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PRECLUSION UNDER PRIMACY: THE EFFECT OF PRIOR STATE DETERMINATIONS ON FEDERAL OVERSIGHT ENFORCEMENT UNDER THE SURFACE MINING CONTROL AND RECLAMATION ACT

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The enactment of the Federal Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act)\(^1\) launched a new era in the regulation of surface coal mining and the surface effects of underground mining. SMCRA ended the era of exclusive state regulation, prompted in substantial part by the perceived failure of the states to do the job effectively.\(^2\) Instead, there was substituted a federal program of stringent environmental controls and performance standards, accompanied by a mechanism through which the states could regain regulatory predominance.

A state that wanted to regulate surface coal mining operations within its borders could develop a state program to implement fully and effectively the Act and the federal regulations and to demonstrate the state's capacity and commitment to proper enforcement. By obtaining federal approval of its state program, a state was awarded primacy and regained exclusive jurisdiction over the regulation of surface coal mining on non-federal lands within the state.\(^3\) As a check against state laxity, Congress reserved oversight authority in the Office of Surface Mining (OSM) and armed OSM with various mechanisms to ensure that primacy would not become synonymous with permissiveness.\(^4\)

Several years of experience with state primacy and federal oversight have introduced a number of thorny legal issues. Significant among them are the interrelationship between prior state decisionmaking and federal enforcement authority and the extent to which state determinations should be given binding effect precluding subsequent federal redetermination. What began as a trickle of decisions wrestling with these issues has become a minor torrent. This article will consider some of the recent cases and will review the evolving and somewhat confused state of the law.\(^5\) We then suggest some guiding principles for preclusion of routine federal

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4 See infra notes 76-84 and accompanying text.
5 The decisions of the Interior Department's Office of Hearings and Appeals, Hearings Division, will be cited "OHA" and identified by docket number, administrative law judge and date.
redeterminations—principles that are wholly consistent with the purposes of SMCRA, efficient administrative and judicial process, and the interests of justice.

I. THE TWO VERY DIFFERENT PRONGS OF PRECLUSION

Two very different types of preclusion have been at issue in the cases, but the distinctions between them are too often unrecognized. The failure to distinguish between the two different defenses has obscured the dimensions and prerequisites for each. In Alternate Fuels, Inc.,\(^6\) for example, a federal administrative law judge correctly granted the mine operator’s motion for summary decision and vacated a federal notice of violation (NOV),\(^7\) in reliance on two federal district court decisions which stood for two entirely different rules of law, apparently without recognizing the distinctions between them.

In Alternate Fuels, the state originally approved bond release after public notice and a public hearing. OSM appeared, opposing the release of the mine operator’s reclamation bond and alleged violations of OSM’s interim program regulations. OSM did not appeal the state’s bond release decision or take any other action for almost two years. It then issued a ten-day notice\(^8\) to the state alleging the existence of violations at the mine. Before the ten-day period elapsed, the state responded to OSM claiming that the bond for the area had been released by the state and that the state lacked statutory authority to take any action as a result. OSM then promptly issued an NOV to the mine operator alleging violations of OSM’s interim regulations. In granting the operator’s motion for summary decision, the administrative law judge relied on Excello Coal Corp. v. Clark (Excello I),\(^9\) and Drummond Coal Co. v. Hodel.\(^10\)

Both Excello I and Drummond represent important and valid limitations on OSM’s oversight authority. Each precludes OSM, on the basis of prior state action, from taking direct enforcement action against a mine operator. However,

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\(^7\) A notice of violation is the initial and most common enforcement action for which the Act provides. See 30 U.S.C. § 1271(a). It sets a time by which the alleged violation must be abated and it is followed by assessment of a civil penalty and, if necessary, a closure order under 30 U.S.C. § 1271(a).

\(^8\) 30 U.S.C. § 1271(a)(1) provides that, in a state with primacy, OSM cannot take enforcement action when it discovers an apparent violation until it notifies the state and gives the state 10 days in which to take “appropriate action” to cause the violation to be corrected or to show good cause for failure to do so. The Act provides that if the state fails to take appropriate action then OSM shall inspect the site, and, if the violation poses an imminent danger to the public or a significant and imminent environmental harm, OSM shall issue a cessation order. By regulation, OSM has asserted authority also to issue notices of violation where the state fails to take appropriate action but there is no such danger to the public or the environment. Notice of Violations, 30 C.F.R. § 843.12(a)(2).

\(^9\) Excello Coal Corp. v. Clark, No. CIV-3-84-904 (E.D. Tenn. Dec. 27, 1984) [hereinafter Excello I]. The administrative law judge also relied upon the case on which the Excello I court principally relied, United States v. ITT Rayonier, Inc., 627 F.2d 996 (9th Cir. 1980).

the two cases stand for entirely different propositions of law; they serve distinct policy objectives and they apply in entirely different situations. It is to the task of articulating these principles and differentiating the circumstances of their applicability that we now turn.

II. **COLLATERAL ESTOPPEL: THE PRINCIPLE OF EXCELLO**

In *Excello I*, OSM took direct enforcement action against a mine operator (*Excello*) even though the operator had already successfully defended against a state NOV for exactly the same violation before a state administrative tribunal. On appeal of a federal administrative law judge's decision denying the operator temporary relief from OSM's enforcement action, the district court held that collateral estoppel barred OSM's enforcement action.\(^{11}\)

*Excello* had operated the Tennessee mine at issue until 1979, when it began efforts to reclaim the area. In October 1983, an inspector from the Tennessee Division of Surface Mining (DSM) issued an NOV to *Excello* under Tennessee's OSM-approved state program. Among the problems DSM alleged were *rill and gully* violations. *Excello* contested this NOV before the Tennessee Board of Reclamation Review (the Tennessee Board), which in April 1984 vacated the Tennessee NOV and issued an order finding that the mine area had been properly reclaimed.

