

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

RANDY C. HUFFMAN,
Secretary, WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION;

Appellee

v.

No. 34138

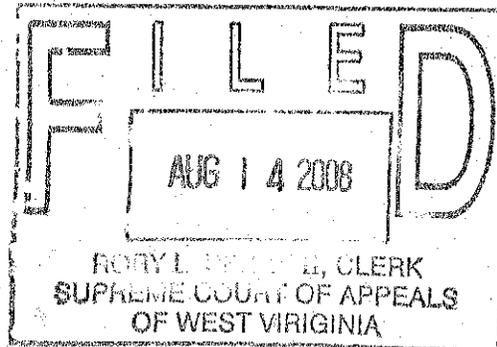
GOALS COAL COMPANY, and COAL RIVER
MOUNTAIN WATCH

Respondents Below,

and

COAL RIVER MOUNTAIN WATCH,

Appellant.



APPELLANT'S REPLY BRIEF

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ARGUMENT

A. APPELLEES WOULD IMPROPERLY “DIVORCE” THE MARKER FROM THE MAP

Goals Coal and Secretary Huffman have created much confusion in this action by conflating the physical boundary marker on the ground and the permit map’s depiction of where to find the marker in the physical world. For example, Goals’ Response Brief states that the **“marker is not divisible from the map; rather it existed first as an integral part of it.”** p. 10. (bold typeface in original). At the risk of stating the obvious: the marker is not a part of the map. The marker is on the ground. The piece of ground where the marker is supposed to be placed is depicted on the map, but the marker itself is clearly not on the map. Far from being an integral part of the map, the marker is not part of the map at all. The map and the marker are distinct.

The boundary marker is a physical artifact in the world and the map is supposed to be an accurate representation of the state of affairs on the ground. The map and the marker are separate and are harmonized only to the extent that the marker is accurately depicted on the map. In this case, the disharmony between the marker on the ground and the map’s depiction of that marker on the ground has created the chaos which drives Appellees’ arguments. In other words, the marker that Goals Coal Company and Secretary Huffman insist defines the permit area at issue is not on the map at all. The marker is on the ground. It is merely depicted on the map. That simple point underlies the flaws in the Appellees’ arguments.

Secretary Huffman argues that “the boundary marker that has been in place at the site for years must be used, along with the 1982 map, to establish the boundary of the permit area.” Huffman Brief at 14. He further insists that that the statutes contemplate maps and markers and that “neither . . . is superior to the other.” Huffman Brief at 28-29. His actions in this case belie

those statements, however. The Secretary has essentially abandoned the map, and has given controlling weight to the physical marker on the ground. That is, he has defined the permit area at issue by the location of the marker on the ground, with no concern for the boundary indicated on the map. In so doing, it is he who is attempting to “divorce” the marker from the map, not Appellant.

Likewise, Goals Coal’s insistence that the “marker is not divisible from the map,” Goals Coal Brief at 10, defies common sense. As observed above, the marker is not part of the map—it is merely depicted on it. Despite its protests to the contrary, Goals Coal is trying to “overrule the permit boundary shown on the 1982 map with a physical marker.” Goals Coal Brief at 18. Goals Coal contends that “[a]llowing a map to refer to physical markers and monuments is not in any way inconsistent with the federal act.” Goals Coal Brief at 16. Appellant does not disagree with that statement—as far as it goes. There is no inconsistency with federal or state law in allowing a map to depict a physical marker. It is flatly inconsistent, however, to allow a physical marker to control the location of the boundary of a permit area when that marker is inconsistent with the boundary shown on the permit map.

Goals Coal and Secretary Huffman seem to argue that the map somehow includes the markers because the markers are depicted on the map. Not only does that argument run counter to all of the provisions of law at issue here, it is incoherent and begs the question. Markers cannot be on the map. They may be depicted on a map, but the markers themselves are obviously on the ground—not on the map.

Goals argues that because the markers are depicted on the map, they are part of the map. In fact, the markers depicted on the map are at the same location on the map that the boundaries are drawn. There is no distinction on the map between the markers and the permit boundary.

