Pursuant to normal business practice

"[i]n late January and in Febru-

English parents, or affiliates. The United States, Japan and Israel are the nationalities of two each of the Excess Insurer Defendants. Switzerland and the Republic of Ireland are the nationalities of one each of the Excess Insurer Defendants. The remaining Excess Insurer Defendant is a Belgium Company which represents the United States parent." 1 App 196a.

3. Four of the excess insurers did not contest personal jurisdiction in the District Court. *Id.*, at 105a. The Court of Appeals directed the dismissal of the complaint with respect to three others. *Compagnie des Bauxites de Guinee v Insurance Co. of North America*, 651 F2d 877, 886 (1981). CBG challenges the latter action in its petition for certiorari in No. 81-290.

ary, 1974, Bland Payne presented to the excess insurer [petitioners] a placing slip in the amount of \$10,000,000, in excess of the first \$10,000,000. [Petitioners] initialed said placing slip, effective February 12, 1974, indicating the part of said \$10,000,000 each was willing to insure."⁴ Finding 27 of the District Court, 2 App 347a.

Once the offering was fully subscribed, Bland Payne issued a cover note indicating the amount of the coverage and specifying the percentage of the coverage that each excess insurer had agreed to insure. No separate policy was issued; the excess insurers adopted the INA policy "as far as applicable."

Sometime after February 12, CBG allegedly experienced mechanical problems in its Guinea operation, resulting in a business interruption loss in excess of \$10 million. Contending that the loss was covered under its policies, CBG brought suit when the insurers refused to indemnify CBG for the loss. Whatever the mechanical problems experienced by CBG, they were perhaps minor compared to the legal difficulties encountered in the courts.

[456 US 698]

In December 1975, CBG filed a two-count suit in the Western District of Pennsylvania, asserting jurisdiction based on diversity of citizenship. The first count was against INA; the second against the excess insurers. INA did not challenge personal or subject-matter jurisdiction of the District Court. The answer of

the excess insurers, however, raised a number of defenses, including lack of in personam jurisdiction. Subsequently, this alleged lack of personal jurisdiction became the basis of a motion for summary judgment filed by the excess insurers.⁵ The issue in this case requires an account of respondent's attempt to use discovery in order to demonstrate the court's personal jurisdiction over the excess insurers.

Respondent's first discovery request—asking for "[c]opies of all business interruption insurance policies issued by Defendant during the period from January 1, 1972 to December 31, 1975"—was served on each defendant in August 1976. In January 1977, the excess insurers objected, on grounds of burdensomeness, to producing such policies. Several months later, respondent filed a motion to compel petitioners to produce the requested documents. In June 1978, the court orally overruled petitioners' objections. This was followed by a second discovery request in which respondent narrowed the files it was seeking to policies which "were delivered in . . . Pennsylvania . . . or covered a risk located in . . . Pennsylvania." Petitioners now objected that these documents were not in their custody or control; rather, they were kept by the brokers in London. The court ordered petitioners to request the information from the brokers, limiting the request to policies covering the period from 1971 to date. That was in July 1978; petitioners were given 90 days to produce the infor-

4. One of the excess insurers, L'Union Atlantique S.A. d'Assurances, does business in Brussels, and was sent a separate placing slip.

5. The motion for summary judgment was filed on May 20, 1977. In it, 17 of the excess

insurers alleged a lack of in personam jurisdiction and all 21 excess insurers sought dismissal on the ground of forum non conveniens. The District Court denied the motion on April 19, 1979.

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mation. On November 8, petitioners [456 US 699] were given an additional 30 days to complete discovery. On November 24, petitioners filed an affidavit offering to make their records, allegedly some 4 million files, available at their offices in London for inspection by respondent. Respondent countered with a motion to compel production of the previously requested documents. On December 21, 1978, the court, noting that no conscientious effort had yet been made to produce the requested information and that no objection had been entered to the discovery order in July, gave petitioners 60 more days to produce the requested information. The District Judge also issued the following warning:

"[I]f you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under Rule of Civil Procedure 37(b), subsection 2(A), that there is jurisdiction." 1 App 115a.

A few moments later he restated the warning as follows: "I will assume that jurisdiction is here with this court unless you produce statistics and other information in that regard that would indicate otherwise." *Id.*, at 116a.

