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NOTES: ANOTHER WINNER! DES-BEE-DOVE MANGOS SHALE CASE.

# 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)

February 28, 1995

| | | |
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| PACIFICORP, | : | Docket No. DV 94-7-R |
| Applicant | : | Application for Review and Temporary Relief |
| v. | : | |
| | : | Notice of Violation |
| OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (OSMRE), | : | No. 93-020-190-05 |
| | : | Des-Bee-Dove Mine, Emery County |
| Respondent | : | |

## DECISION

Appearances: John S. Kirkham, Esq., and James R. Haisley, Esq., Salt Lake City, Utah, for applicant;

Jon K. Johnson, Esq., Denver, Colorado, for respondent.

Before: Administrative Law Judges Rampton and Sweitzer

PacifiCorp has filed an Application for Review and an Application for Temporary Relief regarding Notice of Violation (NOV) No. 93-020-190-05. Inspector Thomas Wright of the Office of Surface Mining Reclamation and Enforcement (OSM) issued the NOV to PacifiCorp following a December 1993, Federal oversight inspection of the Des-Bee-Dove Mine, Emery County, Utah. The NOV alleged that PacifiCorp failed to control or prevent erosion on the outslope of a mine road in violation of Utah Administrative Code R645-301-752.210.

PacifiCorp argues that the NOV should be dismissed because OSM has failed to establish a prima facie case showing that a violation occurred. In addition, PacifiCorp argues that the erosion control measures it has implemented are in compliance with the requirements of Utah's erosion control performance standard.

A hearing in the matter was held on January 14, 1994, in Salt Lake City, Utah, before now retired Administrative Law Judge John R. Rampton, Jr. At the conclusion of the hearing, PacifiCorp's Application for Temporary Relief was granted, leaving only the Application for Review at issue. Both parties have agreed to waive further hearing on the Application for Review and have submitted briefs in support of their respective positions, final brief having been filed December 22, 1994. Upon the retirement of Judge Rampton, the case was assigned to the undersigned for decision consistent with 43 U.S.C. § 554(d). Following review of the complete record and the parties' briefs, and for the reasons set out below, I must conclude that no violation occurred and that the NOV should be dismissed.

## Statement of the Facts

The State of Utah, pursuant to sections 503(a) and 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1253(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 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (UDOGM).

PacifiCorp is the permittee of the Des-Bee-Dove Mine (Mine) located in Emery County, Utah. Since 1987, mining operations at the Mine have been in temporary cessation (Ex. R-1).

On June 5, 1991, OSM Inspector Mitchell Rollings conducted a Federal oversight inspection of the Mine, including the outslope of the Mine haul road which was built in the mid-1980's to provide access to the Mine (Tr. 29, 106, 139, 212; Ex. R-1). He observed pervasive evidence of erosion on the outslope of the Mine haul road in the form of gullies and rills running down the slope (Exs. R-1, R-2, R-3). These gullies and rills had been in existence since at least 1987 (Tr. 161).

As a result of Inspector Rollings' observations, OSM issued to UDOGM on June 24, 1991, a ten-day notice (TDN) stating OSM's belief that PacifiCorp was violating applicable law by failing to control or prevent erosion on the outslope of the Mine haul road (Ex. R-1). UDOGM then issued a State Notice of Violation (State NOV) to PacifiCorp regarding the erosional features appearing on the Mine haul road outslope (Ex. A-B). In compliance with the abatement requirements of the State NOV, PacifiCorp submitted to UDOGM an approved sedimentation control plan providing for the installation of water bars, a water control berm, and a water control diversion along the Mine haul road above the road outslope (Tr. 123, 169-170, 174-176, 180-181). Between August 8, 1991, and November 8, 1991, PacifiCorp implemented the sedimentation control plan sufficiently so that the State NOV was terminated by UDOGM on November 8, 1991 (Tr. 125, Ex. A-B).

The implemented controls effectively prevented most of the road runoff from flowing onto the road outslope (Tr. 131-132, 145).

Meanwhile, PacifiCorp and UDOGM organized a task force to determine what other measures might be taken to control or prevent erosion on the road outslope (Tr. 133, Exs. A-F, A-G). The members of the task force include representatives of UDOGM, the U.S. Soil Conservation Service, Utah State University Extension Service, PacifiCorp, and its subsidiary, Energy Western Mining Company (Ex. A-G). Although OSM was invited to take part in the task force, OSM did not participate (Tr. 133-134).

The task force met on November 12, 1991, and concluded that the outslope rills and gullies are caused by water erosion and that the erosion control measures implemented by PacifiCorp should curtail and/or control this erosion (Ex. A-G). The task force also concluded that further erosional control and rehabilitation measures should be deferred pending completion of a study to evaluate erosion control measures and reclamation alternatives (Ex. A-G). Pursuant to the task force's recommendations, PacifiCorp, in 1992, with UDOGM oversight, launched a 3-year study to evaluate various erosion control methods (Ex. A-H, Tr. 188-189).

William Malencik, a UDOGM Reclamation Specialist and member of the task force, explained the reasoning behind the task force's conclusions. He noted that the road outslope is composed of Mancos shale and is very steep (Tr. 130-131; *see also* Tr. 52). By all accounts, Mancos shale is highly susceptible to erosion (Tr. 52, 130). Nevertheless, the outslope was considered stable, showing no evidence of tension cracks or mass movement and having naturally settled since the road's construction in the mid-1980's (Tr. 136, 139; Ex. A-G). Implementation of additional erosion control or rehabilitation measures would require the use of heavy equipment and disturbance of the slope, loosening the soil surface and destabilizing the steep slope (Tr. 131, 136, 139; Ex. A-G). The task force feared that if such measures failed, their implementation would only exacerbate the outslope erosion (Tr. 136; Ex. A-G).

