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KAISER STEEL v. SOL (MSHA)
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Federal Safety and Health Review Commission
Office of Administrative Law Judges

KAISER STEEL CORPORATION, CONTESTANT JOINT VENTURE - UNITED STATES STEEL CORPORATION, AND KAISER STEEL CORPORATION, CONTESTANT v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	CONTEST OF CITATION DOCKET NO. WEST 80-301-R Citation No. 0246571 DOCKET NO. WEST 80-483-RM Citation No. 0246571-6 MINE: Sunnyside No. 2

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Before: Judge Jon D. Boltz

DECISION AND ORDER

STATEMENT OF THE CASE

Pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (here and after called the Act), Kaiser Steel Corporation (here and after called Kaiser) contested the issuance on April 8, 1980, of Citation No. 246571, which alleged a violation of 30 C.F.R. 77.216-3(b). (FN.1) The citation stated, inter alia, that a potentially

hazardous condition exist[s] at the Grassy Trail Reservoir in that the spillway structure is inadequate. The citation refers to a report submitted by the contestant which states that the embankment of the dam would be overtopped by 5.72 feet of flood and that a deep seated slide may exist in the right abutment and should be investigated. In its amended notice of contest, Docket No. WEST 80-301-R, Kaiser denied the alleged violation and alleged that respondent had no jurisdiction to issue the citation because the reservoir is not a "coal or other mine" as defined by the Act.

On August 25, 1980, Citation No. 246571-6 was issued to the operator designated as "Joint Venture Kaiser Steel-U.S. Steel." The citation stated, "The U.S. Steel Corporation [hereinafter referred to as U.S.S.] has been included with Kaiser Steel Corporation as joint operators of the Grassy Trail Reservoir ... ." U.S.S. filed its notice of contest, Docket No. WEST 80-483-RM, and therein denied that a potentially hazardous condition existed at the Grassy Trail Reservoir and alleged that neither the joint venture nor U.S.S. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

FINDINGS OF FACT

1. On September 17, 1951, Kaiser and Geneva Steel Company entered into a joint venture agreement to construct and maintain the Grassy Trail Dam. (Ex R-13). U.S.S. succeeded to the interest of Geneva Steel Company.

2. Pursuant to the agreement, U.S.S. owned an undivided 61.2% interest and Kaiser owned an undivided 30.8% interest in the reservoir and its appurtenant works. (Ex R-13).

3. The earth filled dam was built in 1952 and measured approximately 85 feet in height and approximately 600 feet in length. Approximately 1,000 acre feet of water are contained in the dam when it is full to the top. (Vol. I, p. 19).

4. The State of Utah, Division of Water Rights, is required by Utah statutue to approve construction of earth dams and to continue to inspect such dams after they are constructed. (Vol. III, p. 59, 61).

5. The purpose for which the dam was constructed was to provide a stable year round supply of water for household, commerical, and lawn watering purposes to the towns which became known as East Carbon City and Sunnyside. The agreement provided that the water would be used primarily for domestic use, and, if there was excess water, it could be used for industrial or miscelleanous purposes at the coal mine. (Ex R-13).

6. The crest of the dam is 7,620 feet above sea level. The normal pool elevation of the dam is at an elevation of 7,580 feet above sea level. The coal mining complex of Kaiser, called Sunnyside, is at an elevation of approximately 6,708 feet above sea level and is located approximately 4 1/2 miles down stream

from the dam. (Ex. R-2, Vol. I, p. 25).

7. Approximately one mile below Kaiser's mine complex is the town of Sunnyside. The town's elevation is 6,523 feet above sea level and it is approximately 5 1/2 miles down stream from the dam. Further down stream, approximately one mile, is the town of East Carbon City, at an elevation of 6,303 feet. (Vol. I, p. 25).

8. Estimates are that from 2,000 to 6,000 persons reside in the towns of Sunnyside and East Carbon City. (Vol. I, p. 52, Ex. R-20).

9. An employee of U.S.S., an outside foreman at their Geneva Mine, which is located approximately 10 miles East of Grassy Trail Creek, drives to the dam generally once daily, including Saturdays and Sundays, spending approximately two hours there in order to look over the facilities, check for possible slide areas, and check "dam overflow, if needed." Depending upon the water level of the tanks in the towns of Sunnyside and East Carbon City, he adjusts water outflow from the dam to maintain an adequate water supply. (Vol. III, p. 108; Vol. I, p. 165, 166, 175; Vol. I, p. 166).

