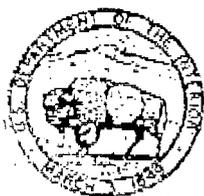


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GENERAL SERVICES ADMINISTRATION

December 12, 1994

PACIFICORP,

Applicant

v.

OFFICE OF SURFACE MINING
RECLAMATION AND
ENFORCEMENT (OSMRE),

Respondent

Docket No. DV 94-15-R

Application for Review and Petition for
Temporary Relief

Cessation Order No. 94-020-370-002

Hunter Coal Preparation Plant, Emery
County, Utah

DECISION

Appearances: David Jordan, Esq., and John S. Kirkham, Esq., Salt Lake City, Utah, for applicant;

DeAnn L. Owen, Esq., Denver, Colorado, for respondent.

Before: Administrative Law Judge Child

Statement of the Case

On September 19, 1994, PacifiCorp filed an Application for Review and Petition for Temporary Relief regarding Cessation Order No. 94-020-370-002 (CO) issued to PacifiCorp by the Office of Surface Mining Reclamation and Enforcement (OSM) on September 15, 1994. The CO charged PacifiCorp, the owner of the Hunter Coal Processing Plant, a.k.a. Cottonwood Coal Blending and Preparation Facility (Preparation Plant), with "[f]ailure to obtain a permit [for the Preparation Plant] in accordance with all applicable requirements of the approved Utah program as found in the State of Utah, R645 Coal Mining Rules." More specifically, the CO alleged that PacifiCorp was in violation of the following provisions of the Utah program: Utah Administrative Code (U.A.C.) R645-300-112.400, -302-261 (1994). The CO also directed PacifiCorp, which operates the Preparation Plant through its wholly owned subsidiary, Energy Western Mining Company (EWM), to cease receiving and processing coal at the Preparation Plant until such time as PacifiCorp obtains a permit for the plant.

The matter came on regularly for hearing on September 23, 1994, in Salt Lake City, Utah. Prior to the hearing, a Federal District Court issued an order restraining further enforcement of the CO until a decision could be rendered in this proceeding. At the hearing, PacifiCorp was granted leave to file an amended application for review and petition for temporary relief. Also, PacifiCorp waived its right to a determination on its petition for temporary relief within 5 days in light of the District Court's restraining order. A decision on the issue of temporary relief was then waived by the parties, leaving only the application for review at issue.

The parties have submitted proposed decisions, including proposed findings and conclusions, and responses in support of their respective positions. To the extent proposed findings or conclusions are consistent with those entered herein, they are accepted; to the extent that they are not so consistent or may be immaterial or irrelevant, they are rejected.

The issues:

- I. Was a prima facie case of the validity of the CO established?
- II. Did PacifiCorp establish that OSM lacked authority to issue the CO and thus overcome the prima facie case?
 - A. Does PacifiCorp's operation of the Preparation Plant through EWM, its subsidiary, constitute "coal mining and reclamation operations" which must be permitted under the Utah program?
 - B. Was OSM required to follow the procedures 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prior to inspecting the site and issuing the CO?
 - C. Did DOGM's interpretation of U.A.C. R645-302-261 constitute "appropriate action?"

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), 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 Part 944. The State's regulatory program for these operations (the Utah program) is administered by the Utah Division of Oil, Gas and Mining (DOGM) (Answer at ¶2).

PacifiCorp is the sole owner and permittee under the Utah program of the Cottonwood/Wilberg mine (CW mine), the Deer Creek mine (DC mine), and the Trail Mountain mine (TM mine) (hereinafter collectively referred to as the "Mines") and is also the sole developer and owner of the Preparation Plant. The Mines and the Preparation Plant are operated by PacifiCorp's wholly owned subsidiary, EWM. (Tr. 91-95, 117; Ex. R-6)

The manager of the CW mine, Anthony C. Pollastro, is the immediate supervisor of the Preparation Plant's supervisor, Jim Hentie (Ex. R-6; Tr. 97, 117). Pollastro is also identified as the person in charge of health and safety on the Mine Safety and Health Administration (MSHA) permit issued for the Preparation Plant (Ex. R-6).

