

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

FILED
NOV 29 2011
WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By Deputy Clerk

FARRELL-COOPER MINING COMPANY)
)
Plaintiff,)
)
vs.)
)
THE U.S. DEPARTMENT OF THE INTERIOR;)
THE OFFICE OF SURFACE MINING,)
RECLAMATION AND ENFORCEMENT;)
KEN SALAZAR, AS THE SECRETARY U.S.)
DEPARTMENT OF THE INTERIOR;)
AND JOSEPH PIZARCHIK AS)
THE DIRECTOR OF THE OFFICE OF)
SURFACE MINING, RECLAMATION)
AND ENFORCEMENT.)
)
Defendants.)

CIVIL NO. CIV 11 - 428 - FHS

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND REVIEW OF AGENCY DECISIONS**

Plaintiff, Farrell-Cooper Mining Company, seeks declaratory and injunctive relief against the U.S. Department of the Interior; The Office of Surface Mining, Reclamation and Enforcement; Ken Salazar as the Secretary of the U.S. Department of the Interior (Secretary) and Joseph Pizarchik as the Director of the Office of Surface Mining, Reclamation and Enforcement ("OSM") in their official capacities as the persons charged with administering the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("F-SMCRA"), and in support states:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this civil action under 28 U.S.C. § 1346 and 28 U.S.C. § 1331 (Federal question jurisdiction) because this action arises under the U.S. Constitution and other federal laws, including the Administrative Procedures Act ("APA"),

5 U.S.C. § 553, 554 and § 702, F-SMCRA, 30 U.S.C §§ 1201 *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

2. Venue is proper in the United States District Court for the Eastern District of Oklahoma under 28 U.S.C. § 1391(e) in that the controversy herein involves two mines, the Liberty #5 and Liberty #6, located in Haskell County, Oklahoma, where the events giving rise to the claims presented herein occurred.

PARTIES

3. Plaintiff, Farrell-Cooper Mining Company, is an Arkansas corporation admitted to do business in Oklahoma and owns and operates Liberty Mine #5 and Liberty Mine #6 in Haskell County, Oklahoma. Farrell-Cooper is a family owned company which produces approximately 400,000 total tons of coal per year, approximately 200,000 of which are produced at Liberty Mines #5 and #6.

4. Ken Salazar is the Secretary of the United States Department of the Interior and Joseph Pizarchik is the Director of Office of Surface Mining, Reclamation and Enforcement. Defendants are charged with administering F-SMCRA.

GENERAL ALLEGATIONS

Oklahoma Department Of Mines – Exclusive Permitting Jurisdiction

5. F-SMCRA, 30 U.S.C. § 1251 *et seq.*, established the various requirements for a state to have "exclusive jurisdiction" over surface coal mining and reclamation activities within its borders, 30 U.S.C. § 1253(a), through a State Program approved by the Secretary of the Interior consisting of a statute and regulations reflecting F-SMCRA.

6. Oklahoma has assumed such exclusive jurisdiction, all as set forth in the Secretary of the Interior's approval of the Oklahoma Program in 30 C.F.R. § 936 *et seq.*

7. Accordingly, it is the Oklahoma statute, Oklahoma Department of Mines (ODM) regulations, and the State issued permits which apply and establish an operator's obligations under F-SMCRA, § 503(a). *Haydo v. Amerikohl Mining Co., Inc.*, 830 F.2d 494, 498 (3rd Cir. 1987). "The State is the sole issuer of permits . . . (and) permit decisions are matters of State jurisdiction in which the Secretary plays no role." *In re: Permanent Surface Mining Regulation Litigation (en banc)*, 653 F.2d 514, 519 (D.C. Cir. 1981).

8. Pursuant to F-SMCRA and the Oklahoma Program, ODM is the "Regulatory Authority" and "sole issuer of permits and decider of issues concerning surface coal mining and reclamation operations" under such permits.

9. F-SMCRA allows OSM to interfere with State issued permits pursuant to § 521(b) when it determines that there are "violations of all or part of an approved State Program" because of a "failure of the State to enforce such State Program or any part thereof effectively. . . ." No provision of F-SMCRA allows OSM to challenge State issued permits and the permittee except after due process proceedings including a hearing of record pursuant to § 521(b) (30 U.S.C. § 1271(b)). When OSM challenges a state permittee which has "met its obligations under such permit . . . 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." [Emphasis in the original.]