10. There is one mutual valve at the dam that releases water into a 10 inch pipeline. The water from this line is distributed to East Carbon City and the town of Sunnyside. Water from the line also flows to the 500,000 gallon tank at the Kaiser mine complex. This tank supplys some water for facilities at Kaiser. Water from the tank is also used for the needs of the town of Sunnyside. (Vol. I, p, 166, 167).

11. The water from the dam passes through a chlorinator on Kaiser property and then goes into the 500,000 gallon storage tank. From the storage tank, the water is piped to the town of Sunnyside. (Vol. III, p. 103).

12. From the main water line below the storage tank, another line diverts water for use on Kaiser property. The water is then used at the bathhouse, shop area, and office area for showers or drinking water, and also to fill the boiler. (Vol. III, p. 104).

13. The boiler provides heat for the coal preparation plant, the shop, the bathhouse and the warehouse. During the winter months it provides hot water for showers at the bathhouse. (Vol. III, p. 99).

14. A diversion in the water line coming from the dam pipes water to the upper bathhouse for the shower facilities. (Vol. III, p. 103, 104).

15. During the last three to four years, no water from the dam has been used at Kaiser's coal preparation plant, except for the water applied to domestic purposes, which includes the boiler system. (Vol. III, 98).

16. Water that is collected at the bottom of the shaft of Kaiser's coal mine, amounting to approximately one and one half million gallons per day, is pumped to 500,000 gallon storage tanks located on Kaiser property. The water is then gravity fed back to the coal preparation plant where approximately 200,000 gallons of water are used daily in the preparation of coal. Water not used in coal preparation is sent through pipelines to provide water for such outside uses as the watering of alfafa fields, the city park, golf course, high school athletic fields and lawns. Any additional water not used is discharged into

Grassy Trail Creek. (Vol. III, p. 96, 97, 98).

17. None of the water from the dam is used by or in any mines owned or controlled by U.S.S. (Vol. I, p. 175).

18. U.S.S. initially pays all expenses of the joint venture, including the following: the salary of the employee (called the water master, who attends the dam), expenses associated with truck or equipment operation, repairs incurred in maintaining and operating the dam, the cost of operating the Big Springs Ranch and the cost of an annual study on the stability of the dam. (Vol. III, p. 112).

19. All of the costs incurred by U.S.S. in connection with the joint venture are reimbursed by the East Carbon City municipal government and Kaiser, so that U.S.S. does not make a profit nor incur a loss on the venture. (Vol. III, p. 112, 122).

20. The dam's vertical drop inlet spillway has a round, morning glory-shaped entrance into which water enters from all directions. The top of this round spillway is approximately 6 1/2 feet below the crest of the dam. The discharge rate of the spillway is 1,600 cubic feet per second when the water level is at the crest of the dam. (Vol. II, p. 111, 112).

21. The watershed supplying the dam is an area of approximately 20 square miles. The average annual precipitation for the area is 18 inches. (Ex. R-2).

22. The probable maximum precipitation for the watershed area of the dam in one hour's time is 6.5 inches and for a time interval of six hour's duration is 7.5 inches. (Ex. R-2) (FN.2)

23. The 100 year flood would result with precipitation of 1.35 inches occurring within one hour in the watershed of the dam, and precipitation of 1.8 inches in six hours. (Ex.R-2) (FN.3)

24. The embankment of the dam would be overtopped by 5.72 feet during the passage of probable maximum flood storms. (Ex R-2).

25. After the dam is overtopped, it would breach in approximately one hour. (Vol. II, p. 40; Ex R-3).

26. In the event of the occurrence of the probable maximum flood, the dam would begin to overtop approximately two hours and thirty minutes after the storm begins. (Ex R-3).

27. If the dam does breach as a result of the probable maximum flood, the water level of Grassy Trail Creek, where it flows past the mine, would be 3.7 feet higher than if the dam does not breach during the probable maximum flood. (Vol. II, p. 143).

28. The damage resulting from the probable maximum flood would be approximately the same whether or not a breach of the dam occurred. (Vol. II, p. 153).

29. In case of a breach of the dam as a result of the probable maximum flood, the water from Grassy Trail Creek would not reach Sunnyside No. 2's bathhouse or air shaft, but would probably enter the lowest portal of the coal mine. This portal travels uphill and water would not go in far enough to flood the mine. (Vol. p. 122, 123; Vol. II, p. 154).