All of the coal processed by the Preparation Plant originates from the Mines and all of the coal from the CW mine goes to the Power Plant, with most of it first being processed by the Preparation Plant (Tr. 46, 117-119; Ex. R-6). Of the coal processed by the Preparation Plant in 1993, 84 percent came from the CW mine, 16 percent came from the DC mine, and less than 1 percent came from the TM mine (Tr. 91; Exs. R-6, R-8). The Preparation Plant is located in Emery County, Utah, outside of the permit boundaries for the Mines, about 12 miles from the CW mine and the shipping point for coal from the DC mine, 23 miles from the DC mine, and 15 miles from the TM mine (Application at 15, Tr. 34, 52, 119, 126; Ex. R-6, R-10).

The Preparation Plant was constructed to process coal to the specifications of PacifiCorp's Hunter Power Plant (Power Plant) (Tr. 128; Ex. R-6). Prior to the construction of the Preparation Plant, PacifiCorp had operated a different coal preparation plant also in Emery County, Utah, which had been permitted by DOGM (Ex. R-5).

When PacifiCorp acquired the land to build the Power Plant facilities, the property for the future Preparation Plant site was included (Tr. 88). The Preparation Plant is now located adjacent to the Power Plant, but they are separated by a fence (Tr. 51, 124).

Construction of the Preparation Plant began in the fall of 1989, and the plant commenced operations in April 1991 (Application at 3; Tr. 10-11, 88; Ex. R-6). The Preparation Plant's washing facility is located approximately 500 feet from the Power Plant's stockpile coal barn (Tr. 87). The Power Plant and the Power Plant stockpile are connected by conveyor belt to the Preparation Plant and the processed coal can be transported directly by conveyor belt to either facility (Tr. 86; Ex. A-2). The Power Plant uses 100 percent of the coal processed by the Preparation Plant and the Power Plant is the end user of the coal (Tr. 66, 88-89).

In addition, the Power Plant burns coal from sources other than the Mines and that coal is not processed by the Preparation Plant (Ex. R-6; Tr. 117-118). Furthermore, the employees of the Preparation Plant and the employees of the Power Plant belong to separate labor unions (Tr. 100-101, 118). Finally, the Preparation Plant and Power Plant are operated by different components of PacifiCorp; the Preparation Plant is operated by EWM, a wholly owned subsidiary of PacifiCorp and the Power Plant is operated by Utah Power and Light Electrical Generating, a division of PacifiCorp (Exs. A-4, R-6).

The Preparation Plant is not permitted under the Utah program, as DOGM determined in 1991 that the Preparation Plant is exempt from permitting under R645-302-261 because it is located "at the site of ultimate coal use." (Application at 3-4, 8; Tr. 36, 52-53, 67, 89; Exs. A-3, R-6) OSM Inspector Mitchell Rollings conducted a Federal inspection of the Preparation Plant on

September 8 and 9, 1994, to investigate a citizen's complaint filed with OSM alleging "imminent harm of significant environmental damage" from PacifiCorp's unpermitted operation of the Preparation Plant (Tr. 105-107; Exs. R-5, R-6). Inspector Rollings determined that PacifiCorp's Preparation Plant should be permitted under the Utah program and, as a result, the CO was issued to PacifiCorp directing it to cease the receiving and processing of coal (Application at 4; Tr. 107-112; Exs. A-1, R-6).

Discussion

I. Was a prima facie case of the validity of the CO established?

Pursuant to 43 CFR 4.1171(a), OSM has the burden of establishing a prima facie case as to the validity of the CO. The ultimate burden of persuasion rests with PacifiCorp. See 43 CFR 4.1171(b).

The argument and evidence in this case has focused upon whether OSM had authority to issue the CO; PacifiCorp arguing that OSM lacked such authority. Under a State program approved by the Secretary, such as the Utah program, the State has primary, but not exclusive, jurisdiction to enforce the State program. OSM retains oversight authority to enforce the State program under certain conditions.