Revocation Of Federal Rule Re "Improviently" Issued Permits

10. In 1988, the Secretary promulgated a regulation which allowed it to collaterally attack "improviently issued" State permits that violated the ownership and control regulations concerning when related companies had outstanding violation, 30 C.F.R. § 843.21. But the Secretary repealed the regulation in a decision in the Federal Register, December 3, 2007, 72 FR

68000, 58024. "We are adopting our 2006 proposal to removal Section 843.21 in its entirety. Section 843.21 contained Federal procedures relative to State-issued permits that may have been improvidently issued based on certain ownership or controlled relationships . . . In part the reason for removing § 843.21 is that on further study, Congress did not intend for OSM to second guess a State's permitting decision. Instead, the Secretary of the Interior's ultimate power over a State's lack of implementation of its permitting provisions is set out in § 521(b) of the Act. . . ." *Id.* at 68026.

INE-35 --Unlawful Rule Disguised As A Directive

11. Beginning in 2009 without any further rulemaking, the Secretary and the OSM Director and other agencies determined to unlawfully expand the scope of federal jurisdiction over the regulation of coal mining by unlawfully swiping authority that Congress had granted to the States. On June 11, 2009, the new appointees heading the Department of the Interior, EPA and the Army Corp of Engineers set forth an agreement to usurp the environmental regulation of coal mining without any new legislation, rulemaking or notice to the public and an opportunity for interested parties to engage. [Available at www.osmre.gov/topic/oversight as of November 28, 2011.]

12. This unlawful effort is set forth in the June 11, 2009 Memorandum of Understanding (MOU) which charted the course for the Interior Department and OSM to collaterally attack primacy state issued surface coal mining and reclamation permits under State Programs. The MOU charged the Interior Department and OSM with, among other things, obligations to "reevaluate and determine how it will more effectively conduct oversight of State permitting . . . activities under SMCRA" and "remove impediments to its ability to require correction of permit defects in SMCRA primacy States." *Id.* MOU, p. 3. After a year of

strategizing, on January 31, 2011, OSM finalized revisions to Directive INE-35, which sanctioned the use of NOV's (Notice of Violations) under F-SMCRA § 521(a)(1) for alleged defects in State issued permits [available at www.osmre.gov/topic/oversight, November 28, 2011].

13. Various agency activities pursuant to this June 11, 2009 MOU were recently declared unlawful rule making by the Federal District Court in the District of Columbia. See *NMA v. Jackson, et al.*, ___ F.Supp.2d ___, 2011 WL 4600718 (October 6, 2011, D.D.C.)

14. Pursuant to the June 11, 2009 MOU and the new INE-35, OSM has pursued unlawful actions against the plaintiff herein as set forth hereafter, just like those declared unlawful in *NMA v. Jackson, supra*.

ODM Permits - Liberty Mines #5 And #6

15. Beginning in 2005 and continuing through June 2011, Farrell-Cooper has filed volumes of permitting documents and reclamation plans (more than several feet in length when stacked end to end), all of which ODM has approved for Liberty Mine #5 and #6 as set forth below:

Liberty #5	Permit Granted	24 June 2005
Revision	Description	Approval Date
1743	Add support acreage	21 Mar 2007
1756	Revise Mine Plan	3 July 2007
1797	Increase coal Recovery area	7 Nov 2008
1804	Add support acreage	2 Feb 2009
1809	Increase recovery depth	26 Feb 2009
Liberty #6	Permit Granted	1 April 2009
Revision	Description	Approval Date
1818	Change postmine landuse	23 April 2010
1821	Add support acreage	28 Sep 2010
1848	Add support acreage	10 June 2011

16. The permit for Liberty #5 allows all that OSM is now challenging and the same as to Liberty #6. See Permit documents, Section 27-10, Section 27-16 and 27-11, dealing with pond and impoundment construction and justification.

17. Pursuant to those approved permits, including the reclamation plans, Farrell-Cooper has removed, placed and reclaimed more than 35,000,000 yards of material, all in accordance with ODM permits.

18. OSM has done "oversight inspections" of Liberty #5 and #6 and ODM permit records at least yearly in 2005, 2006, 2007, 2008, 2009 and 2010.

