

Editor's note: appealed -- withdrawn pursuant to Rule 41(a)(1)(i), Civ.No. 93-305-PCT CAM (D.Ariz. April 21, 1993); appeal filed sub nom. Maxine Kescoli v. Babbitt, Civ.No. 93-0839 PCT RCB (D. Ariz. April 30, 1993); dismissed for nonjoinder of Navajo Nation and Hopi Tribe (date unknown); aff'd, No. 94-17125 (9th Cir. Nov. 22, 1996), 101 F.3d 1304

PEABODY COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
THE HOPI TRIBE, MAXINE KESCOLI, AND THE NAVAJO NATION (INTERVENORS)

IBLA 93-5

Decided January 14, 1993

Petitions for discretionary review of a decision by Administrative Law Judge John R. Rampton, Jr., approving a settlement of Special Condition 1 and upholding Special Conditions 3 and 4, as modified, to permit AZ-0001C (Hearings Division Docket No. TU 90-2-PR).

Petitions granted; Administrative Law Judge decision affirmed in part, and reversed and remanded in part.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

A settlement agreement is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts. The Board will affirm an Administrative Law Judge's approval of a settlement unless the objecting party demonstrates that the Judge made a harmful error of law or a meaningful error in judgment. In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise.

2. Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

OSM has the authority, pursuant to SMCRA's prohibition against mining within 100 feet of a cemetery, 30 U.S.C. § 1272(e)(5) (1988), to require a permit applicant to submit additional information concerning the probability of locating undiscovered prehistoric burials in the permit area and to propose means to avoid disturbing such sites. However, if that information is necessary to support the written finding required by 30 U.S.C.

§ 1260(b)(4) (1988) that no mining will occur in an area designated unsuitable for surface mining, such data must be obtained before permit approval. OSM's attempt to base the required finding upon information to be received after permit issuance by the imposition of special conditions to the permit violates 30 U.S.C. § 1260(b)(1) and (4) (1988).

APPEARANCES: Timothy N. Black, Esq., Mary Jane Wilson-Bilik, Esq., Washington, D.C., and Timothy A. Heydinger, Esq., Chinle, Arizona, for Maxine Kescoli; James R. Bird, Esq., Peter J. Spiro, Esq., Washington, D.C., and Michael H. Hyer, Esq., Flagstaff, Arizona, for Peabody Coal Company; Stanley M. Pollack, Esq., Window Rock, Arizona, for the Navajo Nation; David S. Neslin, Esq., Denver, Colorado, Gloria Kindig, Esq., Kykotsmovi, Arizona, and Harry R. Sachse, Esq., Washington, D.C., for the Hopi Tribe; Jennifer E. Ring, Esq., and Jon K. Johnson, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Maxine Kescoli and Peabody Coal Company (PCC) have filed petitions for discretionary review of an August 28, 1992, decision of Administrative Law Judge John R. Rampton, Jr., approving a settlement of Special Condition (Condition) 1 and upholding Conditions 3 and 4, as modified, to permit AZ-0001C. The permit was issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 6, 1990, to PCC for the Kayenta Mine in northeastern Arizona.

Background

From 1964 to 1966, PCC's predecessor entered into leases with the Navajo Nation and the Hopi Tribe to mine coal in areas controlled by either the Navajo Nation or by the Navajo Nation and the Hopi Tribe jointly (the Tribes). In 1970 PCC began mining operations at the Black Mesa Mine, which supplies coal via slurry pipelines to the Mohave Generating Station near Bullhead City, Nevada, and in 1972 PCC began mining operations at the Kayenta Mine, from which coal is shipped by rail to the Navajo Generating Station in Page, Arizona. OSM issued permit AZ-0001 in 1982 to cover both mines, which are known collectively as the Black Mesa/ Kayenta complex. On September 28, 1984, OSM issued regulations governing the permitting of mining operations on Indian lands under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988). See 49 FR 38462 (Sept. 28, 1984). The regulations required new permits for all operations, but allowed existing operations to continue under their existing authorizations pending action on timely applications for new permits. In 1984, PCC applied for a permit under the new program for the Black Mesa/Kayenta complex.

During the period from November 1985 to May 1990, OSM was engaged in considering PCC's permit application and preparing an environmental

impact statement (EIS) for the Black Mesa/Kayenta complex. In August 1988, Robert F. Robinson, a consulting economist engaged by OSM, submitted to OSM the Black Mesa-Kayenta Mine Socioeconomic Analysis and Final Technical Report (Robinson Report) (Exh. J-3), detailing the potential socioeconomic effects of approving the permit application. The draft EIS was published on June 5, 1989, and was distributed in final form (FEIS) on May 17, 1990. OSM issued a technical analysis (TA) (Exh. J-15) in July 1990.

On July 6, 1990, OSM issued permit AZ-0001C (Exh. J-1) covering only the Kayenta Mine. Although PCC's permit application covered both the Black Mesa and the Kayenta Mines, as did the required studies and analyses, OSM's decision memorandum for permit AZ-0001C (Exh. P-52) noted that OSM was permitting only the Kayenta Mine and reserving action as to the Black Mesa Mine. Permit AZ-0001C contained the standard conditions listed at 30 CFR 733.17, the terms and conditions of PCC's leases with the tribes, and an "Attachment A" listing 18 "Special Conditions."