The parties have not focused upon whether a prima facie case was established perhaps because this case primarily involves issues of law. In any event, the evidence shows not only that a prima facie case of OSM's authority was established, but also that PacifiCorp failed to overcome this prima facie case for the reasons set forth below.

II. Did PacifiCorp establish that OSM lacked authority to issue the CO and thus overcome the prima facie case?

PacifiCorp raises several arguments in support of its contention that OSM did not have authority to issue the CO. Before examining these contentions, it is necessary to set forth portions of the relevant laws.

Pursuant to SMCRA § 521, 30 U.S.C. § 1271(a)(2), as implemented in pertinent part at 30 CFR 842.11(a)(1)(ii), OSM must immediately order a cessation of surface coal mining and reclamation operations if OSM finds any condition or practice or any violation of any State program which is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 CFR 843.11(a)(1)(ii). "Surface coal mining and reclamation operation" is defined to include "surface coal mining operations." 30 CFR 700.5. Pursuant to 30 CFR 843.11(a)(2), surface coal mining operations conducted by any person without a valid permit constitute such a condition or practice.

Under the Federal regulations, "[a]ctivities conducted on the surface of lands in connection with a surface coal mine . . . , [including the] processing or preparation of coal[.]" constitute

"surface coal mining operations," *id.*; *see also* 30 CFR 785.21(a),¹ which must be permitted pursuant to the applicable State or Federal program, 30 CFR 107.11(a); *see also* 30 CFR 785.21(a). The applicable program in this case, the Utah program, requires that "[a]ll persons who engage in and carry out any coal mining and reclamation operations will first obtain a permit from [DOGM]." U.A.C. R645-300-112.400 (1994).

Like the analogous Federal term "surface coal mining operations," the Utah program term "coal mining and reclamation operations" means "activities conducted on the surface of lands in connection with a surface coal mine . . . , [including the] processing and preparation of coal." U.A.C. R645-100-200 (1994). With specific reference to the type of coal processing plant in question, one located outside the permit area of a surface coal mine, the Utah program provides:

R645-302-260 applies to any person who operates or intends to operate a coal processing plant outside the permit area of any coal mining and reclamation operation, other than such plants which are located at the site of ultimate coal use. Any person who operates such a processing plant will obtain a permit from [DOGM] in accordance with the requirements of R645-302-260.

U.A.C. R645-302-261 (1994).

- A. Does PacifiCorp's operation of the Preparation Plant through EWM, its subsidiary, constitute "coal mining and reclamation operations" which must be permitted under the Utah program?**

OSM contends that PacifiCorp's operation of the Preparation Plant was "in connection with" its operation of the Mines and therefore constitutes "coal mining and reclamation operations" which should have been permitted under the Utah program. Based upon this fact, OSM contends that its exercise of its oversight authority in issuing the CO was proper and, in fact, mandated by the provisions of 30 CFR 843.11(a)(1)(ii) and (2).

PacifiCorp contends that operation of the Preparation Plant does not constitute "coal mining and reclamation operations," but rather, that the Preparation Plant is a coal processing plant which is "located at the site of ultimate coal use" and which therefore is exempt from the permitting requirements of the Utah program under U.A.C. R645-302-261. Based upon this

¹ 30 CFR 785.21(a) provides:

This section applies to any person who operates or intends to operate a coal preparation plant in connection with a coal mine but outside the permit area for a specific mine. Any person who operates such a preparation plant shall obtain a permit from the regulatory authority in accordance with the requirements of this section.

fact, PacifiCorp argues that OSM had no proper basis for exercising its oversight authority in issuing the CO.

Resolution of this dispute turns upon the meaning to be given to the phrases "in connection with a surface coal mine" and "located at the site of ultimate coal use." PacifiCorp argues that its Preparation Plant, being adjacent to the Power Plant, is clearly "located at the site of ultimate coal use" under the ordinary meaning of the phrase. PacifiCorp's argument has superficial appeal but does not withstand close scrutiny.