On April 19, 1979, the court, after

6. On March 22, 1979, the excess insurers instituted a suit against CBG in England, attacking the validity of insurance contract. In its April 19 decision, the District Court found that "the commencement of the separate action in England [was] oppressive, unfair, and an act of bad faith under all of the circumstances." 1 App 203a. It, therefore, enjoined the continuation of that suit. This aspect of the District Court decision was reversed by the Court of Appeals. Respondent seeks certiorari review of that decision (see n 1, *supra*).

7. It reversed as to three of the excess

concluding that the requested material had not been produced, imposed the threatened sanction, finding that "for the purpose of this litigation the Excess Insurers are subject to the in personam jurisdiction of this Court due to their business contacts with Pennsylvania." *Id.*, at 201a. Independently of the sanction, the District Court found two other grounds for holding that it had personal jurisdiction over petitioners. First, on the record established, it found that petitioners had sufficient business contacts with Pennsylvania to fall within the Pennsylvania long-arm statute. Second, in adopting the terms of the INA contract with CBG—a Pennsylvania insurance contract—the excess insurers implicitly agreed to submit to the jurisdiction of the court.⁶

[456 US 700]

Except with respect to three excess insurers, the Court of Appeals for the Third Circuit affirmed the jurisdictional holding, relying entirely upon the validity of the sanction.⁷ *Compagnie des Bauxites de Guinea v Insurance Co. of North America*, 651 F2d 877 (1981). That court specifically found that the discovery orders of the District Court did not constitute an abuse of discretion and that imposition of the sanction fell within the limits of trial court discretion under Rule 37(b):

insurers on the grounds that they had complied with the discovery orders and that their contacts with Pennsylvania were not sufficient to justify exercise of the Pennsylvania long-arm statute. It also held that the District Court had abused its discretion in enjoining the action in England. Judge Gibbons dissented on the propriety of the sanction, arguing that the District Court had abused its discretion. He also expressed some doubt that a Rule 37 sanction could ever be used as the source of personal jurisdiction. 651 F2d, at 892, n 4.

"The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery." 651 F2d, at 885.

Furthermore, it held that the sanction did not violate petitioners' due process rights, because it was no broader than "reasonably necessary" under the circumstances.

Because the decision below directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Familia de Boom v Arosa Mercantil, S.A.*, 629 F2d 1134 (1980), we granted certiorari.⁸ 454 US 963, 70 L Ed 2d 377, 102 S Ct 502 (1981).

[456 US 701]

II

In *McDonald v Mabee*, 243 US 90, 61 L Ed 608, 37 S Ct 343 (1917), another case involving an alleged lack of personal jurisdiction, Justice Holmes wrote for the Court, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Id.*, at 91, 61 L Ed 608, 37 S Ct 343. Petitioners' basic submission is that to apply Rule 37(b)(2) to jurisdictional facts is to allow fiction to get the better of fact and that it is impermissible to use a fiction to establish judicial power, where, as a matter of fact, it does not exist. In our view, this represents a funda-

mental misunderstanding of the nature of personal jurisdiction.

[2] The validity of an order of a federal court depends upon the court's having jurisdiction over both the subject matter and the parties. *Stoll v Gottlieb*, 305 US 165, 171, 72 L Ed 104, 59 S Ct 134 (1933); *Thompson v Whitman*, 18 Wall 465, 21 L Ed 897 (1874). The concepts of subject-matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. Petitioners fail to recognize the distinction between the two concepts—speaking instead in general terms of "jurisdiction"—although their argument's strength comes from conceiving jurisdiction only as subject-matter jurisdiction.

Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Art III, § 2, cl 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only

[456 US 702]

exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art III, § 1.

[3, 4a] Subject-matter jurisdiction, then, is an Art III as well as a statutory requirement; it functions as

8. In *Familia de Boom*, the Fifth Circuit held that a sanction under Rule 37(b)(2) is valid only if the court has personal jurisdiction over the party that has refused compliance with a court order. Personal jurisdiction must, it held, appear from the record independently of the sanction. The Courts of Appeals

for the Fourth and Eighth Circuits, on the other hand, have agreed with the Third Circuit on the appropriateness of a sanction on the issue of personal jurisdiction. *English v 21st Phoenix Corp.*, 590 F2d 723 (CA8 1979); *Lekkas v Liberian M/V Caledonia*, 443 F2d 10, 11 (CA4 1971).