That same month, OSM announced that, effective May 1, 1984, it was suspending DSM's authority and would begin direct enforcement of Tennessee's program pursuant to SMCRA section 521(b),\(^{12}\) as implemented by OSM's regulations.\(^{13}\) In July 1984, an OSM inspector issued an NOV to *Excello* for precisely the same *rill and gully* violations cited in the vacated state NOV. *Excello* sought administrative review of the federal NOV and asked for temporary relief from OSM enforcement pending the administrative decision. The administrative law judge rejected *Excello*'s argument that OSM's NOV was barred by the prior Tennessee administrative litigation and denied temporary relief on the ground that an adverse state agency decision could not bar later OSM enforcement efforts.\(^{14}\)

The district court reversed the administrative law judge's decision, ruling that state tribunal decisions in favor of SMCRA defendants can block OSM relitigation of the same factual issues. The district court identified two principal issues in determining whether the Tennessee Board's decision should be afforded this collateral

\(^{11}\) The case was before the district court, pursuant to 30 U.S.C. § 1276(a)(2), (c). The operator had sought temporary relief from the administrative law judge pursuant to 30 U.S.C. § 1275(c).

\(^{12}\) 30 U.S.C. § 1271(b).

\(^{13}\) See 30 C.F.R. Part 733. These regulations and provisions of the Act represent one of OSM's major oversight mechanisms. They empower OSM to, and establish the procedural prerequisites for, takeover of enforcement in a state where OSM finds that there are violations resulting from a failure of the state to enforce all or part of the state program effectively.

estoppel effect. First, had Congress, in passing SMCRA, intended to prevent state decisions from blocking later OSM enforcement? Second, were the interests of the state enforcement authority and those of OSM sufficiently aligned to justify making the result of DSM's litigation binding on OSM? Since these issues had not been considered in prior SMCRA cases, the court relied heavily on the reasoning of United States v. ITT Rayonier,13 in which the Ninth Circuit had considered the same questions in the context of the Federal Water Pollution Control Act (FWPCA), an environmental protection statute which establishes a federal and state enforcement scheme similar to SMCRA's. ITT Rayonier held that EPA could not relitigate an issue already decided by a state court under that statute.

The Excello I court noted that principles of res judicata and collateral estoppel "serve a number of vitally important functions in our legal system: they conserve judicial resources, protect litigants from multiple lawsuits, foster certainty and reliance in legal relations, and promote harmony between federal and state courts."16 Moreover, the court found nothing in the language or legislative history of SMCRA which indicated a congressional intent to reject the application of ordinary principles of preclusion under SMCRA. Although Congress created a federal oversight role for OSM, the court noted that (1) the state and federal enforcement actions under SMCRA both were based on permits issued under a single regulatory system, and (2) OSM retained authority to take over enforcement and permit issuance—two factors that were relied on by the Ninth Circuit in supporting the application of preclusive principles under the FWPCA. The critical point under both the FWPCA and SMCRA, the court found, is that the enforcement actions of both the state and OSM are carried out under a single regulatory scheme.17

Having concluded that principles of res judicata or collateral estoppel apply under SMCRA, the court next turned to the question whether such principles were applicable to the case before it. The court noted that the same operative facts gave rise to the two enforcement actions, that the issue was actually and finally litigated in the state proceeding, and that all of the other prerequisites for the application of collateral estoppel clearly applied despite OSM's claim that it was neither a party nor privy to the state enforcement action.18

13 Rayonier, 627 F.2d 996.
17 The court noted also that the United States Court of Appeals for the Sixth Circuit has applied a similar analysis in Buckeye Power v. EPA, 481 F.2d 162, 167 n.2 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1975) (court first acquiring jurisdiction, state or federal, under the Clean Air Act has "exclusive jurisdiction" to proceed and its judgment will be res judicata). It distinguished Sixth Circuit decisions where collateral estoppel effect was not accorded prior state agency decisions under state law in the context of Title VII civil rights cases. See Cooper v. Philip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Tipler v. E.I. duPont de Nemours & Co., 443 F.2d 125 (6th Cir. 1971). The court quoted Tipler for the proposition that, in the area of Title VII, the "purposes, requirements, perspective and configuration" of the complementary state and federal statutes often vary. Excello I, No. Civ.-3-84-902, slip op. at 11 n.3.
18 Although the standards for collateral estoppel have been variously described, Wright, Miller, https://researchrepository.wvu.edu/wvlr/vol88/iss3/10
The court, following *ITT Rayonier*, noted that courts are no longer bound by rigid definitions of parties or their privies in determining the applicability of preclusive principles. Courts have recognized that a non-party may be bound if a party is so closely aligned in its interests as to be its *virtual representative* and that a *privo* may also include those whose interests are represented by one with authority to do so. Accordingly, the court found that the interests of the DSM and OSM were so similar in this case that OSM was a privy to the state enforcement action:

Both agencies were participating in the same federal program, enforcing the same state guidelines which OSM had approved and pursuing the same environmental protection objectives. The OSM could have participated in the state enforcement action if it had desired. That DSM was OSM’s ‘virtual representative’ is evident by the fact it stepped in and began operating exactly the same program that DSM had operated. The relationship between DSM and OSM is sufficiently close to preclude relitigation of the issue already determined in the DSM enforcement action.

The principle of *Excello I* is unquestionably sound. There is no reason to believe that collateral estoppel should not apply under SMCRA as it does elsewhere in the law. Yet, to conclude that this defense is generally available to a mine operator under SMCRA is only the beginning of the analysis. As explained above, the defense is only available when a number of prerequisites have been satisfied.