On August 3, 1990, PCC filed a request for review of 13 of the 18 "Special Conditions" attached to permit AZ-0001C. See 43 CFR 4.1360 through 4.1369. By orders dated September 18, October 12, and November 16, 1990, Judge Rampton granted petitions to intervene filed by the Hopi Tribe, the Navajo Nation, and Maxine Kescoli. By order dated January 31, 1991, he denied Feather Hammond's petition to intervene, but granted her status as amicus curiae.

Prior to the hearing before Judge Rampton, the parties pursued settlement negotiations which were successful as to 9 of the 13 conditions originally challenged. 1/ The hearing began on March 5, 1991, in Denver, Colorado, and continued there through March 8, 1991. It reconvened in Flagstaff, Arizona, on March 12, 1991, and ended there on March 15, 1991. 2/ At the conclusion of the hearing, Judge Rampton asked the parties to explore the possibility of settling PCC's challenge to Conditions 1, 3, and 4 in light of the record made at the hearing. On October 24, 1991, Judge Rampton issued a decision addressing only Special Condition 12. This decision was affirmed by the Board on June 5, 1992. Peabody Coal Co. v. OSM, 123 IBLA 195 (1992).

After extensive negotiations, the parties failed to resolve their disagreements concerning Conditions 3 and 4, but all the parties, except Kescoli, reached an agreement on a settlement of Condition 1. On July 2,

1/ On Mar. 5, 1991, PCC's challenge to Condition 2 was dismissed as moot upon joint motion of the parties at the hearing (Tr. D39). On Mar. 8, 1991, Judge Rampton issued an order approving a settlement of Conditions 5-7, 9-11, and 16-17.

2/ Throughout this decision, citations to the Denver, Colorado, phase of the hearing will be given as "Tr. D," and those to the Flagstaff, Arizona, phase as "Tr. F."

1992, OSM filed with Judge Rampton a motion for approval of the settlement of Condition 1. Kescoli responded stating her opposition to the settlement. The parties also briefed the issues affecting Conditions 3 and 4.

In his August 28, 1992, decision, Judge Rampton rejected Kescoli's objections and approved the settlement of Condition 1. He also found that Conditions 3 and 4, as modified by his decision, were appropriate. These petitions for discretionary review, which we hereby grant, followed. For clarity, we will discuss each petition separately.

Kescoli's Petition - Condition 1

Condition 1 as originally imposed provided:

Within 30 days of permit issuance, * * * PCC shall submit to OSM a description of measures, in addition to those proposed in the permit application package as it applies to the Kayenta Mine (PAP/KM), that PCC will take to mitigate impacts on sacred and ceremonial sites. Such measures shall include: (1) verification, and mitigation of impacts where necessary, of the sacred and ceremonial resources identified in OSM's [Robinson Report]; (2) coordination with any sacred site advisory committee formed by the Hopi or Navajo Tribe for exchanging information regarding sacred site concerns; and (3) means to resolve disputes between PCC and the Tribes regarding sacred and ceremonial sites.

Condition 1 as modified by the settlement agreement states:

Peabody's commitment with respect to protection of and mitigation of damages to religious and ceremonial sites in Chapter 13 of the Permit Application Package is clarified and amended by section A of the Settlement Agreement among Peabody, OSM, the Hopi Tribe and the Navajo Nation dated June 26, 1992 (hereinafter the "1992 Settlement Agreement"), which section is hereby incorporated by reference.

Section A of the settlement agreement requires PCC to address the religious and ceremonial concerns brought to its attention in a manner consistent with the methods outlined in Chapter 13 of its application. These procedures include: (1) identifying the nature of the concern, i.e., whether the concern relates to a location of religious or ceremonial significance because of a present or historical practice or whether the concern centers on materials used in ceremonies or religious activities; (2) determining whether PCC's mining activities will actually affect the place or materials; (3) if the concern relates to the accessibility of materials and the area will be disturbed by mining, making available resource specialists to assist the concerned party in locating the materials in an undisturbed area, and assisting the concerned party in obtaining any services of religious specialists needed to make the substitute material acceptable; and (4) if the concern relates to a location which is significant because of a ceremony or death, assisting the concerned

party in obtaining the services of an appropriate religious specialist to perform the ceremonies necessary to mitigate or eliminate the concern. See Exh. P-61 at 6.

Section A establishes procedures designed to foster communication among PCC, the Tribes, and individual Native Americans, including PCC's designation of specific PCC employees to be contacted with religious and ceremonial site concerns, and its commitment to maintain the confidentiality of information concerning such sites. The agreement further provides that PCC will meet annually with representatives of the Hopi, the Navajo, and OSM to review the progress of the mining operation and future mining plans, and to keep the Tribes apprised of the anticipated schedule of areas to be disturbed. Section A also discusses the parties' rights should an unresolved dispute arise.

Kescoli opposed the settlement, arguing that it contained serious legal flaws. Kescoli asserted that the settlement did not assure PCC's compliance with the requirements of Condition 1. She further contended that, by relieving PCC of any duty to mitigate the impacts of the mine on sacred and ceremonial sites, including grave sites known to local residents, OSM had abdicated its statutory and regulatory responsibilities under the National Environmental Policy Act of 1969 (NEPA), SMCRA, and the Administrative Procedure Act (APA). Kescoli also claimed that Condition 1 as originally promulgated was insufficient to fulfill OSM's regulatory responsibilities.

In his decision Judge Rampton concluded that Kescoli had raised no grounds justifying disapproval of the settlement. He rejected Kescoli's interpretation of 40 CFR 1505.3, a regulation implementing NEPA, as curtailing OSM's ability to modify a condition established in the FEIS or committed as part of the agency's decision by mandating that all such mitigation measures must be implemented. He stressed that the U.S. Supreme Court has held that NEPA's mandate is essentially procedural, and that NEPA does not impose any substantive requirements that mitigation measures be implemented, but directs only that possible mitigation measures be reasonably and completely discussed, citing Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978), and Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989).