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a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California v LaRue*, 409 US 109, 34 L Ed 2d 342, 93 S Ct 390 (1972), principles of estoppel do not apply, *American Fire & Casualty Co. v Finn*, 341 US 6, 17-18, 95 L Ed 702, 71 S Ct 534 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this

court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, C. & L. M. R. Co. v Swan*, 111 US 379, 382, 28 L Ed 462, 4 S Ct 510 (1884).⁹

[5a] None of this is true with respect to personal jurisdiction. The requirement that a court have personal jurisdiction flows not from Art III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.¹⁰ Thus, the test for personal jurisdiction

[456 US 703]

requires that "the maintenance

9. [4b] A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist. v Baxter State Bank*, 308 US 371, 84 L Ed 329, 60 S Ct 317 (1940); *Stoll v Gottlieb*, 305 US 165, 84 L Ed 329, 60 S Ct 317 (1938).

10. [5b] It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States. For example, in *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291-292, 62 L Ed 2d 490, 100 S Ct 559 (1980), we stated:
"[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts do not

reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (Citation omitted.)

Contrary to the suggestion of Justice Powell, post, at 713-714, 72 L Ed 2d, at 508-509, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum State. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v Washington*, 326 US 310, 316, 90 L Ed 95, 66 S Ct 154 (1945), quoting *Milliken v Meyer*, 311 US 457, 463, 85 L Ed 278, 61 S Ct 339 (1940).

[6] Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. In *McDonald v Mabee*, supra, the Court indicated that regardless of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance. A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. In *National Equipment Rental, Ltd. v Szukhent*, 375 US 311, 316, 11 L Ed 2d 354, 84 S Ct 411 (1964), we

[456 US 704]

stated that "parties to a contract may agree in advance to submit to the jurisdiction of a given court," and in *Petrowski v Hawkeye Security Co.*, 350 US 495, 100 L Ed 639, 76 S Ct 490 (1956), the Court upheld the personal jurisdiction of a District Court on the basis of a stipulation entered into by the defendant. In addition, lower federal courts have found such consent implicit in agreements to arbitrate. See *Victory Transport Inc. v Comisaria General de Abastecimientos y Transportes*, 336 F2d 354 (CA2 1964); 2 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 4.02[3], n 22 (1982) and cases listed there. Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See *Adam v Saenger*, 303 US 59, 67-68, 82 L Ed 649, 58 S Ct 454 (1938) ("There is nothing in the Fourteenth Amendment to

prevent a state from adopting a procedure by which a judgment in personam may be rendered in a cross-action against a plaintiff in its courts It is the price which the state may exact as the condition of opening its courts to the plaintiff"); *Chicago Life Ins. Co. v Cherry*, 244 US 25, 29-30, 61 L Ed 966, 37 S Ct 492 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ"). Finally, unlike subject-matter jurisdiction, which even an appellate court may review sua sponte, under Rule 12(h), Federal Rules of Civil Procedure, "[a] defense of lack of jurisdiction over the person . . . is waived" if not timely raised in the answer or a responsive pleading.

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—i. e., certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission

[456 US 705]

to the jurisdiction of the court, whether voluntary or not.

The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under

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Rule 12(h)(1), a waiver of the objection. A sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect. As a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver. Although "a court cannot conclude all persons interested by its mere assertion of its own power," *Chicago Life Ins. Co. v Cherry*, supra, at 29, 61 L Ed 966, 37 S Ct 492, not all rules that establish legal consequences to a party's own behavior are "mere assertions" of power.

[1b] Rule 37(b)(2)(A) itself embodies the standard established in *Hammond Packing Co. v Arkansas*, 212 US 322, 53 L Ed 530, 29 S Ct 370 (1909), for the due process limits on such rules.¹¹ There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.*, at 350-351, 53 L Ed 530, 29 S Ct 370.

[456 US 706]

The situation in *Hammond* was specifically distinguished from that in *Hovey v Elliott*, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale v Rogers*, 357 US 197, 209-213, 2 L Ed 2d 1255, 78 S Ct 1087 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

Petitioners argue that a sanction consisting of a finding of personal jurisdiction differs from all other instances in which a sanction is imposed, including the default judgment in *Hammond Packing*, because a party need not obey the orders of a court until it is established that the court has personal jurisdiction over that party. If there is no obligation to obey a judicial order, a sanction cannot be applied for the failure to comply. Until the court has established personal jurisdiction, moreover, any assertion of judicial power over the party violates due process.