The failure of these measures was a distinct possibility. In addition to being extremely erosive, Mancos shale is very resistant to revegetation because of its high salt content and tendency to form a hard surface crust (Tr. 128-129, 157). In light of these conditions, it was unclear whether implementation of additional measures, such as mulching, netting, tackifiers, and revegetation, would be effective (Tr. 152-153, 155-156, 161-167).

On December 2, 1993, OSM Inspector Thomas Wright conducted an inspection of the Mine and observed that no repair of the outslope rills and gullies had occurred after issuance of the TDN and State NOV in 1991 (Tr. 84-85; Ex. R-12). He concluded that because the rills and gullies had not been repaired, the State NOV had been improperly terminated, necessitating issuance of the NOV to PacifiCorp for its alleged failure to prevent or control erosion on the outslope (Ex. R-12). The NOV ordered PacifiCorp to

remedy the situation by eliminating the rills and gullies and by stabilizing the outslope (Ex. R-12).

Inspector Wright testified that, although he had taken no measurements of the rills and gullies, they appeared to be actively eroding (Tr. 83-84). Measurements taken by PacifiCorp from 1990 through 1993 specifically showed that the gullies were becoming wider and more shallow over time as a result of the sloughing off of the walls of the channels, but that the actual dimensions of the rills and gullies had changed very little (Tr. 90-92, 184).

UDOGM's position is that it weighed the risk of harm against the possible benefit of implementing additional erosion control measures and concluded that the certain harm of initially destabilizing the outslope outweighed the uncertain benefit that additional measures might ultimately produce (Tr. 135-139; Ex. A-G). As Mr. Malencik testified, "[t]he question [was] whether or not all the steps [had] been taken to minimize erosion considering the risk of failure if you did something on the outslope where you'd destabilize that." (Tr. 138-139). He further stated that if UDOGM had been aware of any other current prudent engineering practices that could have been implemented to control or prevent erosion, it would have required their implementation (Tr. 137).

Mr. Malencik concluded that PacifiCorp had done all it could to control or prevent erosion on the outslope in compliance with the Utah performance standards (Tr. 162, 167). OSM Inspector Wright believed that some erosion control measures should have been implemented on the outslope itself, but did not identify any measure which could have been implemented under the circumstances in accordance with current, prudent engineering practices (Tr. 104).

In December 1993, in response to the NOV, PacifiCorp considered using a variety of alternatives to eliminate the rills and gullies (Tr. 204-208). Like UDOGM and the task force, PacifiCorp concluded that efforts to rehabilitate the rills and gullies would destabilize the outslope and might not resolve the erosion problem (Tr. 207-208).

## Discussion

In notice of violation proceedings, OSM has the initial burden of establishing a prima facie case as to the fact of the violation. The ultimate burden of persuasion regarding the fact of the violation rests with PacifiCorp as the applicant for review. 43 CFR 4.1171.

In this case, it is questionable whether OSM established a prima facie case. Assuming, arguendo, that a prima facie case was established, PacifiCorp met its burden of showing that no violation occurred because it has implemented all current prudent engineering practices to control and prevent erosion on the road outslope, as more fully discussed below.

The NOV issued by Inspector Wright alleges that PacifiCorp has violated Utah Administrative Code R645-301-752.210 by failing to "control or prevent erosion on road outslopes." (Ex. R-12). U.A.C. R645-301-752.210, in pertinent part, requires PacifiCorp to "control or prevent erosion * * * by vegetating or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices." OSM claims that some form of erosion control must be on the outslopes themselves in order for erosion control or prevention to be accomplished. As corrective action, the NOV requires PacifiCorp to "eliminate rills and gullies and stabilize slopes." (Ex. R-12)

OSM's position cannot be sustained because the evidence preponderates in favor of a finding that PacifiCorp did all it reasonably could to prevent or control erosion by stabilizing the outslope in accordance with current, prudent engineering practices. The undisputed testimony shows that PacifiCorp had put in place erosion control features including water bars, a water control berm, and a water control diversion. These devices effectively presented road runoff from going onto the road outslope. By the time the NOV was issued, the outslope was stabilized, with very little ongoing erosion.

The great weight of the evidence clearly shows that filling the gullies and/or implementing additional erosion control measures would initially destabilize the slope. The evidence further shows that it is uncertain whether these actions would ultimately result in a reduction, rather than an increase, in erosion on the outslope. Faced with the certain harm of destabilizing the slope and the uncertainty of any ultimate benefit to be gained by attempting to further control erosion, the task force and UDOGM concluded that further attempts to control erosion would not be prudent pending completion of the erosion control studies.

OSM presented no evidence to refute this conclusion that any attempt to further control erosion would not be in accordance with current, prudent engineering practices. There was testimony concerning what common erosion control measures could be used on the outslope. Yet, none of OSM's witnesses identified an erosion control method that would be effective or prudent to implement under the difficult circumstances faced by PacifiCorp. For example, vegetation is a common erosion control device. However, by all accounts, implementation of a vegetation program would initially destabilize the slope, with only a small hope of ultimately succeeding in further stabilizing the slope.

In sum, PacifiCorp cannot be faulted for failing to take further action to control erosion when any such action was likely to result in an increase, rather than a decrease, in erosion. The unrebutted testimony of Mr. Malencik shows that it was not prudent for PacifiCorp to take further action, *i.e.*, that utilization of any additional, available engineering techniques to prevent or control erosion would not be considered prudent under the circumstances.

## Conclusion

Based upon the foregoing, Notice of Violation No. 93-020-190-05 is hereby declared invalid and is dismissed.

Harvey C. Sweitzer
Administrative Law Judge

## APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 43 CFR Part 4 (see enclosed information pertaining to appeals procedures.)

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