Judge Rampton further noted that the NEPA regulations themselves, specifically 40 CFR 1502.9(c)(1), contemplate that an agency may make changes in an approved action and appear to place no restrictions on such modifications unless they are substantial and relevant to environmental concerns, a charge not made by Kescoli. The Judge agreed with PCC that the consequences of holding that Condition 1 was fixed in stone from the time OSM approved it would render the administrative review process meaningless and could place OSM in a classic "Catch-22" position of violating one law, e.g., SMCRA, by keeping the condition, but violating another law, e.g., NEPA, by altering it. He therefore concluded that 40 CFR 1505.3 did not prohibit OSM from modifying initially adopted mitigation measures through appropriate administrative action.

Judge Rampton analyzed the settlement in light of the purposes of Condition 1. He observed that testimony during the hearing had revealed that OSM's primary reason for imposing the condition was to foster communication between PCC and Native Americans regarding sacred and ceremonial site concerns (see, e.g., Tr. D169, D192, D243-46, D341-44). He noted that the Robinson Report similarly had focused on improving structures for communication and decisionmaking that would better enable the Tribes to identify sacred site concerns and relate those concerns to PCC (Tr. D149-53, D169, D243-46; Exh. J-3 at 164-65). Both Robinson and Foster Kirby, OSM's archaeologist, the Judge remarked, had testified that the condition had not been imposed because of any concern about the types of mitigation measures taken by PCC in the past (Tr. D149, D300).

Judge Rampton found that the modification of Condition 1 addressed the primary concerns of OSM by detailing the processes for collecting information regarding sacred and ceremonial sites and discussing the information with Native Americans. He indicated that these types of procedures previously had been identified in OSM's TA for the Kayenta Mine as additional mitigation measures which would acceptably resolve the problem of dealing with sacred and ceremonial sites (Exh. J-15 at 19). He further commented that the strategies described in the settlement agreement responded to additional concerns highlighted at the hearing or discussed in the FEIS, i.e., the protection of the confidentiality of sacred site locations, the desire for a regular, more structured review of PCC's mining plans, and the need for an available process for dealing with the concerns of individual Native Americans.

Judge Rampton concluded that the settlement adequately implemented the provisions of Condition 1:

By creating processes that address these concerns, the proposed modification of Condition 1 provides an appropriate vehicle for verifying sacred and ceremonial resources (determining whether the resources will be impacted by mining). The detailing of these processes largely implements the provision of Condition 1 that requires PCC to submit a description of the following mitigation measures: "verification, and mitigation where necessary, of the sacred and ceremonial resources identified in OSM's [Robinson Report]."

The introductory portion of Section A of the 1992 Settlement Agreement also implements the Condition 1 requirement that PCC submit a description of the following mitigation measure: "coordination with any sacred site advisory committee formed by the Hopi or Navajo Tribe for exchanging information regarding sacred site concerns." Section A "commit[s] [PCC] to coordinate with sacred site committees established by the tribes." (See Ex[h]. J-2, p. IV-74). Additionally, Section A implements the Condition 1 mandate to submit a description of the following mitigation measure: "means to resolve disputes between PCC and

the tribes regarding sacred and ceremonial sites." (See the 1992 Settlement Agreement, Section A, Paragraph 6).

In sum, the 1992 Settlement Agreement provides for modification of Condition 1 in a manner which largely implements that condition. Also the modification more adequately addresses (1) [OSM's] primary concern for fostering communication between PCC and the Native Americans, (2) concerns, such as the confidentiality of site locations, that Condition 1 failed to specifically address, and (3) concerns, such as the desire for a more structured and regular review of PCC's mining plans, which were revealed at the hearing. The 1992 Settlement Agreement therefore should be approved as a reasonable exercise of [OSM's] authority to modify an approved action through appropriate administrative action.

(Judge Rampton's Decision at 6-7). Accordingly, Judge Rampton determined that approval of the settlement did not violate 40 CFR 1505.3.

Judge Rampton also rejected Kescoli's argument that, because Condition 4, discussed subsequently, did not require PCC to protect grave sites known to local residents, OSM must have intended Condition 1 to protect known grave sites, and that the failure of the modified version of Condition 1 to provide this protection violated SMCRA. The Judge found this argument totally unsupported by the facts, noting that there was little or no evidence that Condition 1 was designed to protect known grave sites or that Condition 1 was linked to Condition 4. To the contrary, the Judge indicated that OSM had made a finding that no mining would occur within 100 feet of a cemetery (which included individual burials), subject only to PCC's compliance with Condition 4 (Tr. D81-82, D278), and that the evidence demonstrated that the Navajo Nation's Policies and Procedures concerning the Protection of Cemeteries, Gravesites and Human Remains (Navajo Burial Policy) would govern the treatment and protection of known grave sites (see, e.g., Exh. J-15 at 20). Judge Rampton characterized Kescoli's argument as a challenge to the adequacy of the permit's treatment of known burials, an issue outside the pleadings framed by the original parties, and held that Kescoli could not change or enlarge the issues by her intervention. Judge Rampton therefore concluded that the settlement agreement did not violate SMCRA.