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*Excello I*, No. Civ.-3-84-902 slip op. at 12 (citing Rayonier, 627 F.2d at 1003).

*Id.* at 12-13.


*The numerous conditions which have evolved to limit the use of collateral estoppel reflect the
A preliminary evaluation of those prerequisites in the context of the Surface Mining Control and Reclamation Act suggests that the occasions in which the collateral estoppel defense can successfully be used will be relatively few. Indeed, several recent decisions have found the prerequisites not satisfied and have refused to afford preclusive effect to prior state determinations. In Solar Sources, Inc., for example, the state’s administrative decision to release the operator’s reclamation bond was held not to preclude OSM from issuing, more than two years later, a ten-day notice and, subsequently, its own NOV. The judge recognized the applicability of preclusive principles generally but found them unavailable to the operator in this case because no administrative agency acted in a judicial capacity and there was no resolution of a disputed issue of fact which the parties had an opportunity to litigate.

Similarly, in June Elswick, the operator unsuccessfully raised a collateral estoppel defense against a cessation order for disturbing more than two acres without a permit. The operator contended that the state had previously commenced and was pursuing proceedings addressed to the same issue. The state had thus far only held a preliminary hearing, however. Thus, the administrative law judge properly refused to afford any collateral estoppel effect to the state proceedings because only final decisions can bar relitigation of issues.

Although the administrative law judge on that basis reached the correct result, the heart of his analysis was misdirected. He sought to distinguish June Elswick from Excello I on the ground that in Excello I the Tennessee enforcement program had been revoked and OSM had been substituted as the enforcing authority, whereas in June Elswick the state program was still in effect. That distinction is invalid. Unlike the absence of a final state decision, the existence of an ongoing approved state program provides no justification for denying collateral estoppel effect to state proceedings to bind OSM and to bar enforcement. Indeed, the fact that OSM has not taken over enforcement of a state program indicates that the state enforcement agency’s interests are even more closely aligned with OSM’s than were those of the Tennessee enforcement agency in Excello I, and thus the state’s determinations are more deservedly binding on OSM. Therefore, it would be particularly appropriate for a final state decision in a state with primacy to preclude later OSM enforcement.

fact that its virtues (avoiding inconsistent determinations, duplicative litigation burdening parties and the courts, and promoting the need for finality and reliability) stand in constant tension with its dangers, including most prominently the fact that the first adjudication may be wrong. See 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 18, at 139-44 (1981).


24 Id. at 5.


26 Operations which disturb less than two acres are exempt from regulation. 30 U.S.C. § 1278(2).

27 June Elswick, OHA Docket No. NX 5-87-R, slip op. at 3.

28 Id. at 3-4. Both Bernos Coal Company and Excello Coal Corporation, as permittee and agent respectively, were issued the contested NOVs.
In *Bernos Coal Co.*, another administrative law judge rejected a mine operator's contention that an OSM cessation order was barred by a prior state determination that the site was fully reclaimed. The cessation order alleged that the mine had failed to return the site to approximate original contour. The administrative law judge noted that preclusive effect is only afforded to those questions "definitely and actually litigated and adjudged adversely to the government in previous litigation," and he found that the violation alleged in the cessation order failed to satisfy that criterion. As Judge Torbett said, "The State Board received no evidence on this violation. It was not litigated before them. The fact that the Board found the site fully reclaimed does not mean that all possible violations were litigated before them."31

In another *Excello Coal Corp.* case, the operator sought to bar an OSM NOV issued after OSM began direct federal enforcement of the Tennessee program by asserting the res judicata effect of a favorable state adjudicatory ruling that predated Tennessee's loss of primacy. Interestingly, the operator claimed that OSM's NOV was barred by collateral estoppel based on the ruling in the prior *Excello I* litigation. OSM, on the other hand, claimed that the operator was collaterally estopped by the ruling in *Bernos Coal Co.* to which Excello had been a party. The judge sorted through the preclusion thicket rather well, stating:

The undersigned disagrees with both parties. Each of these three cases raise distinct issues. In *Bernos*, the issue was whether a finding by the State that a site was fully reclaimed collaterally estopped the Respondent [OSM] from enforcing a violation written before the State proceedings had begun. The issue in *Excello I* was whether a finding by a State that a violation did not occur collaterally estopped the Respondent from relitigating that violation in this forum. Here, the issue is whether a finding by the State that the site is fully reclaimed collaterally estopped the Respondent from enforcing a violation that occurred after the State's decision was handed down.35

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31 *Id.* at 3 (quoting Montana v. United States, 440 U.S. 147, 157 (1979); United States v. Moser, 266 U.S. 236, 242 (1924)).
32 *Id.* The administrative law judge went on to rule in the alternative that even if res judicata and collateral estoppel were to apply, the State Board had no jurisdiction to issue an order finding the site fully reclaimed with respect to its effect on the OSM cessation order because the OSM action was first commenced. Under the principles of *Rayonier, Excello I* and *Buckeye Power*, he noted, the first court to acquire jurisdiction has exclusive jurisdiction. Therefore, he stated, "If res judicata and/or collateral estoppel apply, their application would require the decision of the undersigned be binding upon the State Board." *Id.* at 4. *But see* 18 C. WRIGHT, A. MILLER & E. COOPER, supra note 18, § 4404 at 23 (citing cases for the general rule that as between actions pending at the same time, res judicata attaches to the first judgment regardless of the sequence in which the actions were commenced).
33 *Excello II*, OHA Docket No. NX5-68-R (ALJ Torbett, Oct. 31, 1985) [hereinafter *Excello II*].
34 *See supra* notes 9, 11-20 and accompanying text.
35 *See supra* notes 29-31 and accompanying text.
36 *Excello II*, OHA Docket No. NX5-68-R, slip op. at 3.
Emphasizing the need for finality in a finding that a site has been fully reclaimed, the administrative law judge held that the state’s prior ruling that the site was fully reclaimed collaterally estopped OSM from issuing NOVs for violations that developed after the date of the ruling by the State Board.36