[7] This argument again assumes that there is something unique

11. The Advisory Committee Notes to the Rule specifically stated that "the provisions of the rule find support in [*Hammond Packing Co. v Arkansas*, 212 US 322, 53 L Ed 530, 29 S Ct 370 (1909)]." Final Report of Advisory

Committee on Rules for Civil Procedure 25 (1937). See also *Societe Internationale v Rogers*, 357 US 197, 209, 2 L Ed 2d 1255, 78 S Ct 1087 (1958).

about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights. A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. See *Baldwin v Traveling Mens Ass'n.*, 283 US 522, 525, 75 L Ed 1244, 51 S Ct 517 (1931). By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be *res judicata* on that issue in any further proceedings. *Id.*, at 524, 75 L Ed 1244, 51 S Ct 517; *American Surety Co.*

[456 US 707]

v *Baldwin*, 287 US 156, 166, 77 L Ed 231, 53 S Ct 98 (1932). As demonstrated above, the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straightforward factfinding. A particular rule may offend the due process standard of *Hammond Packing*, but the mere use of procedural rules does not in itself violate the defendant's due process rights.

III

[8, 9] Even if Rule 37(b)(2) may be applied to support a finding of personal jurisdiction, the question remains as to whether it was properly applied under the circumstances of this case. Because the District Court's decision to invoke the sanction was accompanied by a detailed explanation of the reasons for that order and because that decision was upheld as a proper exercise of the District Court's discretion by the

Court of Appeals, this issue need not detain us for long. What was said in *National Hockey League v Metropolitan Hockey Club, Inc.*, 427 US 639, 642, 49 L Ed 2d 747, 96 S Ct 2778 (1976), is fully applicable here: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing" (citations omitted). For the reasons that follow, we hold that it did not.

Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing*, *supra*, the former represents the general due process restrictions on the court's discretion.

In holding that the sanction in this case was "just," we rely specifically on the following. First, the initial discovery request was made in July 1977. Despite repeated orders from the court to provide the requested material, on December 21, 1978, the District Court was able to state that the petitioners

[456 US 708]

"haven't even made any effort to get this information up to this point." 1 App 112a. The court then warned petitioners of a possible sanction. Confronted with continued delay and an obvious disregard of its orders, the trial court's invoking of its powers under Rule 37 was clearly appropriate. Second, petitioners repeatedly agreed to comply with the discovery

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orders within specified time periods. In each instance, petitioners failed to comply with their agreements. Third, respondent's allegation that the court had personal jurisdiction over petitioners was not a frivolous claim, and its attempt to use discovery to substantiate this claim was not, therefore, itself a misuse of judicial process. The substantiality of the jurisdictional allegation is demonstrated by the fact that the District Court found, as an alternative ground for its jurisdiction, that petitioners had sufficient contacts with Pennsylvania to fall within the State's long-arm statute. *Supra*, at 699, 72 L Ed 2d, at 499. Fourth, petitioners had ample warning that a continued failure to comply with the discovery orders would lead to the imposition of this sanction. Furthermore, the proposed sanction made it clear that, even if there was not compliance with the discovery order, this sanction would not be applied if petitioners were to "produce statistics and other information" that would indicate an absence of personal jurisdiction. 1 App 116a. In effect, the District Court simply placed the burden of proof upon petitioners on the issue of personal jurisdiction.¹² Petitioners failed to comply with the discovery order; they also failed to make any attempt to meet this burden of proof. This course of behavior coupled with the ample warnings demonstrate the "justice" of the trial court's order.

Neither can there be any doubt that this sanction satisfies the second requirement. CBG was seeking through discovery

[456 US 709]

to respond to peti-

tioners' contention that the District Court did not have personal jurisdiction. Having put the issue in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. It surely did not have this option once the court had overruled petitioners' objections. Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and Pennsylvania, the critical issue in proving personal jurisdiction. Petitioners' failure to supply the requested information as to its contacts with Pennsylvania supports "the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense." *Hammond Packing*, 212 US, at 351, 53 L Ed 530, 29 S Ct 370. The sanction took as established the facts—contacts with Pennsylvania—that CBG was seeking to establish through discovery. That a particular legal consequence—personal jurisdiction of the court over the defendants—follows from this, does not in any way affect the appropriateness of the sanction.