Finally, Judge Rampton determined that the settlement agreement did not violate the APA. He found no merit in Kescoli's argument that the alleged violations of NEPA and SMCRA rendered the settlement agreement arbitrary and capricious or contrary to law, based on his conclusion that no violations of those statutes had occurred. He further reiterated that Kescoli's challenges to the adequacy of the permit, as opposed to the imposition of the special conditions, were beyond the scope of this proceeding. Accordingly, Judge Rampton approved the settlement of Condition 1.

In her petition for discretionary review, Kescoli argues that the approval of the proposed settlement of Condition 1 has inappropriately eviscerated the protections of that condition. She asserts that Condition 1 was a valid exercise of OSM's authority which should be upheld, and restates her position that 40 CFR 1505.3 mandates that OSM ensure that PCC implements all appropriate conditions to the permit. Kescoli contends that the original Condition 1 required specific mitigation measures, i.e., that PCC submit a plan within 30 days to mitigate the impacts of its operation on known sacred and ceremonial sites, 3/ while the modified condition eliminates this requirement, replacing it with a communication mechanism and limiting PCC's mitigation responsibilities to those outlined in Chapter 13 of its permit application. Kescoli contends that OSM has admitted that the measures proposed by PCC are inadequate, therefore the settlement agreement violates OSM's obligation under 40 CFR 1505.3 to ensure that lawful mitigation measures committed as part of its decision are implemented.

Kescoli attempts to distinguish the cases relied upon by the Judge in reaching his conclusions that NEPA is essentially procedural and does not impose any substantive requirement that mitigation measures be implemented. She further claims that requiring an agency to implement appropriate decisions does not put the agency in the Catch-22 position of being locked into inappropriate conditions, and asserts that in any event, Condition 1 has not been shown to be inappropriate.

Kescoli disputes Judge Rampton's conclusion that the primary concern of OSM was to encourage communication. She asserts, instead, that the evidence in the record demonstrates that a crucial motivating factor was the need to mitigate the damage to known sacred and ceremonial sites. Kescoli also contends that the settlement agreement threatens grievous immediate injury to sites revered by her and her family because the edge of PCC's mining operation currently lies within a half mile of her home. According to Kescoli, because 30 CFR 773.17(c) requires PCC to comply with the terms and all valid and appropriate conditions of its permit and Condition 1, which was amply defended by OSM, and was intended to afford important protections to individual citizens, OSM should not be permitted to eviscerate those valid protections in the name of compromise.

Kescoli maintains that the modified Condition 1 does not afford the statutorily required protection for grave sites. She argues that the original Condition 1 potentially protected grave sites by requiring PCC to specify mitigation measures for sacred and ceremonial sites, including burial sites which are revered by the Navajo as religious and sacred sites. The

3/ We note that the terms of the original Condition 1 required the submission of measures to verify, and mitigate if necessary, only those sites identified in the Robinson Report, not all known sacred and ceremonial sites as asserted by Kescoli.

modified Condition 1, Kescoli asserts, eliminates the mitigation requirement, thus erasing all legal assurances that PCC's mining operation will comply with SMCRA's prohibition of mining within 100 feet of a cemetery, unless relocation of the cemetery is authorized by state law.

Kescoli contends that unless Navajo law on burials authorizes relocation, mining must be prohibited within 100 feet of a burial. She concedes that the Navajo Burial Policy, which authorizes relocation only if the next of kin consent and provides that if consent is not given, the grave site must be left in place and avoided with a 100-foot buffer zone surrounding it, satisfies SMCRA's requirements. Nevertheless, although Judge Rampton dismissed Kescoli's challenge to the settlement in part because he concluded that PCC had undertaken to follow the Navajo Burial Policy, Kescoli argues that PCC has agreed only to relocate burials in accordance with that policy but has not indicated its willingness to abide by the most important protection afforded by that policy, i.e., the right of the next of kin to have the burial plots of relatives remain undisturbed forever.

Kescoli insists that the original Condition 1 required PCC to mitigate damage to sacred sites, including burials, as required by statute and regulation. Without that mitigation requirement, Kescoli maintains, the permit violates OSM's statutory and regulatory responsibilities, and Judge Rampton's decision approving the settlement must be set aside. OSM, PCC, and the Navajo Nation have responded in opposition to Kescoli's petition. ^{4/}

[1] A settlement agreement reached after negotiations among the parties to a dispute is properly approved if the settlement is fair, adequate, reasonable, and appropriate under the particular facts, and if the agreement does not violate the Constitution, a statute, or other authority. Durrett v. Housing Authority of the City of Providence, 896 F.2d 600, 604 (1st Cir. 1990); see also Citizens for a Better Environment v. Gorsuch, 718 F.2d 1118, 1126 (D.C. Cir. 1983), and cases cited therein. A decision approving a settlement will be affirmed on review unless the objecting party can demonstrate that the trier of fact committed a harmful error of law or made a meaningful error in judgment. See United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990). In evaluating the appropriateness of a settlement agreement, deference should be paid to the judgment of the Government agency which has proposed and submitted the compromise. S.E.C. v. Randolph, 736 F. 2d 525, 529 (9th Cir. 1984).

^{4/} On Nov. 12, 1992, Kescoli filed a motion for leave to file an answering brief in reply to PCC's response to her petition, and on Nov. 20, 1992, she filed her answering brief. By order dated Nov. 25, 1992, the Board denied her request. Kescoli's answering brief has not been considered in resolving the issues raised by her petition.