Finally, in *Clemens Coal Co.*,37 a Kansas operator defended against a federal NOV on the ground that (1) OSM had no jurisdiction since, *inter alia*, the state responded to OSM’s ten-day notice by advising OSM that the state had previously released the operator’s performance bond and had no jurisdiction over the mine, and (2) OSM could not collaterally attack the findings of the state in connection with the bond release determination. The state had previously held a public hearing on the bond release question. OSM was represented at that public hearing, and it knew, and had reported to the state its belief, that there was an inadequately reclaimed highwall at the mine. After the bond hearing, state authorities expressed the view that the highwall did not constitute a violation under its particular circumstances. The state then issued written orders finding that all SMCRA requirements had been satisfied, that reclamation had been completed, and that the operator’s bond should be released. OSM did not object at the hearing and did not challenge the state’s action. Two years after the bond had been released, however, OSM issued a ten-day notice of the alleged violation. The state timely responded that it had no authority to impose post-bond release reclamation requirements. OSM then issued the NOV under contest.

The administrative law judge rejected the contention that OSM lacked jurisdiction either because the bond had been released or because of the state’s response to the ten-day notice. The judge stated that it would be “inconceivable that a state’s erroneous actions . . . would constitute good cause for failure to take any action to correct the errors, and, as a result the Secretary would be precluded from taking any action to carry out his mandated responsibilities of enforcing the requirements of SMCRA.”38 He then rejected a series of what he characterized as estoppel arguments.

First, the operator argued that OSM was estopped from issuing an NOV because OSM failed to exercise its rights under section 519(f) of SMCRA to file objections with and request a hearing by the state with respect to bond release. Second, the operator argued that OSM failed to exercise its right under section 526(e) of SMCRA to seek judicial review of the state’s action in releasing a performance bond. Third, the operator argued that OSM failed to object to the release of the performance bond by issuing a ten-day notice and instead waited two years before issuing the NOV in question. Fourth, the operator argued that OSM was collaterally estopped under the rule of *Excello I* from issuing the NOV.39

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36 *Id.*
38 *Id.* at 8-9.
39 *Id.* at 9.
The judge examined each of these contenions in isolation. With respect to the non-*Excello* I based "estoppel contenions," the judge ruled, in essence, that the mere failure of the Secretary to exercise a particular oversight power should not bar him from the exercise of another. The judge repeatedly sounded the theme that the operator's view of the statute could not be adopted without threatening the Act's objectives. For example, he stated that:

If the Secretary must seek judicial review, in accordance with State law, of actions of a State regulatory authority, then he must first submit to the jurisdiction and determinations of the State regulatory authority in order to have standing to seek judicial review; and, as previously noted, this would give a State regulatory authority absolute control over the mining and reclamation standards promulgated in SMCRA and destroy the Secretary's mandated enforcement responsibilities contrary to the manifested intent of Congress.40

With respect to collateral estoppel, the judge correctly distinguished *Excello* I on the ground that certain prerequisites were not present. Although his conclusions about *some* of the prerequisites are highly questionable,41 the judge correctly noted that the highwall issue was not actually litigated by opposing parties and therefore was not actually decided in a judicial proceeding.42 The judge noted that there was no material difference between the action of the State Board and the action of a state inspector who conducts an inspection and determines that there are no violations, therefore no reasons to initiate any state enforcement action. Such bare administrative determinations are clearly not entitled to collateral estoppel effect to bar subsequent litigation of an issue.

There is little question that preclusive principles apply to protect mine operators from duplicative federal enforcement actions where an issue has already once been fully adjudicated by the state. Each case will necessarily entail an evaluation of the factors prerequisite to preclusion. The number of cases where those factors are all satisfied may be rather limited, however.43

In each case, the nature of the state administrative action must be evaluated as a threshold consideration. Although it has long been clear that an administrative adjudication is entitled to res judicata effect,44 the line between judicial and non-

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40 *Id.* at 11.
41 For example, the administrative law judge observed that the state could not be considered as OSM's virtual representative because it was aware of and refused to give serious consideration to OSM's position that the high-wall constituted a violation. *Id.* at 14.
42 *Id.* at 14-15.
43 Indeed, it may be no accident that the cases in which preclusion was applied arose in states where a prior grant of privacy had been revoked or limited and direct OSM enforcement had been imposed. Although available in full primacy states as a matter of law, it may as a factual matter be more likely that a prior state adjudication will be retested by OSM in a state which OSM has found to be inadequately enforcing the Act.
judicial action can be highly elusive.45 As Professor Davis has suggested, "[t]he best approach is to avoid the labels that have been attached to various [administrative] functions for other purposes and to determine what is judicial or non-judicial for purposes of res judicata by emphasizing factors which relate to res judicata."46

Additionally, in evaluating which state decisions are sufficiently adjudicatory to merit res judicata effect, it will be necessary to distinguish between the prerequisites for true res judicata, or claim preclusion, and for collateral estoppel, or issue preclusion. For example, claim preclusion will, where it applies, bar a second action even with respect to matters which were never asserted in the initial proceeding but which could have been.47 Collateral estoppel, on the other hand, will only bar relitigation of a matter that was actually litigated, decided, and necessary to the decision in the former proceeding.48 These are critical distinctions, but they are not being made by the courts and administrative law judges that are encountering these issues under SMCRA. Instead, the analysis largely ceases with the recognition of an issue relating to res judicata and collateral estoppel or to preclusion generally.49 Proceeding further, admittedly, can be analytically burdensome in any case. In the context of the variegated administrative proceedings conducted pursuant to SMCRA, those subsequent distinctions can be particularly difficult. Yet, proper administration of justice and proper representation of industry, citizen, and agency clients by their attorneys demands that these issues be addressed and resolved under SMCRA.

