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SOL V. MID-CONTINENT RESOURCES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
DENVER, COLORADO
January 4, 1989

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEST 88-121 A.C. No. 05-00301-03629
v.	Docket No. WEST 88-122 A.C. No. 05-00301-03630
MID-CONTINENT RESOURCES, INC., Respondent	Docket No. WEST 88-123 A.C. No. 05-00469-03642 Docket No. WEST 88-124 A.C. No. 05-00469-03643 Dutch Creek No. 1 and No. 2 Mines

ORDER GRANTING SECRETARY'S MOTION

Respondent, Mid-Continent, has indicated, in these and other proceedings, that it wishes to establish by evidence, including statistical data, that the enforcement documents (Orders and Citations) issued by the Secretary are examples of and the products "of a pattern of harassment and enforcement abuse by MSHA directed at Mid-Continent." 1/ This issue is for convenience being referred to as the "abuse" issue.

Petitioner, the Secretary, in a Motion in Limine filed on November 29, 1988, seeks to have an order issued prohibiting Respondent from submitting evidence on both the "abuse" issue and on the issue relating to its alleged failure to follow its own regulations in proposing penalties. Both parties have submitted briefs in support of their positions.

In Docket No. WEST 89-3-R, Judge John J. Morris determined that the Commission does not have jurisdiction to review alleged abuse of discretion by the Secretary in enforcing the Mine Safety Act at Respondent's Dutch Creek Mine and granted the Secretary's motion to dismiss Respondent's "broad allegation of alleged abuse...". Having carefully considered the arguments and authorities presented by the parties on this issue. I am in full accord with the views and holdings of Judge Morris expressed in

1/ In a preliminary hearing held in these four proceedings in Denver on November 2, 1988, Respondent also indicated its intent to establish that the Secretary did not follow her own regulations in proposing penalties for the alleged violations.

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his Order dated December 22, 1988, in Docket No. WEST 89-3-R, and such are fully incorporated herein by reference as an integral part of my decision here. It is specifically concluded that the Commission and its judges have no jurisdiction to hear the "abuse" issue. Evidence bearing on this issue and subject matter will thus be deemed irrelevant and excluded at the evidentiary hearings to be held in the four subject proceedings.

With respect to the allegation that MSHA did not follow its regulations in proposing penalties for the alleged violations, it is first noted that Respondent, at the prehearing conference, indicated that it did not desire to have penalty assessments sent back to MSHA's penalty assessment office for reassessment (Transcript of Prehearing Conference, p. 66). One of the purposes of the de novo formal hearings scheduled in these matters is to develop a record with respect to the various mandatory penalty criteria which are to be considered by the Judge and Commission in the event a violation is established.

Respondent also argues (at page 8 of its brief) that the Secretary's failure to follow her own regulations "is a further indication of abuse ...". Since I have previously determined the Secretary's position with respect to the lack of jurisdiction to hear the "abuse" issue is meritorious, this argument of Respondent is rejected. Evidence on this issue and subject matter will also be excluded at the evidentiary hearings in these proceedings.

Michael A. Lasher, Jr.
Administrative Law Judge

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