30. In the event that the lower portal of the coal mine is blocked by flood waters, there are numerous other exits from the mine. (Vol. III, p. 94).

31. The probability of the probable maximum precipitation occurring in the watershed of the dam is 10,000 or 20,000 to 1. (Vol. III, p. 38; Vol. II, p. 198).

32. The spillway of the dam will adequately handle the 100 year floods since the spillway of the dam has a maximum discharge rate of 1,600 cubic feet per second, and the inflow into the dam during the 100 year storm or flood would be 504 cubic feet per second. (Vol. II, p. 93, 94; Ex. K-1).

33. The spillway would be insufficient to discharge the inflow of water to the dam during the probable maximum flood because the peak flow rate into the dam would be approximately 26,000 cubic feet per second. (Vol. II, p. 204).

ISSUES PRESENTED

1. Is the Grassy Trail Dam and Reservoir subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977?

2. If so, has the Secretary established a violation of 30 C.F.R. 77.216-3(b)?

APPLICABLE LAW

The following sections of the Act are applicable to the question of jurisdiction:

Section 3(h)(1) ""coal or other mine' means ... impoundments (FN.4) ... used in, or to be used in, ... the work of preparing coal...[.]"

Section 3(i) ""work of preparing coal' means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal, and such other work of preparing such coal as is usually done by the operator of the coal mine[.]"

DISCUSSION

It is undisputed that the Grassy Trail Dam is owned by the joint venture and that the joint venturers are Kaiser and U.S.S. A joint venture is a legal entity in the nature of a partnership engaged in the joint prosecution of a particular transaction for mutual profit. Tex-CO Grain Co., v. Happy Wheat Growers Inc., 542 S.W. 2d 934, 936. The joint venture of Kaiser and U.S.S. is a legal entity separate from either Kaiser or U.S.S. as individual corporations. The mutual rights and liabilities of these joint venturers in respect to their common enterprise are substantially those of partners. Taylor v. Brindley, 164 Fed. 2d 235 (1947). Since the ownership and operation of the Grassy Trail Dam is vested in the separate entity of the joint venture, any rights or liabilities accruing from the application of the Federal Mine Safety and Health Act of 1977, would be directed to Kaiser and U.S.S. only to the extent of their respective interest in the joint venture.

U.S.S. argues in its post hearing brief that since the joint venture does not own any coal mines, does not mine any coal and does not prepare any coal for market, it is not subject to the jurisdiction of the Act. This argument overlooks the implication of section 3(i) of the Act. If water from the dam is used in, or to be used in, the "work of preparing the coal", it is a "coal or other mine" and thus subject to the jurisdiction of the Act.

The Secretary asserts that the Act gives jurisdiction over the dam because the dam is owned, operated and controlled by a mining company; that the dam is a surface facility close to the mine; and that the dam is used in the mine operation and for the preparation of coal. (Vol. I, p. 83, 111, 144).

The Act does not concern itself with the question of ownership. Whether the dam is owned by a mining company, or by the town of Sunnyside, or by the joint venture is not controlling as to the question of jurisdiction of the Act. Whether the dam is close to the mine (approximately 4 1/2 miles in this case) or whether it is 20 miles away is equally not controlling. If the water from the impoundment or dam is used or to be used in the "work of preparing the coal" it is a coal mine according to the definition contained in section 3(h)(1) of the Act. Thus, the dam would be subject to the jurisdiction of the Act regardless of the ownership of the dam or its location.

The final question is whether the water in the dam was used in the "work of preparing the coal" as that phrase is defined in section 3(i) of the Act. Is the water from the dam used, or to be used, in the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of ... coal" or "such other work of preparing such coal as is usually done by the operator of the coal mine?"

The Manager of Engineering and Quality Control for Kaiser described the manner in which water is used at the mine in the preparation of coal. The raw coal out of the mine goes into one of two wash boxes where a pulsating action of water separates reject material from the coal. The rejected material falls to the bottom and is transmitted to a refuse belt and trucked to a refuse disposal site. The clean coal passes over the wash box and into the water. Water is also used at the mine in long wall mining. The emulsion oil, consisting of 95% water and 5% oil, charges the hydraulic system on Kaiser's long wall mining units. (Vol. III, p. 95. 96).

An MSHA inspector who worked at the Kaiser coal mine for approximately one year, and whose last day of work there was August 31, 1975, testified that water from the dam was used to fill the wash boxes on two occasions for short periods of time when water from the mine was inadequate. Less than eight hours use of water from the dam was required during these two periods. (Vol. II, p.9). The witness speculated that water from the dam may also have been used in making emulsion oil which was used in the hydraulic system for long wall mining. (Vol. II, p. 11). In these cases, the water from the dam was being used in the "work of preparing the coal."