Rather, the conflict arises when comparing the markers on the ground with the boundary and the markers as depicted on the map.

There is no way under any provision of law to rely on the markers on the ground when they conflict with the boundary and the markers as depicted here. As discussed below, the permittee bears the burden to submit an accurate map with its permit application, and hence bears the risk that an inaccurate map could result in a more limited permit area. In asking the Court to hold that the map can be disregarded when a physical marker on the ground conflicts with the map and the depiction of that marker therein, the Secretary and Goals Coal invite the Court to construe the law to help out an inept draftsman. The Court must decline that invitation. Goals Coal must live with the foreseeable consequences of its predecessor's actions.

B. THE RELEVANT STATUTES REQUIRE A PERMIT AREA TO BE DEFINED SOLELY BY REFERENCE TO THE APPLICATION MAP

The Secretary and Goals Coal observe that the state and federal definitions of permit area refer to physical boundary markers. They misconstrue those references without giving any consideration to how the term is used in the statute.

The State statute defines "permit area" to mean "the area of land indicated on the approved proposal map submitted by the operator as part of the operator's application showing the location of perimeter markers and monuments and shall be readily identifiable by appropriate markers on the site." W. Va. Code § 22-3-3(q). The State provision, like federal law, provides that the boundary is determined by the map, and that the markers show on the ground that which is established by the map. Understood correctly, the statute provides that the permit area is defined by the application map, and that that map determines the location of the boundary markers. The statute does not say that the permit area is the area of land indicated on the approved proposal map and by the location of perimeter markers and monuments.

Moreover, the Secretary is wrong when he asserts that nothing in the administrative record of the regulatory activity of the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) supports the distinction in the statute between those portions of the statute that are definitional and those that are directional. When it promulgated its rule governing signs and markers, OSMRE specifically identified 30 U.S.C. § 1291(17)—the provision of federal law that defines “permit area”—as the source of its authority to issue such a rule. 44 Fed. Reg. 14,902, 15,137 (Mar. 13, 1979). By relying on the statutory definition of permit area as its authority for the promulgation of its mandate that operator’s use appropriate signs and markers, OSMRE demonstrated that it understood 30 U.S.C. § 1291(17) to include a mandate within its terms.

Goals Coal’s arguments regarding the deference due the Secretary’s interpretation mischaracterize the law. Appalachian Power Co. v. State Tax Dep’t of West Virginia, 195 W. Va. 573 (1995), unmistakably stands for the proposition that an agency action only deserves Chevron-style deference where the agency’s interpretation is embodied in a legislative rule. Id. at 586. By arguing that the Secretary’s interpretation “must be affirmed even if the Court either does not view it as the best construction of the law or views CRMW’s construction as also consistent with the law,” it is precisely Chevron-style deference that Goals Coal seeks. This Court has warned, however, of “a great danger in giving Chevron deference (and often legislative effect)” to agency actions that did not benefit from legislative oversight. Id. at 583 n. 7. Absent a legislative rule interpreting a statute, an agency interpretation is only entitled to the weight its persuasiveness commands. Id. Consequently, the Court is not required to defer to the Secretary’s interpretation if it is “permissible.” Rather, it must weigh the persuasiveness of the Secretary’s position against competing constructions, and decide which construction best reflects the Legislature’s intent.

Moreover, there is no inconsistency in Appellant's argument that OSMRE's interpretation is due Chevron-style deference whereas the Secretary's is not. OSMRE took the time to duly promulgate what this Court would characterize as a "federal legislative rule" (id. at 583 n. 6) that embodies its interpretation of the meaning of the term "permit area"; the Secretary has not. By exercising the authority vested in it by Congress, OSMRE has earned Chevron-style deference. U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001) (holding that "administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). In contrast, the Secretary has taken no such formal step and, as a result, has not earned the type of deference for which Goals Coal argues.