IV

[1c] Because the application of a legal presumption to the issue of personal jurisdiction does not in itself violate the Due Process Clause and because there was no abuse of the discretion granted a district court under Rule 37(b)(2), we affirm the judgment of the Court of Appeals.

So ordered.

12. Counsel for petitioners agreed to this characterization of the sanction at oral argument. Tr of Oral Arg 47-48.

SEPARATE OPINION

Justice Powell, concurring in the judgment.

The Court rests today's decision on a constitutional distinction between "subject matter" and "in personam" jurisdiction. Under this distinction, subject-matter jurisdiction defines an Art III limitation on the power of federal courts. By contrast, the Court characterizes the limits on in personam jurisdiction solely in terms of waivable personal rights and notions of "fair play." Having done so, it determines

[456 US 710]

that fundamental questions of judicial power do not arise in this case concerning the personal jurisdiction of a federal district court.

In my view the Court's broadly theoretical decision misapprehends the issues actually presented for decision. Federal courts are courts of limited jurisdiction. Their personal jurisdiction, no less than their subject-matter jurisdiction, is subject both to constitutional and to statutory definition. When the applicable limitations on federal jurisdiction are identified, it becomes apparent that the Court's theory could require a sweeping but largely unexplicated revision of jurisdictional doctrine. This revision could encompass not only the personal jurisdiction of federal courts but "sovereign" limitations on state jurisdiction as identified in *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291-293, 62 L Ed 2d 490, 100 S Ct 559 (1980). Fair resolution of this case does not require the Court's broad holding. Accordingly, although I concur in the Court's judgment, I cannot join its opinion.

I

This lawsuit began when the respondent *Compagnie des Bauxites* brought a contract action against the petitioner insurance companies in the United States District Court for the Western District of Pennsylvania. Alleging diversity jurisdiction, respondent averred that the District Court had personal jurisdiction of the petitioners, all foreign corporations, under the long-arm statute of the State of Pennsylvania. See *Compagnie des Bauxites de Guinea v Insurance Co. of North America*, 651 F2d 877, 880-881 (CA3 1981). Petitioners, however, denied that they were subject to the court's personal jurisdiction under that or any other statute. Viewing the question largely as one of fact, the court ordered discovery to resolve the dispute.

Meantime, while respondent unsuccessfully sought compliance with its discovery requests, petitioners brought a parallel action in England's High Court of Justice, *Queens Bench*

[456 US 711]

Division. It was at this juncture that the current issues arose. Seeking to enjoin the English proceedings, respondent sought an injunction in the District Court. Petitioners protested that they were not subject to that court's personal jurisdiction and thus that they lay beyond its injunctive powers. But the District Court disagreed. As a jurisdictional prerequisite to its entry of the injunction, the court upheld its personal jurisdiction over petitioners.¹ It characterized its finding of jurisdiction partly as a sanction for petitioners' noncompliance with its

1. A district court must have personal jurisdiction over a party before it can enjoin its actions. *Zenith Radio Corp. v Hazeltine Re-*

search, Inc., 395 US 100, 111-112, 23 L Ed 2d 129, 89 S Ct 1562 (1969).

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discovery orders under Federal Rule of Civil Procedure 37(b).²

Rule 37(b) is not, however, a jurisdictional provision. As recognized by the Court of Appeals, the governing jurisdictional statute remains the long-arm statute of the State of Pennsylvania. See 651 F2d, at 881. In my view the Court fails to make clear the implications of this central fact: that the District Court in this case relied on state law to obtain personal jurisdiction.

As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own. Under the Rules of Decision Act, 28 USC § 1652 [28 USCS § 1652], they must apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide" See generally *Erie R. Co. v Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817 (1938). Thus, in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State. See, e.g., *Intermeat, Inc. v American Poultry Co.*, 575 F2d 1017 (CA2 1978); *Wilkerson v Fortuna Corp.*,

[456 US 712]