Kescoli argues that the settlement agreement violates provisions of both NEPA and SMCRA. She has failed to persuade us, however, that Judge Rampton erroneously concluded that the settlement agreement does not violate 40 CFR 1505.3, and we adopt his analysis of this issue. See Judge Rampton's Decision at 4-8. Similarly, Kescoli has not demonstrated that the original Condition 1 was specifically designed to prevent mining within 100 feet of a cemetery, or that the modified condition allows PCC to damage known grave sites in violation of 30 U.S.C. § 1272(e)(5) (1988) and 30 CFR 761.11(g). Accordingly, we find that Kescoli has not shown that Judge Rampton committed a harmful error of law necessitating reversal of his approval of the settlement of Condition 1.

Kescoli's challenges to the reasonableness, fairness, appropriateness, and adequacy of the settlement of Condition 1 center on her contentions that Condition 1 was created to protect sacred and ceremonial sites, and that the settlement eliminates any requirement that PCC mitigate impacts to known sacred and ceremonial sites including burials. In her petition, Kescoli asserts that the original condition was a valid exercise of OSM's authority and should have been upheld. However, the merits of the underlying controversy need not be resolved when considering approval of a settlement agreement. Citizens for a Better Environment v. Gorsuch, 718 F.2d at 1125-26; Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976). In fact, settlements are negotiated precisely to avoid just such an examination of the legal rights of the parties. Citizens for a Better Environment v. Gorsuch, 718 F.2d at 1125. Therefore, the appropriateness of the original condition does not affect the propriety of the settlement. Accordingly, we find Kescoli's contentions are without merit.

Kescoli disputes Judge Rampton's determination that the catalyst for OSM's imposition of Condition 1 was the need to enhance communication between PCC and the Tribes and their members about sacred and ceremonial sites. The record, however, amply demonstrates that fostering communication motivated OSM's decision to add Condition 1 to the permit. See, e.g., Tr. D62-63, D105-106, D110, D150, D152, D245-46, D248, D323-25, D341-43. The modified Condition 1 fulfills the underlying purpose of the original condition by establishing procedures to encourage the transmittal of sacred and ceremonial site concerns to PCC, and to ensure the confidentiality of such site locations.

Although the modified condition does not explicitly require PCC to verify and mitigate, if necessary, the sacred and ceremonial sites identified in the Robinson Report, as did the original Condition 1, this omission does not relieve PCC of its mitigation responsibilities. In fact, the settlement agreement expressly incorporates, as well as clarifies and amends, PCC's commitment in Chapter 13 of its permit application to protect and mitigate damages to sacred and ceremonial sites, and as noted by Judge Rampton, OSM has not questioned the adequacy of the measures discussed in the permit application. Thus, the settlement agreement has not diminished PCC's mitigation obligations with respect to the sites sacred to Kescoli,

which were not identified in the Robinson Report and, therefore, not specifically subject to verification and mitigation under the original condition. We further find that the prohibition against mining within 100 feet of a cemetery found at 30 U.S.C. § 1272(e)(5) (1988) and 30 CFR 761.11(g), the Navajo Burial Policy, and the provisions of the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-30013 (Supp. 1990) (NAGPRA), afford ample protection for the known burials sacred to Kescoli.

Accordingly, we find that the settlement agreement is fair, adequate, reasonable, and appropriate under the particular facts and does not violate SMCRA or NEPA, and affirm Judge Rampton's approval of the settlement of Condition 1. To the extent Kescoli has raised arguments not specifically addressed herein, they have been considered and rejected.

PCC's Petition - Conditions 3 and 4

Conditions 3 and 4, as contained in Attachment A to permit AZ-0001C, provided:

3. Within 60 days of permit issuance, PCC shall submit to OSM: (1) an updated map(s) of archaeological sites plotted against mining areas, with proposed disturbance areas and pit advancement delineated; and (2) a list of the potentially-impacted sites and a tentative schedule predicting when they might be impacted.

4. Within 120 days of permit issuance, PCC shall submit to OSM a report describing PCC studies of the Black Mesa Archaeological Project records pertaining to the recovery of prehistoric human remains. The report shall discuss strategies employed by the archaeologists in locating human remains, identify sites investigated for burials, identify sites from which remains were recovered, discuss the site characteristics which predict that human remains might be located, and provide a listing of sites which are located in proposed disturbance areas that might contain human remains. The report also shall propose a course of action to be taken in considering, protecting, and mitigating sites considered to fall within the high-probability category for containing human remains.

PCC challenged these conditions, arguing that no statutory or regulatory authority supported their imposition, that the terms of the conditions were unreasonably vague, and that the conditions were unreasonable and unnecessary in light of the extensive archaeological work PCC had already performed in the permit area. PCC asserted that the conditions were unlawful and inappropriate given the enactment of NAGPRA, and that neither SMCRA nor any other statute, regulation, or trust doctrine empowered OSM to require PCC to comply with the terms of the conditions. The Navajo Nation joined in PCC's challenge, while OSM, the Hopi Tribe, and Kescoli argued that the conditions were appropriate and should be upheld.

Judge Rampton concluded that Conditions 3 and 4, as modified by his decision, were appropriate. He determined that OSM had established its prima facie case that the conditions were appropriate in the context of the Kayenta Mine by demonstrating its authority to impose the conditions and the reasonableness of its exercise of that authority. The Judge concluded that PCC had failed to meet its burden of overcoming OSM's prima facie case by a preponderance of the evidence.