Prior to 1983, 30 CFR 785.21, the Federal counterpart to U.A.C. R645-302-261, provided:

This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing coal processing plants or support facilities not within a permit area of a specific mine. Any person who operates such a processing plant or support facility shall have obtained a permit from the regulatory authority

In 1982, OSM proposed to revise § 785.21 to read:

This section applies to any person who operates or intends to operate coal processing plants outside the permit area of any specific mine other than such plants when they are directly associated with the ultimate user. Any person who operates such a processing plant shall have obtained a permit from the regulatory authority

(Emphasis added.). "The proposed revisions to § 785.21 [were] intended to complement the proposed clarification of the definition[s] of surface coal mining operations and [of] coal processing plant" 47 FR 27688, 27690 (June 25, 1982).

OSM had simultaneously proposed to resolve an ambiguity in the definition of "surface coal mining operations" by clarifying that various activities, including the processing and preparation of coal, are regulated if they are "in connection with" a surface coal mine, regardless of whether they are "at or near the mine site." 47 FR 27688-89. This clarification that such activities are regulated, without regard to proximity to the mine, 47 FR 26689, was adopted in 1983. 48 FR 20392 (May 5, 1983).

The proposed amendment of § 785.21 complemented this clarification presumably because OSM wanted to make clear that while proximity to the mine was not controlling, OSM did not intend to regulate all processing and preparation of coal but only that performed "in connection with" a coal mine. OSM explained that it did "not believe that its jurisdiction extends to facilities which are operated solely in connection with the end user of the coal product." 48 FR 20393 (emphasis added). It also stated that it "will treat all facilities which handle coal as either 'in connection with' a mine or 'in connection with' an end user." *Id.* Thus, the primary focus was not upon a preparation plant's physical proximity to the mine or

physical proximity to the end user, but rather, upon a preparation plant's economic, functional, or other types of connections or integrations with the mine operator or the end user. See 48 FR 20393.

OSM did revise the proposed rule prior to final adoption because several commenters complained that OSM's proposed language "directly associated with the ultimate user" presented a confusing test. 48 FR 20398. "Commenters pointed out that a more appropriate and more useful test would be whether the plants were at the point of ultimate use." *Id.* OSM agreed and adopted language to indicate that only plants situated at the point of ultimate coal use will be deemed to be not "in connection with" a mine. *Id.*

Thus, beginning in 1983, the Federal regulations at 30 CFR 785.21 contained language identical to the Utah program, requiring a permit for off permit coal preparation plants other than those plants which are "located at the site of ultimate coal use." This equality is understandable, as the Utah program must be no less stringent than the Federal program. See 30 CFR 730.5, 732.15, 732.17(e).

In 1988, the Federal regulations at 30 CFR 785.21 were again amended, removing the language concerning preparation plants "located at the site of the ultimate coal use," and simply providing that a permit is required for any coal preparation plant operated "in connection with a coal mine" but outside the permit area for a specific mine. 53 FR 47391 (November 22, 1988). This amendment was made because the definition of "coal preparation" had to be changed in response to a court decision to include activities less apt to be conducted either "in connection with a coal mine" or "in connection with an end user." See 53 FR 47385, 47387-88.

OSM recognized that its dichotomy of (1) facilities operated "in connection with a coal mine" and (2) facilities operated "in connection with an end user" did not account for facilities which fell into neither of these categories. See *id.* Without an amendment to 30 CFR 785.21, such facilities would still be regulated as if they were operated in connection with a coal mine, because § 785.21 required a permit unless the facility was "located at the site of the ultimate coal use." *Id.*

The preamble to this 1988 rule also focuses not upon the factor of physical proximity to the mine or to the end user but upon the economic, functional, and other types of connections or integrations with the mine operator or end user. See 53 FR 47384-86, 47388. This preamble reiterates the 1983 preamble's listing of examples of facilities which could be considered to be "in connection with" a coal mine: "facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine." 53 FR 47386 (quoting 48 FR 20393). Like the preamble to the 1983 rule, the 1988 preamble states that "[c]oal preparation facilities which are being operated only in connection with an end user are not operations in connection with a coal mine." 53 FR 47388 (emphasis added).