III. LACK OF JURISDICTION UNDER DRUMMOND: AN EMERGING DEFENSE

Drummond Coal Co. v. Hodel,50 decided by the Federal district court for the Northern District of Alabama, establishes a very different rule than the preclusion defense of Excello I. In Drummond, the state regulatory authority gave a mine operator a time extension to comply with regulations requiring return of the land to the required contour within six months. Before the extension expired, OSM issued NOVs and, ultimately, cessation orders because of the operator's alleged failure to restore the lands in a "timely manner." After the operator's application for temporary relief was denied by an administrative law judge, the operator sought

45 See 2 K. Davis, Administrative Law Treatise § 18.08 at 597-98 (1958); 18 C. Wright, A. Miller & E. Cooper, supra note 18 § 4475 at 765-70.
46 2 K. Davis, supra note 45 at 598.
47 Restatement (Second) of Judgments § 24 (1982); 18 C. Wright, A. Miller & E. Cooper, supra note 18 § 4406 at 43-44.
48 Restatement (Second) of Judgments § 27; 18 C. Wright, A. Miller & E. Cooper, supra note 18 § 4416 at 137-38.
49 The authors' susceptibility to the same analytic shortcoming, evident in these pages, is at least partially justified by the time-honored defense that such matters are beyond the scope of this article.
50 Drummond, No. 85-AR-1411-S.
temporary relief in federal court pursuant to section 526(c). The court granted the operator's motion and awarded temporary relief, sustaining the operator's defense based on the prior state action.

With that result, the similarities between Drummond and Excello I end. The Drummond court ruled, in essence, that OSM did not have authority to second-guess the state regulatory authority by ignoring the ruling of the state and commencing its own enforcement action. Apparently recognizing that the state's administrative determination granting an exemption to the operator was not entitled to preclusive effect under rules of res judicata and collateral estoppel (because there was no adjudication), the court focused instead on the inconsistency of OSM's action with the allocation of authority under SMCRA. The court noted that the incompatibility of concurrent state and federal determinations created a conflict between the state and federal agencies in which the operator was a victim. The court pointed out that SMCRA gives OSM and other parties the right to seek judicial review of state determinations with which they disagree; it does not confer the right to substitute their judgment for that of the state. In language which displayed its impatience with OSM's disregard for the state's prior determination, the district court stated:

If the national public policy is to begin an evolutionary process, without benefit of Congress, toward the atrophication of the authority of State agencies, which were expressly set up to monitor surface mining compliance in the several states, and to turn exclusively to OSM for the enforcement function, then this Court is unwilling to contribute the first mutation. When 30 U.S.C. § 1202(g) states as a purpose of the Surface Mining Control Act of 1977, to 'assist the States in developing and implementing a program to achieve the purposes of the Act', Congress did not indicate a vision of State agencies which would be rubber stamps of OSM.

The United States District Court for the Western District of Virginia was better able to articulate the essence of the defense that the Drummond court struggled to recognize. In Clinchfield Coal Co. v. Hodel, the issue arose in essentially the same manner as in Drummond. The mine operator had sought an amendment to

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51 30 U.S.C. § 1276(c).
52 The court's decision was not well focused, perhaps reflecting the fact that the issue before the court was a motion for temporary relief which did not require a definitive ruling but only a finding of "substantial likelihood" that the operator would prevail on the merits. See 30 U.S.C. § 1276(c)(2).
53 The court stated: "For aught appearing no timely appeal was taken from the 'action' of [the state], a fact which, if [the state's] 'action' is not res judicata to the question of 'timeliness', certainly adds strength to [the state's] side of the argument as the Court considers the overall statutory scheme." Drummond, No. 85-AR-1411-3, slip op. at 4.
54 Id. at 3-4.
55 30 U.S.C. 1276(e).
56 Drummond, No. 85-AR-1411-5, slip op. at 4.
57 Id. at 4-5.
58 Clinchfield Coal Co. v. Hodel, No. 85-0113-A (June 20, 1985). A second opinion was issued on September 25, 1985, denying the defendant's motion for reconsideration (hereinafter "on reconsideration").
its permit which would allow the relocation of diversion ditches at the mine. Applying the approved state program, the state regulatory authority approved the amendment. Several months later, OSM conducted an oversight inspection and issued a ten-day notice alleging that the location of the diversion ditches violated SMCRA. The notice stated that if the state failed within ten days to take "appropriate action" to cause the violation to be corrected, or to show cause for such failure, then a federal inspection would be conducted and appropriate enforcement action would be taken.