Judge Rampton found that SMCRA's prohibition against mining within 100 feet of a cemetery, by itself, provided sufficient authority for OSM's imposition of Condition 4. He considered the regulatory definition of "cemetery," found at 30 CFR 761.5, as "any area of land where human bodies are interred" to be extremely broad, encompassing individual, prehistoric, as well as historic, and unmarked human burial sites. As support for his determination that the definition included unmarked prehistoric burials, the Judge relied in part on the preamble to the regulation, 52 FR 4244, 4254 (Feb. 10, 1987), which discussed OSM's authority to require a permit applicant to provide additional information regarding potential unknown burial sites if the currently available data indicated a likelihood that such sites existed within the permit area. The preamble section quoted by the Judge justified the requirement to provide the additional information as necessary to enable OSM to make the required findings, inter alia, that the proposed permit area was not within an area designated as unsuitable for mining (30 CFR 773.15(c)(3)(ii)), and that the permit application was complete and accurate (30 CFR 773.15(c)(1)). Judge Rampton concluded that OSM's imposition of Condition 4 clearly conformed with the requirements of the regulations and OSM's consistent interpretation of those requirements.

Judge Rampton rejected PCC's contention that protection for unidentified remains was limited to designating the land as unsuitable for mining in accordance with 30 U.S.C. § 1272(a) and (b) (1988), determining that this approach ignored the principle of implied administrative powers. The Judge found no merit in PCC's argument that OSM's imposition of Condition 4 was inconsistent or discriminatory because such a condition had never been imposed on any other permittee. Citing testimony demonstrating the reasonable, albeit small, possibility of locating a fair number of unknown human remains at the Kayenta Mine and the uniqueness of the Kayenta Mine compared to other mines, Judge Rampton found that the preponderance of the evidence did not show that OSM was being inconsistent or discriminatory in imposing Condition 4. He also concluded, contrary to PCC's contentions, that OSM's written finding that no mining would occur with 100 feet of a cemetery was premised upon PCC's anticipated compliance with Condition 4; that permit applicants may be required to bear the expense of providing necessary additional information; and that, even if OSM had all the necessary data to perform the functions required by Condition 4, OSM could still require PCC to expend its time and resources to make the required demonstration that its permit application was complete and accurate, and that it had fulfilled all statutory and regulatory requirements.

Although Judge Rampton concluded that OSM generally had the authority to impose Condition 4 under 30 U.S.C. § 1272(e)(5) and 30 CFR Part 761, he declared that condition invalid to the extent it required PCC to perform acts inconsistent with the provisions of NAGPRA. The Judge explained that NAGPRA clarified that ownership or control of Native American human remains excavated or discovered on Federal or tribal lands after November 16, 1990, vested in Native Americans and their governments, rather than in a Federal agency or museum, and established procedures regarding intentional excavation and removal or inadvertent discovery of such remains. 25 U.S.C. § 3002 (Supp. 1990). Judge Rampton held that, contrary to PCC's and the Navajo Nation's contentions, NAGPRA did not address, and the right of ownership or control over such remains did not embrace, the authority to control the process of predicting the location of such remains and protecting them from excavation, removal, or other disturbance. Thus, he ruled that OSM retained the authority under SMCRA to ensure that no mining occurred within 100 feet of such remains.

Judge Rampton evaluated Condition 4 in light of NAGPRA, finding the condition for the most part a legitimate exercise of OSM's SMCRA authority. However, he invalidated the condition in part because it required PCC to propose a course of action to be taken to mitigate sites considered to fall within the high probability category of containing human remains. According to the Judge, what constituted mitigating actions was unclear and could include actions inconsistent with Native American ownership or control of such remains under NAGPRA. He found that none of the other Federal laws cited by OSM granted it the authority to impose mitigation requirements and concluded, therefore, that OSM could not, consistent with NAGPRA, dictate that PCC take any mitigation measures or require PCC to propose such measures for OSM review.

Accordingly, Judge Rampton modified Condition 4 by deleting the language in the last sentence of the condition so that this sentence read: "The report shall also propose a course of action to be taken in considering and protecting sites considered to fall within the high-probability category for containing human remains" (Judge Rampton's Decision at 18). He also directed that the parties construe the modified condition consistently with his interpretation of NAGPRA.

Similarly, Judge Rampton determined that OSM had the authority to impose Condition 3, as modified by his decision. He found that the condition, which would enable OSM to easily ascertain which sites would be impacted by mining and which would not, was authorized only by the statutory and regulatory provisions protecting cemeteries, including not only 30 U.S.C. § 1272(e)(5) and 30 CFR Part 761, but also 30 U.S.C. § 1257(b)(13) and 30 CFR 779.24(j) requiring the mapping of cemeteries. However, the Judge regarded the condition as overbroad to the extent it included archaeological sites rather than sites highly likely to contain human remains, noting that the statutory and regulatory authorities supporting its imposition did not authorize OSM to require identification and protection of all archaeological sites regardless of whether they contain

or are likely to contain human remains. Because he found that no other statutory or regulatory authority cited by OSM supported the imposition of Condition 3, the Judge modified the condition to recognize that OSM's concern over the probability of unidentified burials existing on the Kayenta Mine was limited to sites concerning prehistoric remains.

As modified, Condition 3 provided:

Within 60 days of permit issuance, PCC shall submit to OSM: (1) an updated map(s) of archaeological sites containing human remains or highly likely to contain prehistoric human remains plotted against mining areas, with proposed disturbance areas and pit advancement delineated; and (2) a list of such sites which may be impacted and a tentative schedule predicting when they might be impacted.

(Judge Rampton's Decision at 19).