More recently, OSM clarified the preamble to the 1988 rule in response to a Federal court decision holding that it would be contrary to Congressional intent to treat proximity to a mine as a decisive factor in determining whether an off-site coal processing facility operates in connection with the mine. 58 FR 3466, 3468-69 (January 8, 1993). OSM made clear that proximity could be a factor but not a decisive factor. *Id.*

In sum, OSM has modified the Federal regulations on several occasions in an attempt to make clear its unchanging intent that preparation plants outside the permit area of a specific mine must be permitted if they are operated "in connection with" a surface coal mine and will not be permitted only if they are operated solely "in connection with" the end user. It also consistently indicated that proximity to the mine is not a controlling factor.

Because the language of U.A.C. R645-302-261 of the Utah program is identical to one version of these Federal regulations, and because the intent of these Federal regulations has remained the same despite several modifications, R645-302-261 should be interpreted consistent with that intent. Thus, U.A.C. R645-302-261 must be interpreted as requiring a permit for all coal preparation plants operated in connection with a coal mine, leaving unregulated only coal preparation plants operated solely in connection with an end user or operated without connection to a mine or an end user.

PacifiCorp's argument that physical proximity to the end user is the decisive factor is directly contrary to OSM's unchanging intent and the intent of Congress in enacting SMCRA. For use as a decisive factor, there is no meaningful distinction between physical proximity to the mine and physical proximity to the end user in that the determination of whether a facility should be regulated should not turn upon its physical location.

In keeping with the broad remedial purposes of SMCRA, OSM has repeatedly indicated that the "in connection with" language of SMCRA and the regulations should be interpreted broadly. *See, e.g.*, 48 FR 20393. It has avoided any attempt to define "in connection with" or to be too prescriptive in regulation covering the broad spectrum of possible facilities. To do so would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the jurisdiction of SMCRA in individual cases. *See* 53 FR 47380-81, 47385.

Neither OSM nor Congress has favored an overly restrictive, discretion-limiting test based upon physical location. Instead, OSM attempted to give meaning to the "in connection with" language through its preamble lists of examples of facilities which would require regulation.

Many of these examples are descriptive of the Preparation Plant's relationship with the Mines. The Preparation Plant receives all of its coal from the Mines; most of the coal from the Mines is processed at the Preparation Plant; and it is integrated with the Mines to the extent that their operators and owners are identical and the CW mine manager supervises the Preparation Plant supervisor and is in charge of health and safety at the Preparation Plant.

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The Preparation Plant is clearly being operated "in connection with" the Mines rather than being operated solely in connection with the Power Plant. Therefore, under R645-302-261, which must derive its meaning from the identical Federal regulation, operation of the Preparation Plant constitutes "coal mining and reclamation operations" which should be permitted under the Utah program.

B. Was OSM required to follow the procedures 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prior to inspecting the site and issuing the CO?

The provisions of 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prescribe the procedures that must be followed and the requirements that must be met before OSM may exercise its enforcement powers in certain instances. PacifiCorp argues that OSM had no jurisdiction to issue the CO because OSM did not follow these procedures.

PacifiCorp's argument cannot be sustained because those provisions do not apply in this case. Rather, where, as here, OSM learns of the existence of a violation involving significant, imminent environmental harm and it appears that the State has failed to take appropriate action to correct the violation, OSM must conduct a Federal inspection immediately. 30 U.S.C. § 1271(a)(1); 30 CFR 843.11(b)(1). Accordingly, the Interior Board of Land Appeals and the Federal courts have held that where, as here, OSM encounters a violation involving significant, imminent environmental harm, and the State has failed to take appropriate action to correct the violation, a State's primacy does not oust OSM of jurisdiction to take direct and immediate Federal enforcement action. *Triple R Coal Co. v. Office of Surface Mining Reclamation and Enforcement*, 126 IBLA 310, 315 (1993); *R.C.T. Engineering, Inc. v. Office of Surface Mining Reclamation and Enforcement*, 121 IBLA 142, 147 (1991); *Slone v. Office of Surface Mining Reclamation and Enforcement*, 114 IBLA 353, 357 (1990); *Annaco, Inc. v. Hodel*, 675 F.Supp. 1052, 1058 (E.D. Ky. 1987). See also 30 CFR 843.11(a)(1).