1997 AOC/Impoundment Oversight Report – OSM Reverses Course In 2010.

19. The creation of last cut lakes (water impoundments) as allowed by the definition of AOC in F-SMCRA, 30 U.S.C. § 1291(2) with the consequent elevation from the out-of-pit spoil and swell factors in the reclamation of surface coal mines caused disagreement between ODM and OSM in the late 1990's. Consequently, OSM and ODM formed a team to resolve the issues as a part of OSM's 1997 Oversight Report.

20. The Team of Eight (5 OSM people and 3 ODM people) investigated the legislative history of AOC, its definition which included the express allowance of last cut water impoundments to cover high walls and exposed coal seams (30 U.S.C. § 1291 (2)) and the resulting out of pit spoil (swelled by 20 to 30%) increasing the elevation of the area.

21. The OSM/ODN Team issued a report approving such reclamation techniques, titled "**AOC Land Use Oversight Report**," January 1997. The same reclamation techniques were approved less than eight years later in the permits at Liberty Mines #5 and #6. The Report rejected the one dissenter who maintained that "AOC was not being met. . . ." and that "spoils should be placed in the proposed final pit permitted impoundments, thus eliminating the

impoundments and reducing the elevation of the reclaimed areas to more closely approximate the premining elevations." Oversight Report p.1.

22. As set forth below, the new Secretary and Director in 2010 determined to reverse course – without new legislation or even rulemaking – to require Farrell-Cooper to fill-in the impoundments, the very approach rejected in the earlier 1997 Oversight Report.

23. In May 2010, OSM pursuant to oversight "assistance" to the states began reviews of ODM's implementation of the Oklahoma Program requirements with respect to AOC. As a part of the review process, OSM reviewed surface coal mining permits issued and approved by ODM, including the permits issued to Farrell-Cooper Liberty Mine #5 and Liberty Mine #6.

24. After this review of various ODM issued permits, OSM issued a draft "Oversight Report" on approximate original contour, National Priority Review in which OSM found "that ODM has not properly implemented its approved Program by failing to require mines to be reclaimed to AOC." Draft Report, p. 3.

25. OSM also in the Draft Report in parts 3.2 and 3.3 determined that the permits for Liberty Mine #5 and Liberty Mine #6 were improper and did not require a return to AOC as required under the Oklahoma SMCRA ("hereinafter OK-SMCRA") Program.

26. ODM received a copy of the draft report on July 16, 2010. OSM requested ODM's comments by July 29, 2010 and was extended to August 3, 2010. ODM comments stated generally that it disagreed "with OSM's conclusion that ODM had not properly implemented its approved Program by failing to require mines to be reclaimed to AOC" and that "OSM's belated attempt to reach an agreed definition of AOC with each state," resulted in a definition "still vague and as unenforceable as the regulations on the issue." Thereafter, ODM, defended its handling of AOC, boxcut spoils, final pit impoundments and all other matters, as well as more specifically,

ODM justified the permits and reclamation plans with respect to Liberty Mine #5 and Liberty Mine #6.

27. Subsequently, on August 18, 2010, OSM issued its final "Oversight Assistance Report" on the national priority concerning the AOC review topic for evaluation year 2010. This report did not respond to ODM's comments.

28. OSM did not serve a copy of the draft report or the final report on Farrell-Cooper. OSM did not provide to Farrell-Cooper any notice of the foregoing or a hearing or any opportunity to provide comments or evidence.

29. ODM protested that the OSM final 2010 AOC report made no response to ODM's comments and requested a meeting to review ODM's response, which was held November 17, 2010 in Tulsa where OSM/ODM teams were formed to review ODM's responses to the 2010 AOC report.

OSM Collaterally Attacks Primacy State Permits – Liberty Mines #5 And #6

30. Rather than allowing teams to sort out the OSM and ODM differences as to AOC, water impoundments, spoil swell and questions of elevation versus general contour, OSM determined to directly attack the allegedly deficient permits and permittees, including Liberty Mine #5 and Liberty Mine #6, all pursuant to OSM's newly formulated Directive INE-35 developed over 2009-2010 and issued January 31, 2011.