Judge Rampton further determined Conditions 3 and 4, as modified, were reasonable exercises of OSM's SMCRA authority within the context of the Kayenta Mine. In rejecting PCC's vagueness challenge to Condition 4, the Judge found the condition, as modified, sufficiently clear on its face. He noted that the condition simply required PCC to prepare a report from an analysis of its existing data base which would further the identification and protection of high probability sites to avoid disturbance of any sites containing prehistoric human remains in accordance with the finding that no mining would occur within 100 feet of a cemetery. Because the modified condition did not compel PCC to conduct additional excavations as mitigation measures, but merely required actions necessary to protect prehistoric human remains from disturbance, the Judge did not regard the condition as too vague or difficult to apply. He also discounted PCC's concern about the lack of definition of such terms as "high probability," pointing out that similar terms of probability were interpreted every day. According to Judge Rampton, the modified condition did not impose an unreasonable burden on PCC and was not otherwise unreasonable.

The failure of some, but not all, of OSM's rationales for imposing Condition 4 to withstand scrutiny did not detract from the reasonableness of the condition in the circumstances of the Kayenta Mine, Judge Rampton observed, citing the proposition that if an agency states more than one ground for a decision, each sufficient, the decision should be upheld if any such ground is correct. He stated that, based on OSM's legitimate reasons for imposing the condition, he was confident that, if OSM had taken NAGPRA properly into account, it would have imposed Condition 4, as modified, reiterating that OSM's finding that no mining would occur within 100 feet of a cemetery depended upon the imposition of Condition 4.

Judge Rampton found no merit in PCC's challenge to the reasonableness of Condition 3 on the basis that OSM already had adequate maps and/or sufficient information to generate the required maps and lists. According

to the Judge, the evidence demonstrated that OSM did not have satisfactory maps showing the sites containing human remains or highly likely to contain prehistoric human remains, and, in any event, OSM could compel PCC to provide data and to prove on the basis of that data that PCC had complied with all statutory and regulatory requirements. Judge Rampton, therefore, concluded that Condition 3, as modified, was reasonable in the context of the Kayenta mine.

Based on his determinations that OSM had the authority to impose Conditions 3 and 4, as modified, under SMCRA's prohibition against mining within 100 feet of a cemetery, and that both modified conditions constituted reasonable exercises of that authority, Judge Rampton held that the modified conditions were appropriate in the context of the Kayenta Mine and upheld their imposition.

In its petition for discretionary review, PCC essentially argues that SMCRA does not authorize OSM's imposition of the conditions, and that, even assuming that the conditions were authorized, OSM has not demonstrated their appropriateness. PCC contends that neither the plain language of 30 U.S.C. § 1272(e)(5) (1988) and its implementing regulations, nor the preamble to the regulation defining "cemetery" empowers OSM to require a permit applicant to take steps to predict the likelihood that currently undiscovered prehistoric human remains may exist at a proposed minesite.

The Navajo Nation has filed a brief in support of PCC's petition. It argues that the Judge's decision is inconsistent with the ownership and control provisions of NAGPRA to the extent that it vests authority to regulate mining activities affecting human remains with OSM, rather than the tribal landowner with ultimate control over the disposition of the remains. The Navajo Nation contends that OSM's retention of the authority to determine the sufficiency of PCC's submissions regarding the protection of sites containing human remains, despite Judge Rampton's modification of Condition 4, conflicts with NAGPRA. The Navajo Nation stresses that given OSM's admitted failure to consider the effect of NAGPRA on Condition 4, that condition must be remanded to OSM for reconsideration in light of NAGPRA's ownership and control provisions.

OSM opposes PCC's petition. OSM asserts that Conditions 3 and 4 are authorized by SMCRA and its implementing regulations prohibiting mining within 100 feet of cemeteries, including individual prehistoric burials. Reciting the rationale for Condition 4 outlined in the TA (Exh. J-15 at 20), OSM explains that the condition was developed in response to concerns expressed by a broad spectrum of organizations and individuals about the likelihood of locating prehistoric remains and their subsequent treatment, and that its conclusion that planning for the likely encounter of such remains was preferable to interrupting mining because of such discoveries.

OSM admits that it made the required finding that no mining at the Kayenta mine would occur within 100 feet of a cemetery (Exh. P-52, Finding No. 3.h), but contends that the required finding could not have been made

absent the imposition of Condition 4. In response to PCC's argument that the finding was unconditional on its face, OSM submits that the findings document was only one of numerous documents, including the permit, issued simultaneously, and that all of those documents must be considered and construed together.

OSM insists that, while it admittedly advanced alternative statutory bases for the conditions, it has consistently maintained its authority to impose the conditions pursuant to SMCRA's prohibition of mining within 100 feet of a cemetery. OSM further asserts that the imposition of the conditions is consistent with previous administrative interpretations of SMCRA and its implementing regulations, pointing out that the conditions comport with the position taken by OSM in the 1987 regulatory preamble long before the present controversy arose. OSM urges an agency's interpretation of its regulations is entitled to great deference, and that the preamble to a regulation should be considered when interpreting that regulation.

OSM argues that NAGPRA, which was enacted after the conditions were imposed, does not supersede OSM's authority to impose the conditions, as modified by Judge Rampton. Although NAGPRA does address ownership and control of human remains after discovery, OSM avers that the statute does not discuss the authority to control the process of predicting the location of such remains and protecting them from disturbance. OSM insists, therefore, that it retains the authority under SMCRA to ensure that no mining occurs within 100 feet of a cemetery.

Finally, OSM insists that a remand would be pointless because its position regarding the overall propriety of the conditions and the specific modifications made by Judge Rampton are clear. Accordingly, OSM requests that Judge Rampton's decision be affirmed.