After the state declined to take any action and timely notified OSM that the diversion ditches had been approved by the state under its approved state program, OSM conducted an inspection and issued the operator an NOV because of the location of the diversion ditches. The operator's application for temporary relief was denied in an administrative proceeding, but the federal district court granted temporary relief, ruling that the administrative law judge's determination that the operator was not likely to prevail on the merits was inconsistent with the law.59

In his analysis, Judge Kiser did not tarry with notions of res judicata or collateral estoppel. He squarely targeted the pivotal questions of statutory construction in order to determine the relative roles of the federal and state enforcing agencies under SMCRA:

The underlying questions in this case are the scope of authority given to a State which has achieved primacy under the Surface Mining Act, and what reliance, if any, permittees can place on the decisions of the appropriate State regulatory bodies. . . .Where there are differing interpretations on the meaning of the Federal or State regulations, can the State make an interpretation, or is OSM's interpretation the binding one?60

The court concluded that OSM did not have authority under SMCRA to ignore the prior state determination and to issue its own NOV inconsistent with the state's determination that there was no violation. The court explained its ruling:

If the term 'primacy' is to have any meaning, then the State regulatory authority must have principal responsibility for interpreting and enforcing its own regulations and the Surface Mining Act. . . .I do not believe that Congress intended the OSM to serve as a duplicative regulatory body, conducting inspections and directly issuing notices of violation, especially where the State authority has made a determination that no violation exists.61

The court's ruling was grounded on its review of the whole statute and its legislative history. The court reviewed the Act's "extensive provisions" setting forth the terms of its enforcement scheme and the circumstances under which federal

59 Clinchfield, No. 85-0113-A, slip op. at 20-21.
60 Id. at 11.
61 Id. at 20.
power can be exercised. 62 As the court pointed out, the Act gives OSM authority in certain circumstances—during a federal inspection to enforce a federal program,63 a federal lands program,64 or the “interim program,”65—to issue its own NOVs where the violation does not create a danger to health or safety and is not reasonably expected to cause significant, imminent environmental harm.66 The court noted the absence of any statutory authority for OSM to issue its own NOV in a state with primacy, in contrast to the express authority granted to OSM to issue a cessation order even in states with primacy where there is an imminent danger to public health or safety or a violation which might cause significant, imminent environmental harm.67 The court bolstered its statutory analysis by pointing to passages in the legislative history which indicate that direct federal enforcement action is authorized only where a cessation order is necessary to prevent an imminent danger or environmental harm.68 Finally, the judge noted that the direct federal issuance of NOVs in a primacy state is only permitted when OSM follows the procedures of section 521(b), which authorizes a federal enforcement takeover due to inadequate state enforcement.69

In concluding that the Act did not vest OSM with authority to issue its own NOV in a primacy state, absent compliance with the provisions of section 521(b), the court nonetheless noted the existence of a federal regulation that could be construed to authorize such action. Section 843.12(a)(2) of Title 30 of the Code of Federal Regulations provides that OSM may issue an NOV when the state regulatory authority, after receipt of a ten-day notice, fails “to take appropriate action to cause the violation to be corrected, or show good cause for such failure.” The court questioned, but did not decide, the validity of the regulation, stating that if the regula-

62 Id. at 14.
63 A “federal program” is defined to mean “a program established by the Secretary [of the Interior] pursuant to Section 504 to regulate surface coal mining and reclamation operations on lands within a State in accordance with the requirements of this Act.” SMCRA § 701(6) (codified at 30 U.S.C. § 1291(6)). Section 504 provides for the promulgation and implementation of a federal program in a state which fails to submit or obtain approval for its own state program or where a state which as an approved state program is found, pursuant to section 521 of the Act, to not be enforcing all or any part of such program and the Secretary accordingly provides for Federal enforcement. 30 U.S.C. § 1254(a), (b).
64 SMCRA defines a “federal lands program” to mean “a program established by the Secretary pursuant to Section 523 to regulate surface coal mining and reclamation operations on Federal lands.” Section 701(5) (30 U.S.C. § 1291(5)). “Federal lands” is also defined in Section 501(4) (30 U.S.C. § 1291(4)).
65 The Act provided for an initial regulatory regime after enactment but before the full-fledged permanent program could be implemented, pursuant to 30 U.S.C. § 1252. This “interim program” provided for federal enforcement prior to the approval of a state program and the transfer of jurisdiction to the state. 30 U.S.C. § 1252(e).
66 SMCRA § 521(a)(3) (codified at 30 U.S.C. § 1271(a)(3)).
69 Id. at 16. See 30 U.S.C. § 1271(b).
tion purported to provide the Secretary with authority beyond that which the Act provides, then an enforcement action based upon the regulation cannot stand.\footnote{Clinchfield, No. 85-0113-A, slip op. at 6 (on reconsideration).} It noted, however, that there was a substantial question whether and to what extent the court had authority to consider the validity of the regulation in the context of the enforcement action.\footnote{See Virginia v. Watt, 741 F.2d 37 (4th Cir. 1984) (holding that an attack on administrative action taken in accordance with SMRCA regulations is effectively an attack on the regulations themselves; 30 U.S.C. § 1276(a)(1) limits such attacks on SMRCA regulations to the federal district court for the District of Columbia within 60 days of their promulgation).}

In a third case, still pending, a different judge in the United States District Court for the Western District of Virginia has granted temporary relief staying an OSM NOV under similar circumstances. In Harman Mining Corp. v. Office of Surface Mining Reclamation and Enforcement,\footnote{Harman Mining Corp. v. OSM, No. 85-0322-A (Oct. 28, 1985).} the operator received a federal NOV for failure to bring under permit a county road which the state regulatory authority had previously determined to be exempt from permitting. Pursuant to the state’s determination, the operator did not obtain a permit for the road. Subsequently, OSM issued a ten-day notice to the state alleging that the operator had violated the state program by failing to permit the road. The state timely responded to the ten-day notice, reporting that it had investigated and determined that the road was exempt from permitting and that no enforcement action was appropriate. Nevertheless, OSM then issued its own NOV. Following the administrative law judge’s denial of its application for temporary relief, the operator turned to federal court where the state regulatory authority filed a brief amicus curiae in support of the operator’s application.