31. OSM in January 2011 issued 2 ten day notices ("TDN") directly attacking the ODM permits and reclamation plans for Liberty Mine #5 and Liberty Mine #6 asserting that Farrell-Cooper was in violation of AOC requirements at each mine despite the entirety of Farrell-Cooper's operations being in conformity with the ODM approved permits and reclamation plans. (Ten Day Notice, TDN X10-030-246-001 Liberty #6, Permit No. 05/10-4279, January 10,

2011; and the Ten Day Notice X11-030-370-001 January 12, 2011 Liberty #5, Permit No. 05/10-4274).

32. These TDN's required that ODM in ten days demonstrate that it had taken "appropriate action" to cure the alleged "violation" or show "good cause" for not doing so.
30 U.S.C. §1271(a)(1) Section 521(a)(1)

33. The only cure would have been to invalidate Farrell-Cooper's permits and require that Farrell-Cooper amend its permits to comport with OSM's newest interpretations, that is, move 35 million yards of material into the lakes, as contrasted with the OSM/ODM Team's 1997 determinations of AOC, last cut impoundments, excess spoil, spoil swell and other issues. Accordingly, as ODM had responded earlier, ODM again responded that the AOC as allowed under the permits comported with the Oklahoma Program. (ODM February 10, 2011 TDN response at Liberty Mine #5 and ODM TDN response January 19, 2011 Liberty Mine #6.)

34. Subsequently, OSM rejected ODM's response with respect to Liberty Mine #6 TDN stating that "the response fails to address how Farrell-Cooper's permit 05/10-4279 can be brought into compliance with the AOC requirements of Oklahoma's statute and regulations. OSM finds after evaluation of the relevant criteria, that Oklahoma Department of Mines has acted without a rational basis." Similarly, OSM rejected ODM's response as to the TDN at Liberty Mine #5 finding that the response "is arbitrary, capricious or abusive discretion."

35. On March 9, 2011, ODM requested an informal review of OSM's rejections of ODM's responses to the two TDN's pursuant to 30 C.F.R. § 842.1 (b)(iii)(A). OSM denied the informal review with respect to TDN Liberty Mine #5 on November 10, 2011.

36. Farrell-Cooper was not served with any of the foregoing, nor was it allowed to present evidence at a formal or informal hearing, despite OSM's having directly attacked and found sufficient ODM issued permits and reclamation plans for Liberty Mines #5 and #6.

37. OSM has simply invalidated the ODM permits and determined contrary to the permits that Farrell-Cooper must rehandle and move substantial spoil to fill in the last cut pit impoundments and otherwise move substantial spoil so that Farrell-Cooper will have to expend substantial sums in order to comply with any OSM order and remediate (cure) the asserted violations for having done as the permits allow. The irreparable harm to Farrell-Cooper if it has to remediate (cure) the AOC issues is dramatic and huge. Over 35 million yards of material were moved and placed in accordance with the approved permits. Rehandling of this material would result in a financial burden that would be untenable. On both permits, but especially Liberty #5, significant reclamation has been accomplished in accordance with the approved permit. Final grading and replacement of topsoil has been completed on most of the area of Liberty #5 and a large portion of Liberty #6. Revising the reclamation would require redisturbance of these areas resulting in potential topsoil loss due to rehandling. Also, any changes to the rough grading currently approved would result in a significant financial expense that was not considered when determining the original cost of leasing and mining this coal. The cost to move one yard of overburden now would be at least \$2.50 per yard. During active mining it would have been \$1.50 per yard.

FIRST CLAIM FOR RELIEF

Administrative Procedure Act 5 U.S.C. § 701 et. seq.
Declaratory Judgment Act, 28 U.S.C. § 2801 et seq.

38. Plaintiff realleges and incorporates by reference paragraphs 1-37.

39. Defendants' issuance of the TDN's as to Farrell-Cooper's permits and the further decisions/orders ("TDN Decisions") that ODM failed to take appropriate action or failed to show good cause because such permits deficient and invalid – are final agency actions reviewable by this Court under the APA, 5 U.S.C. § 706.

Ultra Vires Conduct

40. Defendants are not authorized by any provision of F-SMCRA to collaterally attack a primacy state issued permit except only after proceeding pursuant to Section 521(b), 30 U.S.C. § 1271(b) where, if after a public hearing, the Secretary finds that "violations of all or part of an approved state Program result from a failure of the state to enforce such state Program. . . ." Then after public notice and notice to the State, the Secretary is authorized to "issue new or revised permits in accordance with the requirements of this chapter. . . ." But this is only lawful – if the Secretary gives "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" which can only be done after the Secretary holds "a public hearing" "of record" which is subject to 5 U.S.C. § 554. No provision allows charging a permittee (who is in full compliance with a primacy State issued permit) with violating the law by issuing an NOV and assessing a fine because OSM thinks the permit is wrong.