554 F2d 745 (CA5), cert denied, 434 US 939, 54 L Ed 2d 299, 98 S Ct 430 (1977); *Poyner v Erma Werke GMBH*, 618 F2d 1186, 1187 (CA6 1980); *Lakeside Bridge & Steel Co. v Mountain St. Constr. Co.*, 597 F2d 596 (CA7 1979), cert denied, 445 US 907, 63 L Ed 2d 325, 100 S Ct 1087 (1980); *Lakota Girl Scout Council, Inc. v Havey Fundraising Management, Inc.*, 519 F2d 634 (CA8 1975); *Arrowsmith v United Press International*, 320 F2d 219, 226 (CA2 1963); *Forsythe v Overmyer*, 576 F2d 779, 782 (CA9), cert denied, 439 US 864, 58 L Ed 2d 174, 99 S Ct 188 (1978); *Quarles v Fuqua Industries, Inc.*, 504 F2d 1358 (CA10 1974).³

As a result of the District Court's dependence on the law of Pennsylvania to establish personal jurisdiction—a dependence mandated by Congress under 28 USC § 1652 [28 USCS § 1652]—its jurisdiction in this case normally would be subject to the same due process limitations as a state court. See, e.g., *Forsythe v Overmyer*, supra, at 782; *Washington v Norton Mfg., Inc.*, 588 F2d 441, 445 (CA5 1979); *Fisons Ltd. v United States*, 458 F2d 1241, 1250 (CA7 1972).⁴ Thus, the question arises how today's decision is related to cases restricting the personal jurisdiction of the States.

2. The court also found that petitioners in fact had undertaken sufficient business activity in the State to bring them within the reach of the Pennsylvania long-arm statute. See App to Pet for Cert 51a, 53a.

3. As Judge Friendly explained in the leading case of *Arrowsmith v United Press International*, 320 F2d, at 226:

"State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations—for example, affording a fo-

rum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself, to disregard the balance thus struck by the states."

4. It is not contended that there is any federal basis for the exercise of personal jurisdiction by the District Court.

Before today our decisions had established that "minimum contacts" represented a constitutional prerequisite to the exercise of in personam jurisdiction over an unconsenting defendant. See, e.g., *World-Wide Volkswagen Corp. v Woodson*, [456 US 713]

444 US, at 291-293, 62 L Ed 2d 490, 100 S Ct 559; *Hanson v Denckla*, 357 US 235, 251, 2 L Ed 2d 1283, 78 S Ct 1228 (1958); *International Shoe Co. v Washington*, 326 US 310, 316, 90 L Ed 95, 66 S Ct 154 (1945). In the absence of a showing of minimum contacts, a finding of personal jurisdiction over an unconsenting defendant, even as a sanction, therefore would appear to transgress previously established constitutional limitations. The cases cannot be reconciled by a simple distinction between the constitutional limits on state and federal courts. Because of the District Court's reliance on the Pennsylvania long-arm statute—the applicable jurisdictional provision under the Rules of Decisions Act—the relevant constitutional limits would not be those imposed directly on federal courts by the Due Process Clause of the Fifth Amendment, but those applicable to state jurisdictional law under the Fourteenth.

The Court's decision apparently must be understood as related to our state jurisdictional cases in one of two ways. Both involve legal theories that fail to justify the doctrine adopted by the Court in this case.

A

Under traditional principles, the due process question in this case is

5. The Court refers to the respondent's prima facie showing of "minimum contacts" only as one factor indicating that the District Court did not abuse its discretion in entering a finding of personal jurisdiction as a sanction

whether "minimum contacts" exist between petitioners and the foreign State that would justify the State exercising personal jurisdiction. See, e.g., *World-Wide Volkswagen Corp. v Woodson*, supra, at 291-293, 62 L Ed 2d 490, 100 S Ct 559; *Shaffer v Heitner*, 433 US 186, 216, 53 L Ed 2d 683, 97 S Ct 2569 (1977); *Hanson v Denckla*, supra, at 251, 2 L Ed 1283, 78 S Ct 1228. By finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction to impose sanctions under Federal Rule of Civil Procedure 37, the Court must be understood as finding that "minimum contacts" no longer are a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant.⁵ Whenever the Court's r

[456 US 714]

of fairness are not offended, jurisdiction apparently may be upheld.

Before today, of course, our cases had linked minimum contacts and fair play as *jointly* defining the "sovereign" limits on state assertions of personal jurisdiction over unconsenting defendants. See *World-Wide Volkswagen Corp. v Woodson*, supra, at 292-293, 62 L Ed 2d 490, 100 S Ct 559; see *Hanson v Denckla*, supra, at 251, 2 L Ed 2d 1283, 78 S Ct 1228. The Court appears to abandon the rationale of these cases in a footnote. See ante, at 702-703, n 10, 72 L Ed 2d, at 501. But it does not address the implications of its action. By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of States—

under Rule 37(b). See ante, at 708, 72 L Ed 2d, at 505. Generally it views the requirement of personal jurisdiction as a right that may be "established or waived like other rights." Ante, at 706, 72 L Ed 2d, at 504.