C. THE SAME LAW APPLIES TO PRE- AND POST- SURFACE MINING ACT OPERATIONS

Both the Secretary and Goals Coal essentially argue that, because mining operations predate enactment of the Surface Coal Mining and Reclamation Act and its attendant permitting requirements, the law should be applied differently to it than to an operation seeking a permit before operations have begun. The fundamental flaw in that argument is that there is only one set of governing statutes and regulations, and they do not distinguish between pre- and post-surface mining act operations. Rather, a permit area is defined by the area indicated on the application map, regardless of when that operation began.

It bears repeating that a surface mining applicant has an obligation to submit an accurate map, and assumes the risks attendant to not doing so. The statute places that obligation on operators at pre- and post-surface mining act sites equally. Goals Coal's predecessor had the opportunity to define with precision its permit area when it applied for its surface mining permit.

Because it sought to avail itself of the "existing operations" exemption to the prohibition of mining within 300 feet of a school, it should have been acutely aware of the need for precision. It alone had the ability to ensure that there was no conflict between the depiction of the marker on the map and the location of the marker on the ground. It did not do so. Goals Coal must now live with the consequences.

D. NOTHING IN THE 1982 REGULATORY SCHEME UNDERMINES APPELLANT'S ARGUMENT

Goals Coal argues that Appellant "fails altogether" to discuss the statute regulatory program as it existed at the time the permit boundary was established in 1981 and 1982. But none of the state regulations that Goals Coal cites require a different conclusion from that for which Appellant argues.

Goals Coal admits that the language of the statutory definition of permit area has not changed over the years, but it insists that several state regulations in effect at the time support its efforts to define the permit boundary by the location of the physical marker on the ground. Goals Coal's reliance on those regulations is misplaced.

The first regulations that Goals Coal cites governs the scale for maps. Goals Coal Brief at 13 (citing WVCSR § 20-6-3C.01, .02 & 6A.01.c.2 (June 16, 1982)). Goals Coal represents that those regulations provided that "the scale for all **maps**, unless otherwise noted, was to be a USGS 7.5-minute quadrangle map enlarged to 500' or less to the inch, though lesser scales could be used for improved clarity." Goals Coal Brief at 13 (emphasis original). That regulation does not advance Goals Coal's argument one iota. Indeed, it undermines it. That regulation makes clear that the mapmaker was authorized by regulation to use a map with a lesser scale to improve clarity. In this case, the mapmaker did not avail himself of that opportunity.

The second regulations that Goals Coal cites provided that application maps shall

“[s]how by **appropriate markings** the boundaries of the area of land to be disturbed.” Goals Coal Brief at 13 (citing WVCSR § 20-6A-6A.01.c.5 (1982) (emphasis by Goals Coal)). Goals Coal is apparently treating the term “markings” as if it were synonymous with “markers.” It is not. All that the cited regulation requires is that the boundary be marked on the map, as in depicted. The line depicting the boundary is, in fact, a marking.

The final regulation that Goals Coal cites is WVCSR § 20-6A-6B.01.b(1982), which provides that “[a] two-inch (2”) pipe or suitable substitute shall be driven into the earth . . . to permanently **mark the beginning and ending points of the area under permit.**” Goals Coal Brief at 13 (quoting WVCSR § 20-6A-6B.01.b (1982); emphasis by Goals Coal). That regulation is merely the 1982 equivalent of the current performance standard requiring the establishment of “suitable markers made of durable material . . . to permanently mark the perimeter of the area under permit.” 38 C.S.R. § 2-14.1(b). That is, it implements the mandate in the federal and state definitions of permit area that requires operators to mark their boundaries on the ground. The 1982 regulation, however, does not require the permit area to be defined by the physical markers. Rather, it requires the markers to reflect “the area under permit”—which is defined by the map.

E. THE STATUTE GOVERNS THE OUTCOME IN THIS CASE; COMMON LAW PRINCIPLES DO NOT APPLY

In an ineffective attempt to justify the Secretary’s use on common law principles to explain his sole reliance on the location of the physical marker to define the permit area, Goals Coal invokes the presumption against statutes in derogation of the common law. As an initial matter, Appellant’s proposed construction of the statute is not in derogation of the common law. As explained in Appellant’s Opening Brief, the Secretary’s arguments based on the intent of the mapmaker and the preference for monuments over maps are specious. But even if there were

some conflict between the common law and the proper construction of the statutory definition of permit area, the statute must control. That is, the presumption against statutes in derogation of the common law does not apply to comprehensive environmental statutes like the federal Surface Mining Control and Reclamation Act and the West Virginia Surface Coal Mining and Reclamation Act.