41. As stated above, the actions taken by defendants attacking the ODM permits for Liberty Mines #5 and #6 are in excess of their statutory authority and ultra vires.

The INE-35 Directive – A Legislative Rule

42. To the extent that Section 521(a)(1), 30 U.S.C. § 1271(a)(1) and the primacy provisions do not prohibit OSM from collaterally attacking state primacy permits as being improperly issued, then OSM can only act pursuant to uniform standards which can only be done by rulemaking.

43. OSM pursuant to the 2009 MOU agreed with other agencies to embark upon a policy of attacking primacy State issued permits. OSM declared such by the remaking of Directive INE-35, which is a substantive legislative rule issued without compliance with the rulemaking requirements of APA, 5 U.S.C. § 553.

44. Accordingly, defendants have violated § 553 through the issuance of Directive INE-35 which is arbitrary, capricious or abuse of discretion, and otherwise not in accordance with the law and without the observation of procedure required by law.

TDN Decisions Invalidate State Permits

45. The TDN decisions are essentially orders invalidating the ODM issued permits for Liberty Mines #5 and #6 which can only be undone after hearing of record pursuant to 5 U.S.C. § 554 – and therefore, are erroneous, not in accordance with law, and are otherwise arbitrary or capricious.

TDN Decisions -- Erroneous

46. Under the State Program, Farrell-Cooper was not in violation of the permits and was mining and reclaiming as allowed under the ODM permits for Liberty Mines #5 and #6. Hence, ODM's responses to the TDN's demonstrated good cause and appropriate action.

47. OSM in its TDN Decisions failed to give due deference, as required, to ODM's responses and permit decisions under the Oklahoma Program.

48. OSM failed to recognize, much less follow, its 1997 Oklahoma Oversight Report made jointly by OSM and ODM, which approved the reclamation technique of last cut water impoundments and changed land use - substantially the same as here - which further demonstrates that OSM is attempting redo the law concerning AOC and final pit impoundments pursuant to the Oklahoma Program, all without authority and by illegal actions.

SECOND CLAIM FOR RELIEF

Due Process Clause Fifth Amendment To The U.S. Constitution - Procedural Due Process

49. Plaintiff's reallege and incorporate by reference paragraphs 1-37.

50. The Due Process Clause of the Fifth Amendment to the U.S. Constitution prohibits the Federal Government from depriving any person of "life, liberty, or property, without due process of law."

51. In general, "due process" requires that a party be given a hearing before being deprived of life, liberty or property by the Federal Government, excepting only in a very limited and unusual case can the Federal Government deprive the party of its property interest in advance of a hearing. But only if the government affords the aggrieved party a post deprivation process that would make the aggrieved party whole if the government's action was shown to lack the proper basis. Such process requires a hearing at which the legal basis for the government's course of action can be evaluated, challenged and judged, and the aggrieved party made whole if it prevails.

52. Farrell-Cooper has constitutionally protected rights in the several surface coal mining and reclamation permits issued by ODM and operations conducted in reliance thereon, including having conducted the various surface coal mining and reclamation operations as approved and authorized by the permits.

53. To the extent that F-SMCRA § 521(a)(1), 30 U.S.C . § 1271(a)(1), or any regulation pursuant thereto, authorized OSM to attack Farrell-Cooper's ODM issued permits at Liberty Mine #5 and Liberty Mine #6, as described below, F-SMCRA and such regulation violate a permittee's constitutionally protected rights by not providing due process of law, and as applied to Farrell-Cooper in the situations described in this complaint, violated Farrell-Cooper's constitutionally protected rights, including the following:

A. Due process required that a permittee, including Farrell-Cooper, be given adequate notice of OSM's attacks on the permits, including in this case both TDNs and the OSM decisions thereafter.

B. Due process required that a permittee including Farrell-Cooper be given an adequate opportunity (more than 10 days) to prepare a defense of its permits and the opportunity to present evidence, briefs and arguments at a hearing to contest OSM's collateral attacks on its permits, including in this case both TDN's and the TDN Decisions.