There was no evidence that water from the dam has been used since 1975 for these purposes. Specifically, it is undisputed that water from the dam has not been used for such coal preparation for the last 3 to 4 years. (Vol. III, p. 99). Water from the dam that is subsequently purified is used at the coal mine for drinking purposes, showering, sanitation, and also in the boiler. The boiler provides heat for the coal preparation plant, the shop, bathhouse and the warehouse. During the winter months it provides hot water for showers at the bathhouse.

Within the last five years, an underground sump capable of holding millions of gallons of water has been developed at Kaiser's mine. All of the water used at the coal mine for the purpose of cleaning and washing coal comes from this underground source. This collection of water amounts to approximately 1 1/2 million gallons daily. Of this amount, approximately 200,000 gallons of water per day are used in the preparation of coal. (Vol. III, p. 97). This ground water is also used in the preparation of emulsion oil. Thus, the water "used in, or to be used in, the work of preparing coal" does not come from the Grassy Trail Dam.

In support of the position that the Secretary has jurisdiction, the Secretary argues in his post hearing brief that mining activities around Sunnyside and East Carbon City directly depend on a stable water supply provided by the Grassy Trail Dam. Water from the dam serves the towns where the majority of the miners live and also supplies the domestic needs of Kaiser Sunnyside Mine No. 2. The domestic use of water includes water for drinking, bathing facilities and for the boiler, "which allows the operators of the mine to comply with many of the health requirements of the Act." The problem with this argument

is that it would have jurisdiction extend to include the dam based on use of the water therefrom for purposes other than in the work of preparing the coal. The uses of the water from the dam, as stated by the Secretary, are for domestic purposes. The definition of the work of preparing coal contained in section 3(i) does not include water for domestic purposes at a mine or at a town where many coal miners may happen to reside.

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The Secretary also argues that the Act should be given a broad and liberal interpretation and any doubts concerning jurisdiction should be resolved in favor of granting jurisdiction. I agree that the Act should be given a broad interpretation, but the words contained in the definition of "work of preparing coal" are words of limitation and are unequivocal. The definition does not include impoundment water used for domestic purposes at a coal mine, as distinguished from the defined use, such as washing or cleaning the coal itself. To conclude otherwise would be to extend jurisdiction of the Act to any facility, municipal corporation, or other entity that might happened to provide nothing more than drinking water to a coal mine operation.

CONCLUSION OF LAW

The Grassy Trail Dam is not a "coal or other mine" and is, thus, not subject to the jurisdiction of the Act. It is, therefore, not necessary to decide the issue of whether or not 30 C.F.R. 77.216-3(b) was violated.

ORDER

There being no jurisdiction over the impoundment, Citations No. 246571 and 246571-6, alleging a violation of 30 C.F.R. 77.216-3(b), are hereby VACATED. There was also a written motion to strike Exhibit R-21 filed by Kaiser several weeks after the hearing was concluded. This motion is DENIED.

Jon D. Boltz
Administrative Law Judge

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~FOOTNOTE_ONE

1 When a potentially hazardous condition develops, the person owning, operating or controlling the impounding structure shall immediately: (1) Take action to eliminate the potentially hazardous condition; (2) Notify the District Manager; (3) Notify and prepare to evacuate, if necessary, all coal miners from coal property which may be affected by the potentially hazardous conditions; and (4) Direct a qualified person to monitor all instruments and examine the structure at least once every 8 hours, or more often as required by an authorized representative of the Secretary.

~FOOTNOTE_TWO

2 The concept of probable maximum precipitation is the theoretically greatest depth of precipitation that is physically possible for a given time interval, over a particular drainage basin, at a particular time of year. (Vol. II, p. 51).

~FOOTNOTE_THREE

3 A 100 year flood is a storm that has a one percent chance of occurring in any given year. (Vol. I, p. 98).

~FOOTNOTE_FOUR

4 The Dictionary of Mining, Mineral, and Related Terms defines an impounding dam as one in which tailings are collected and settled; also, a water storage dam. An impounding reservoir is defined as a reservoir which stores water from a wet season to a dry one, as distinct from a service reservoir. U.S. DEP'T OF THE INTERIOR, BUREAU OF MINES. A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 572 (1968).