Where Congress enacts a “self-consciously comprehensive” environmental statute, such an enactment “strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.” City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 319 (1981) (discussing the Federal Water Pollution Control Act). In City of Milwaukee, the United States Supreme Court could have applied the presumption against statutes in derogation of the common law, but did not do so because of the comprehensive nature of the Federal Water Pollution Control Act. Kasza v. Browning, 133 F.3d 1159, 1177 (9th Cir. 1998) (Tashima, J., concurring). The Supreme Court of the United States has observed that the federal Surface Mining Control and Reclamation Act “is a comprehensive statute designed to ‘establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.’” Hodel v. Virginia Surface Mining and Reclamation Ass’n, Inc., 452 U.S. 264, 268 (1981) (emphasis added; quoting 30 U.S.C. § 1202(a)). This Court has also recognized that, in the federal surface mining act, “Congress set forth a comprehensive scheme.” DK Excavating, Inc. v. Miano, 209 W. Va. 406, 409, 549 S.E.2d 280, 283 (2001), and that the West Virginia Surface Coal Mining and Reclamation Act also sets out a comprehensive statutory scheme. Callaghan v. Eastern Assoc. Coal Corp., 177 W. Va. 257, 263, 351 S.E.2d 605, 611 (1986). Because the federal Surface Mining Coal and Reclamation Act and the West Virginia Surface Coal Mining and Reclamation Act are comprehensive statutes, they leave no room for

the common law.

That is particularly true of the provisions at issue here, which clearly provide that the permit area of an operation is defined by the area indicated on the application map. With that language, both Congress and the West Virginia Legislature indicated their intention for the permit application maps to control, and the Court must give effect to that intent, even if there were contrary common law principles.

F. ANY ABSURD RESULT IN THIS CASE IS THE FAULT OF THE MAPMAKER, NOT THE STATUTE

The Secretary and Goals Coal both argue that adopting Appellant's proposed construction of the relevant statutes would lead to absurd results in this case. As Appellant explained in footnote 9 of its opening brief, the "absurd" result to which the Secretary and Goals Coal are referring is not the type of absurdity necessary to trigger the canon of statutory construction requiring courts to avoid absurd results. Appellant's Opening Brief at 25-26 n. 9. Once again, any absurdity that results in this case was directly caused by the drawing of an absurdly inconsistent map. The mapmaker had it within his control to submit a map and place a boundary marker that are consistent with one another. He did not do so. The Secretary and Goals Coal are now torturing the statutory and regulatory language in an effort to remedy his mistake

Granted, Goals Coal did not draft the map. It is simply stuck in the unfortunate position of having acquired something less than what it believed it had acquired. But Goals Coal remedy for that dilemma is not a personalized construction of the West Virginia Surface Coal Mining and Reclamation Act. This Court should not follow the Secretary and Goals Coal's contorted reading of the statute in order to protect Goals Coal from the consequences of the mapmaker. Rather, the Court should interpret the law consistently with its language, the regulatory scheme,

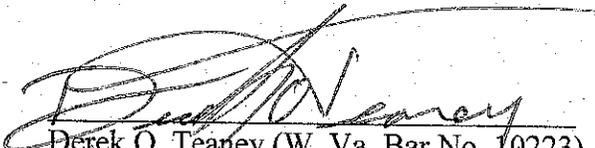
and common sense.

CONCLUSION

For the foregoing reasons and for the reasons expressed in Appellant's Opening Brief, Appellant respectfully requests that the Court reverse the final order of the Circuit Court and remand this matter to the Circuit Court with instructions to reverse and remand the final order of the Surface Mine Board.

Respectfully submitted,

Coal River Mountain Watch
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