54. Accordingly, in the circumstances described above, OSM has violated Farrell-Cooper's rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

THIRD CLAIM FOR RELIEF

Denial Of Substantive And Procedural Due Process--Patterns And Practices

55. Plaintiff incorporates by reference the allegations contained in paragraphs 1-37 and further, paragraphs 50-52 as fully set forth herein.

56. Over the last 15 years, defendants have engaged in patterns and practices of conflicting proclamations of the law and actions (that is, expressly approving of certain reclamation practices and repeatedly confirming such by oversight inspections, and then at a later

time expressly disapproving the same) – specifically with respect to reclamation plans and operations in Oklahoma concerning AOC, water impoundments, (last cut lakes) and excess overburden spoil.

57. Permittees, including Farrell-Cooper, in reliance on permits issued by ODM consistent with the initial OSM pronouncements pursued and acquired permits and expended great sums pursuing the permitted reclamation work in conformity with such permits.

58. Permittees, including plaintiff Farrell-Cooper, will suffer irreparable harm due to defendants having now proclaimed the opposite of what they formerly proclaimed.

59. Defendants' patterns and practices of conflicting pronouncements and actions without any rational basis deprived Farrell-Cooper procedural and substantive due process and will cause irreparable harm, as aforesaid, to Farrell-Cooper.

60. Defendants' conflicting pronouncements without any rational basis, caused in part by defendants' unlawful actions, including the MOU entered into with various other agencies, the Directive INE-35 and other actions of the defendants, are changes in substantive law under F-SMCRA which are only lawful if done by a regulation duly promulgated pursuant to 5 U.S.C. § 553 without denying permittees, including Farrell-Cooper, substantive and procedural due process by retroactive changes to substantive laws.

61. Plaintiff is entitled to a declaration and injunction that defendants cannot reverse retroactively their pronouncements and interpretations of the law under F-SMCRA concerning AOC and water impoundments in Oklahoma until after following the law as to such changes and may do so only prospectively.

FOURTH CLAIM FOR RELIEF

Declaratory Judgment, 28 U.S.C. § 2201

62. Plaintiff realleges and incorporates by reference paragraphs 1-37.

63. The Declaratory Judgment Act, 28 U.S.C. § 2201 grants this Court authority to declare Farrell-Cooper's legal rights where an actual controversy exists.

64. As stated above, an actual controversy exist between Farrell-Cooper and the defendants to this dispute within the jurisdiction of this Court.

65. Farrell-Cooper is entitled to a declaration that: F-SMCRA fails to provide permittees, including Farrell-Cooper, with due process in situations where, as in the case complained of in this complaint, defendants determine to attack in a primacy state a state issued surface mining and reclamation permit pursuant to an approved state Program, without notice and reasonable time to prepare to defend the permits, and without an opportunity to contest such and present evidence at a hearing to protect its property and property rights; and that defendants cannot reverse retroactively their pronouncements and interpretations of the law under F-SMCRA concerning AOC and water impoundments in Oklahoma until after following the law as to such changes and may do so only prospectively.

FIFTH CLAIM FOR RELIEF

Injunctive Relief

66. The plaintiff incorporates by reference the allegations contained in paragraphs 1-48 of this complaint as fully set forth herein.

67. As set forth above, OSM's TDN's and subsequent orders are unlawful, illegal and a deprivation of plaintiff's rights to due process, both procedurally and substantively, and therefore should not be allowed to go forward with further proceedings against Farrell-Cooper's permits.

68. Farrell-Cooper is entitled to an order preliminarily enjoining OSM from proceeding further pursuant to Section 521(a)(1) and OSM's TDN Decisions to collaterally attack Farrell-Cooper's permits, including issuing an NOV to Farrell-Cooper with respect to the permits set forth in the TDN's for the following reasons:

A. **Farrell-Cooper will suffer irreparable harm absent such an injunction.** OSM has determined that Farrell-Cooper must rehandle and move substantial spoil to fill in the last cut pit impoundments and otherwise move substantial spoil so that Farrell-Cooper will have to expend substantial sums in order to comply with any OSM order and remediate (cure) the asserted violation for having done as the permits allow. The irreparable harm to Farrell-Cooper if it has to remediate (cure) the AOC issues is dramatic and huge as set forth in ¶ 48. This Court will ultimately rule with the plaintiff and plaintiff will have no remedy to recover the sums wrongfully expended.