Based upon the testimony at the hearing, PacifiCorp attacks the premise that significant, imminent environmental harm existed. However, this testimony is irrelevant because PacifiCorp's operation of the Preparation Plant without a valid permit is defined by regulation to be a condition or practice which is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 CFR 843.11(a)(2).

Given the foregoing, OSM clearly not only had the authority, but also was required by law to take immediate and direct Federal enforcement action through the issuance of the CO.

C. Did DOGM's interpretation of U.A.C. R645-302-261 constitute "appropriate action?"

PacifiCorp argues that OSM had no authority to inspect the site and then issue the CO for an additional reason: OSM allegedly should have deferred to DOGM's interpretation of its own program because DOGM's interpretation of U.A.C. R645-302-261 was not arbitrary.

capricious, or an abuse of discretion. This contention is based upon two provisions in the law which provide (1) that OSM's duty to immediately inspect is triggered only if DOGM failed to take "appropriate action" to cause the violation to be corrected, 30 U.S.C. § 1271(a)(1); 30 CFR 843.11(b)(1), and (2) that any action by a State regulatory authority which is not arbitrary, capricious, or an abuse of discretion constitutes "appropriate action" to cause a violation to be corrected, 30 CFR 842.11(b)(1)(ii)(B)(2).

PacifiCorp's argument is based upon an erroneous premise: that DOGM's interpretation of U.A.C. R645-302-261 is not arbitrary, capricious, or an abuse of discretion. DOGM misinterpreted R645-302-261 and a misinterpretation of the law is an abuse of discretion.

Now, having observed the demeanor of the witnesses and having weighed the credibility thereof, there are here entered the following:

Findings of Fact

1. Factual findings set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.
2. The Preparation Plant receives all of its coal from the Mines (Tr. 46, 117-119; Ex. R-6).
3. The Preparation Plant receives a significant portion of the output of each of the Mines (*id.*).
4. The Preparation Plant and the Mines are operated by EWM, a wholly owned subsidiary of PacifiCorp, and are owned by PacifiCorp (Tr. 91-95, 117; Ex. R-6).
5. The supervisor of the Preparation Plant is under the supervision of the manager of the CW mine, who is identified as the person in charge of health and safety on the MSHA permit issued for the Preparation Plant (Tr. 97, 117; Ex. R-6).
6. The Power Plant is operated by Utah Power and Light Electrical Generating, a division of PacifiCorp (Exs. A-4; R-6).

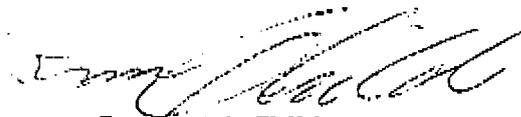
Conclusions of Law

1. The Hearings Division of the Department of the Interior has jurisdiction of the parties and of the subject matter of this proceeding.
2. Conclusions of law set forth elsewhere in this decision are here incorporated by reference as though again specifically restated at this point.

3. A prima facie case was established that OSM has authority to issue the CO.
4. PacifiCorp's operation of the Preparation Plant constitutes "coal mining and reclamation operation" which must be permitted under the Utah program.
5. OSM was not required to follow the procedures at 30 CFR 842.11(b)(1)(ii)(b)(1) and 30 CFR 843.12(a)(2) prior to inspecting the Preparation Plant site and issuing the CO.
6. DOGM's interpretation of U.A.C. R645-302-261 was not "appropriate action" because it was an abuse of discretion.
7. OSM had authority to issue the CO.

Order

Cessation Order No. 94-020-370 issued to PacifiCorp on September 15, 1994, is AFFIRMED.



Razon M. Child
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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