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for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court—the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play. And, astonishingly to me, it does so in a case in which this rationale for decision was neither argued nor briefed by the parties.

B

Alternatively, it is possible to read the Court opinion, not as affecting state jurisdiction, but simply as asserting that Rule 37 of the Federal Rules of Civil Procedure represents a congressionally approved basis for the exercise of personal jurisdiction by a federal district court. On this view Rule 37 vests the federal district courts with authority to take jurisdiction over persons not in compliance with discovery orders. This of course would be a more limited holding. Yet the Court does not cast its decision in these terms. And it provides no support for such an interpretation, either in the language or in the history of the Federal Rules.

[456 US 715]

In the absence of such support, I could not join the Court in embracing such a construction of the Rules

of Civil Procedure.⁶ There is nothing in Rule 37 to suggest that it is intended to confer a grant of personal jurisdiction. Indeed, the clear language of Rule 82 seems to establish that Rule 37 should *not* be construed as a jurisdictional grant: "These rules shall not be construed to extend . . . the jurisdiction of the United States district courts or the venue of actions therein." Moreover, assuming that minimum contacts remain a constitutional predicate for the exercise of a State's in personam jurisdiction over an unconsenting defendant, constitutional questions would arise if Rule 37 were read to permit a plaintiff in a diversity action to subject a defendant to a "fishing expedition" in a foreign jurisdiction. A plaintiff is not entitled to discovery to establish essentially speculative allegations necessary to personal jurisdiction. Nor would the use of Rule 37 sanctions to enforce discovery orders constitute a mere abuse of discretion in such a case.⁷ For me at least, such a use of discovery would raise serious questions as to the constitutional as well as the statutory authority of a federal court—in a diversity case—to exercise personal jurisdiction

[456 US 716]

absent

some showing of minimum contacts between the unconsenting defendant and the forum State.

6. Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. Although Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. See, e.g., *Intermeat, Inc. v American Poultry Co.*, 575 F2d 1017 (CA2 1978); *Washington v Norton Mfg., Inc.*, 588 F2d 441, 445 (CA5 1979); *D. Currie, Federal Courts* 858 (2d ed 1975). For this reason Rule 4 frequently has

been characterized as a jurisdictional provision. See, e.g., 374 US 869 (1963) (statement of Black and Douglas, JJ., dissenting from adoption of amendments to the Federal Rules of Civil Procedure); *Currie, supra*, at 858; *Foster, Long-Arm Jurisdiction in Federal Courts*, 1969 *Wis L Rev* 9, 11. As applicable here, Rule 4 relies expressly on state law. See *Fed Rules Civ Proc* 4(d)(7) and (e).

7. Compare the Court's view. *Ante*, at 707, 72 L Ed 2d, at 504.

II

In this case the facts alone—unaided by broad jurisdictional theories—more than amply demonstrate that the District Court possessed personal jurisdiction to impose sanctions under Rule 37 and otherwise to adjudicate this case. I would decide the case on this narrow basis.

As recognized both by the District Court and the Court of Appeals, the respondent adduced substantial support for its jurisdictional assertions. By affidavit and other evidence, it made a prima facie showing of "minimum contacts." See 651 F2d, at 881-882, 886, and n 9. In the view of the District Court, the evidence adduced actually was sufficient to sustain a finding of personal jurisdiction independently of the Rule 37

sanction. App to Pet for Cert 51a, 53a.⁸

Where the plaintiff has made a prima facie showing of minimum contacts, I have little difficulty in holding that its showing was sufficient to warrant the District Court's entry of discovery orders. And where a defendant then fails to comply with those orders, I agree that the prima facie showing may be held adequate to sustain the court's finding that minimum contacts exist, either under Rule 37 or under a theory of "presumption" or "waiver."

Finding that the decision of the Court of Appeals should be affirmed on this ground, I concur in the judgment of the Court.

8. The Court of Appeals deemed it unnecessary to review this alternative basis for the

District Court's finding of jurisdiction. See 651 F2d, at 886, and n 9.