B. **Farrell-Cooper is likely to prevail on the merits of this case.** It is clear that at a minimum OSM is acting ultra vires pursuant to unlawful directives in order to unlawfully challenge lawful permits issued by ODM, is violating due process rights of the permittees in doing so, and is not giving due deference to ODM's permit decisions (which are consistent with the ODM/OSM Team's 1997 Report) under the Oklahoma Program that the permits were properly issued.

C. **OSM will suffer no conceivable harm if a preliminary injunction is granted which is nothing more than maintaining a status quo until the Court rules.** Likewise, the public will suffer no harm during the pendency of the preliminary injunction. The mining/reclamation is on private property whose owners have all consented to the change in land use.

D. The preliminary injunction will allow Farrell-Cooper to continue its operations and continue the employment for more than 150 people and indirectly protect the local economy where an additional several hundred or more jobs in the community and the surrounding areas are due to the mines.

REQUEST FOR RELIEF

69. Wherefore, Farrell-Cooper prays that:

A. The Court preliminarily enjoin OSM from collaterally attacking, including by performing any federal inspections or issuing an NOV pursuant to Section 521(a)(3) 30 U.S.C. § 521 (a)(3) or otherwise, the Liberty Mines #5 and #6.

B. The Court declare and determine that defendants are not authorized by any provision of F-SMCRA to collaterally attack a primacy State issued permit except pursuant to Section 521(b), 30 U.S.C. § 1271(b).

C. The Court declare and determine that the remaking of Directive INE-35 to provide for attacking primacy State issued permits is a substantive legislative rule issued without compliance with the rulemaking requirements and procedures under the Administrative Procedures Act, 5 U.S.C. § 553.

D. The Court declare and determine that the TDN Decisions by OSM concerning Farrell-Cooper's ODM issued surface mining and reclamation permits for Liberty Mine #5 and Liberty Mine #6 unlawfully invalidated such permits, that such invalidation can only be done after hearing of record pursuant to the Administrative Procedures Act, 5 U.S.C. § 554, and that therefore the OSM decisions are erroneous and not in accordance with law.

E. The Court declare and determine that the TDN Decisions by OSM with respect to the Farrell-Cooper permits was erroneous, arbitrary or capricious because Farrell-Cooper's mining

and reclamation operations with respect to approximate original contour (AOC) were at all times in conformity with ODM's permits, and, hence, there were no violations under the Oklahoma Program; and that ODM's responses to the TDN's demonstrated good cause and appropriate action.


F. The Court declare and determine that Farrell-Cooper has constitutionally protected rights in the several surface coal mining and reclamation permits issued by ODM and the operations conducted pursuant thereto; that to the extent that F-SMCRA in 30 U.S.C. § 1271(a)(1) and any regulations pursuant thereto authorized OSM to collaterally attack a permittee's ODM issued permits, including Farrell-Cooper's, such a permittee including Farrell-Cooper is entitled to the protection of due process of law pursuant to the Fifth Amendment, including written notice of the alleged deficiency, a reasonable period of time to prepare a defense of the permits, and an opportunity to present evidence, briefs and arguments at a hearing to contest the allegations; and that the decisions by OSM concerning Farrell-Cooper's permits are therefore contrary to constitutional right and without observance of procedures required by law.

G. The Court declare and determine that OSM's conflicting pronouncements concerning AOC and under impoundments in the 1997 AOC oversight report, multiple oversight inspections of Liberty Mines #5 and #6 and then OSM's reversal presented in the OSM 2010 AOC oversight report as further set forth in the TDN's issued to ODM concerning such permits are without any rational basis and therefore deprive Farrell-Cooper of procedural and substantive due process contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States; and defendants cannot reverse retroactively their pronouncements and interpretations of the law under F-SMCRA concerning AOC and water impoundments in Oklahoma until after following the law as to such changes and may do so only prospectively.

H. The Court award Farrell-Cooper its reasonable attorney fees defending the ODM issued permits for Liberty Mine #5 and Liberty Mine #6, including preparation for, the filing and prosecution of this action.

I. And for such further relief as the Court deems proper.

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