In granting temporary relief and setting the case for further proceedings, the court found that the operator was substantially likely to prevail on the merits, given that the state regulatory authority had twice determined that the road was exempt from permitting. Without deciding the question of OSM’s authority to issue its own NOV in the circumstances of the case, the court found that it would be arbitrary and capricious to deny temporary relief while there remained unresolved such serious questions of state and federal authority over which the operator had no control.\footnote{Id. at 3.}

The core of this Drummond-type defense\footnote{See also Ryan’s Coal Co. v. OSM, No. CV83-PT-0623-J (N.D. Ala. 1983) (vacated per settlement agreement).} is not that OSM is barred from taking enforcement action because of the res judicata effect of the prior state action; the prior state action was not necessarily an adjudication which is entitled to preclusive finality. Nor is it, as the administrative law judge in Clemens Coal Co.\footnote{See supra note 37.} viewed it, that OSM is barred from using one of its oversight powers because
it failed to use another. On the contrary, the defense is that OSM lacks statutory authority under SMCRA to take such enforcement action in the first place.

Even if OSM’s regulation authorizing OSM to issue a direct NOV in a primacy state were valid, it must be construed as not permitting OSM to take such action in derogation of lawful state processes and determinations. Such a construction is dictated by the terms of the Act. Even more importantly, it is necessary to preserve the viability of the Act by protecting the state and federal partnership which lies at its core.

Congress very obviously balanced its concern for directly protecting the environment and public safety under the Act against its respect for the historic and proper role of the states in this arena. In the legislative scheme it designed, Congress required state conformance to the demanding and extensive federal requirements that Congress mandated as the tradeoff for retaining, or regaining, regulatory authority over surface coal mining operations. In order to ensure that state primacy did not mean a total abdication of federal responsibility for environmental protection from mining, Congress provided for a continuing OSM oversight role and empowered OSM to take various remedial measures as necessary.

First, unwilling to permit dangers to the public health and safety or significant and imminent environmental harm, Congress provided that, notwithstanding state primacy, OSM could—where it was certain that such harms were occurring—directly issue its own cessation order.\(^76\)

Second, and on a broader scale, Congress empowered OSM in section 521(b) to take specified actions when it believes a state is not properly enforcing the Act:

Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of the approved state program result from a failure of the State to enforce such state program or part thereof effectively, he shall after public notice and notice to the state hold a hearing thereon in the state within 30 days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the state to enforce all or any part of the State program effectively, and if he further finds that State has not effectively demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act, the Secretary . . . may issue such notices and orders as are necessary for compliance therewith.\(^77\)

Third, the Act and the regulations provide for the Secretary to require a state to change its state program where the Secretary determines that “conditions or events change the implementation, administration or enforcement of the State Program” or certain events otherwise indicate the approved state program no longer

\(^76\) SMCRA § 521(a)(1)-(2) (codified at 30 U.S.C. § 1271(a)(1)-(2)).

\(^77\) SMCRA § 521(b) (codified at 30 U.S.C. § 1271(b)) (emphasis added).
meets the requirements of the Act. As the United States Court of Appeals for the District of Columbia Circuit has emphasized, Congress intended the Secretary to rely on the state program approval process to fulfill his oversight responsibilities.

Fourth, the Act provides yet another tool for OSM to effect its oversight role. Section 526(e) provides that "[a]ction of the state regulatory authority pursuant to an approved state program shall be subject to judicial review by a court of competent jurisdiction in accordance with state law. . . ."

Fifth, the Act and the regulations provide mechanisms for timely administrative review of key agency decisions, with OSM and public participation. At the outset, there is a mechanism for ensuring that permits for new mines properly comply with the Act and cover all required areas and obligations before the permit is issued and the operator and others rely on it. Thus section 513(b) provides that "[a]ny person having an interest which is or may be adversely affected or the officer or head of any federal, state or local governmental agency shall have the right to file written objections to the permit application, a right to an informal, on-the-record conference, and then, if the interested party disagrees with the ultimate permit approval decision, a right to an on-the-record adjudicatory hearing and full administrative review of the permit." Similarly, at the end of mining operations, the decision of the state that a mine has been reclaimed and its bond can be released is also subject to rights of public notice, hearing, and objection.

As this brief review demonstrates, Congress did not leave OSM powerless when declining to permit OSM to issue its own NOV in a primacy state in the face of a state notification to OSM that no violation existed. Congress provided OSM with a vast array of oversight mechanisms to ensure that primacy is not permitted to jeopardize the Act's environmental protection objectives. Importantly, with the understandable exception for cessation orders for imminent, significant harms, all of these mechanisms have one fundamental and critical element in common: they provide for an orderly process of federal (or private) action designed to advance the Act's objectives without acting in derogation and contemptuous disregard of the states. These mechanisms respect the integrity of the states, state primacy, due process, and the state and federal partnership, while nonetheless ensuring that the environment is protected.

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78 30 C.F.R. Part 732.
80 30 U.S.C. § 1276(e).
81 See Drummond No. 85-AR-1411-5, slip op. at 4.
82 30 U.S.C. § 1263(b).
In contrast, when OSM fails to follow the appropriate oversight procedures and, instead, issues its own direct NOV because it disagrees with a state determination that an NOV is not appropriate, it makes a mockery of primacy. OSM’s actions demonstrate an arrogant disregard for the legitimacy of state law, the state program, and the state administrative process, resulting in a duplicative regulatory regime in which the operator becomes a helpless victim of two inconsistent standards and two inconsistent determinations. The operator is penalized by one government for actions of which the other government approved, introducing a measure of disorder into the legal system which violates the mine operator’s right to due process as much as it violates SMCRA.

OSM and its administrative law judges have not yet accepted the legitimacy of the Drummond defense. The Interior Board of Land Appeals has upheld OSM’s assertion of authority to decide that a determination of a state regulatory authority is wrong, as to a matter of state law, and that the state’s pendent decision not to take enforcement action is a failure to take appropriate action entitling OSM to issue its own NOV.\(^5^5\) The Interior Department’s attitude is well-captured in the decision of one administrative law judge upholding an OSM cessation order negating a prior state decision that legitimized an action OSM regarded as a violation:

The undersigned realizes that, in effect, [OSM] is being allowed to overrule the State enforcement authority in an issue interpreting (sic) the permanent state program. If done correctly, this is a proper oversight function. From a practical standpoint, the oversight responsibility of [OSM] would be completely nullified if [OSM] was bound as a matter of law by consent decisions entered into by the State regulatory authority.\(^5^6\)

What the administrative law judge and OSM have failed to recognize is that federal oversight authority would not be nullified if OSM were to respect and credit the states’ prior determinations. In the cited case, OSM could have participated in the case, could have appealed the decision administratively or judicially, or taken other steps to try to change the state’s determination or perhaps to preclude recurrences. Should the state’s action reflect, or develop into, a broader problem the broader remedies of a federal enforcement takeover, a substituted federal program, or threats of such broader action are available. All of these alternative approaches are legitimate under SMCRA and they reflect OSM’s ultimate authority over the program and its right to disagree with a state, but they do not contradict or undermine the validity and integrity of the state’s lawful processes. Moreover, the existence of OSM oversight does not mean that in every decision OSM is right. OSM must show respect for the state administration of regulatory justice or the Act’s federal and state partnership will not survive.


\(^{5^6}\) Minnie Development Corp., OHA Docket No. NX 4-19-R, slip op. at 3 (ALJ Torbett, Mar. 21, 1984).
IV. The Alternative Grounds of Alternate Fuels

With the two different lines of defense now better demarcated, we can return to the administrative law judge's decision in Alternate Fuels. It can be seen that the administrative law judge mixed legal apples and oranges. The judge's correct conclusion that OSM's NOV was improper was reached through a blurred path which confused the two distinct rationales arguably eligible to support it. The judge's conclusion evidences his confusion:

The facts in the present case are stronger than those set out in Excello. Here, an OSM inspector participated in the final bond release proceeding before the Kansas Board, and OSM had the opportunity to proceed further and prevent the bond release if it felt that the Board's decision was improper. They didn't do so. Some two years later, they now issue a notice of violation and seek enforcement proceedings which, on their face, could be difficult for applicant to defend. The matter has already been decided, and OSM is estopped to proceed further.

An examination of the facts suggests that Excello I did not apply at all. The purportedly dispositive bond release decision of the State Board was voted on by the State Board after a "public hearing" and does not appear to have been an adjudicatory determination at all. There is no indication that the state regulatory authority opposed the operator's request and the fact that OSM offered testimony is hardly a substitute for party status, which is indispensable to application of preclusive principles of a collateral estoppel nature. Thus, though the matter may have "already been decided," collateral estoppel does not preclude its being relitigated and decided again.

The administrative law judge reached the correct result, however, and was close to the proper rationale when he objected that OSM had the opportunity to challenge the bond release decision at the time but failed to do so. Under the Drummond family of cases, OSM had no jurisdiction to issue an NOV. Contrary to the views of the administrative law judges in Clemens and similar cases, OSM is neither paralyzed nor frustrated in its oversight function if it is denied this authority. OSM had passed up the various lawful oversight mechanisms Congress made available to it, including a direct challenge to the bond release decision under section 526(e). Indeed, OSM could also have proceeded under the section 521(b) procedure and become empowered to issue its own NOV. If there were a threat to the public health and safety or imminent environmental harm, OSM could readily have issued a cessation order. Instead, OSM issued a ten-day notice to the state and promptly rejected the timely response of the state that the operator was relieved from liability by a prior bond release. Because there was no authority for OSM to issue an NOV under the circumstances, it was properly vacated. But OSM was likely not bound by the preclusive effect of the state's action.

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77 *Alternate Fuels*, OHA Docket No. TU 5-23-R.
78 *Id.* at 7.
79 30 U.S.C. § 1276(e).
80 *Id.* at § 1276(e).
V. Conclusion

Principles of preclusion clearly apply under SMCRA to bar OSM from taking enforcement action against an operator for a condition or practice which has been previously adjudicated by the state authorities not to constitute a violation. However, the law has severely conditioned the availability of this defense; an operator has the burden of proving that the numerous prerequisites are satisfied before OSM will be bound by the prior determination. Yet, neither the parties nor the adjudicators have been conducting the sort of analysis which is necessary to correctly distinguish the situations where claim preclusion (res judicata) as opposed to issue preclusion (collateral estoppel) may apply.

In most of the cases that seem to cry out for such a defense—where some prior state proceeding released the operator from liability, and OSM knowingly failed to take timely direct action in response to the state’s exoneration of the operator—it simply does not apply. Although it disturbs our sense of equity, res judicata and collateral estoppel are not available remedies in most such cases.

There is, however, another type of defense, often unrecognized or confused with the res judicata defenses, which is available in those cases: SMCRA itself protects against the perceived injustice. As the courts have sought to make clear in the Drummond line of cases, Congress barred OSM from taking such duplicative and inconsistent enforcement actions unless serious threats to the public health and safety or to the environment demand it. Instead OSM was provided with numerous oversight rights and powers through which to assure back-up protection for the environment without contemptuously disregarding the state’s lawful process and without subjecting the mine operator to concurrent but inconsistent regulation. Where OSM believes a pattern of inadequate enforcement exists, Congress provided for the serious sanction of a federal takeover of enforcement—but only after due process procedures have been followed and the state has been given notice, an opportunity to rebut the Secretary’s allegations, and time to cure any derelictions.91 If in its zeal OSM chooses to further expand its remedies beyond those which the Act permits, the courts must be assiduous in striking down those excesses before the Act’s federal and state foundation is jeopardized.