The Hopi Tribe has filed a response in opposition to PCC's petition, requesting that Judge Rampton's decision be affirmed. The Tribe asserts that OSM has the authority under SMCRA and its implementing regulations to impose the conditions, arguing that the authority to require a permittee to take steps to locate cemeteries must be implied because, in order to be able to prohibit mining within 100 feet of a cemetery, OSM must have some way of determining the location of the cemetery. The Hopi Tribe avers that the imposition of the conditions was a reasonable and appropriate exercise of OSM's authority due to the unique nature of the Kayenta Mine. Additionally, the Tribe contends, the enactment of NAGPRA does not supersede OSM's authority to impose the conditions, citing NAGPRA's savings provision, and the conditions, which are designed to predict the location of undiscovered human remains, complement, rather than conflict, with NAGPRA's ownership and control provision.

[2] Condition 4, as modified, requires PCC to analyze data already in its possession as a result of the 20 years of archaeological work on Black Mesa and predict the likelihood of locating additional prehistoric human remains, and to propose a plan for avoiding the disturbance of sites with a

high probability of containing such remains. Modified Condition 3 directs PCC to submit updated maps of archaeological sites containing human remains or highly likely to contain prehistoric human remains plotted against mining areas, and to list such sites which might be impacted and indicate when those impacts might occur. Although we find that OSM had the authority to require the submission of the information sought by these conditions, we, nevertheless, conclude that, given the record in this case, the imposition of the modified conditions to the permit cannot be upheld.

We agree with Judge Rampton that OSM has the authority to enforce SMCRA's prohibition against mining within 100 feet of a cemetery found at 30 U.S.C. § 1272(e)(5) (1988). We also agree with the Judge that while the provisions of NAGPRA clarify that ownership or control over Native American human remains excavated or discovered on Federal or tribal lands vests in the Native Americans, such provisions do not address, and the ownership or control of such remains does not include, the authority to control the process of predicting the location of such remains and protecting them from disturbance. We conclude, however, that the timing of OSM's request for the information sought by the conditions fatally flaws the imposition of those conditions. Pursuant to 30 U.S.C. § 1260(b)(4) (1988), no permit application shall be approved "unless the application affirmatively demonstrates, and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant," that the area proposed to be mined is not included within an area designated unsuitable for surface mining pursuant to 30 U.S.C. § 1272 (1988), which includes an area within 100 feet of a cemetery. This SMCRA provision and its implementing regulation, 30 CFR 773.15(c)(3)(ii), clearly require that the information necessary to make the written finding be obtained before the finding is made and the permit application approved. Similarly, the preamble to the regulatory definition of cemetery, cited by both OSM and Judge Rampton in support of OSM's authority to require the information sought by the modified conditions, envisions that prior to approval of the application, OSM must require the information which would enable it to make the required findings, including the finding at 30 CFR 773.15(c)(1) that the permit application is complete and accurate (see 30 U.S.C. § 1260(b)(1) (1988)). 52 FR 4244, 4254 (Feb. 10, 1987).

Here OSM acknowledges that, absent the information to be provided by PCC's compliance with the conditions, its finding that no mining would occur within 100 feet of a cemetery is not supportable. See, e.g., Tr. D82, D278; OSM's Response to PCC's Petition at 13. Because OSM approved PCC's permit before it had sufficient evidence to justify a statutorily mandated finding, its approval of the application violates 30 U.S.C. § 1260(b)(1) and (4) (1988). Cf. Natural Resources Defense Council v. OSM, 89 IBLA 1, 57, 92 I.D. 389, 416 (1985). Accordingly, we reverse Judge Rampton's decision to the extent it upheld OSM's imposition of Conditions 3 and 4, as modified, and remand the proceeding to OSM for further evaluation of the adequacy of PCC's permit application. If OSM

determines that it cannot make the required findings without the information sought by the modified conditions, it must obtain that information prior to approval of the permit application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for discretionary review are granted; Judge Rampton's decision approving the settlement of Condition 1 is affirmed; Judge Rampton's decision upholding Conditions 3 and 4, as modified, is reversed; and the case is remanded to OSM for further action consistent with this opinion.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

Sometimes a law can be so stringently interpreted that its purpose is defeated.

The Kayenta Mine is one of two surface coal mining operations that make up the Black Mesa-Kayenta complex. Peabody Coal Company (PCC) has operated this mine since 1970, and has a complex coal removal, preparation, and transportation system in place producing approximately 7 million tons of coal a year. The Office of Surface Mining Reclamation and Enforcement (OSM) had previously issued two permits to mine coal at the Black Mesa-Kayenta complex, and the mining operations continue under those permits. ^{1/}

In 1985 PCC submitted a permit application package to OSM seeking issuance of a single Indian Land Program permit covering both the Black Mesa Mine and Kayenta Mine. In furtherance of the permitting process comprehensive environmental, socioeconomic, and archeological studies were undertaken. Of particular importance to this decision is the extent of the archeological examination. Examination commenced in the 1960's, and before 1976 the eastern area had been surveyed at no less than 10-meter intervals. All possible archaeological sites encountered were then surveyed at 4-meter intervals. The same survey of the western area was completed before 1980. The unexcavated sites examined in the first survey were then reexamined, using a 2 by 2 meter grid. Osteological crews were assigned to sites believed to contain human remains. The first excavations took place in 1968 and they continued through 1989. At the height of the activity nearly 250 people were taking part in archeological examination. By 1989 the archaeological study team had identified 2,622 cultural and historic sites on and immediately adjacent to the leases, with 1,596 being prehistoric sites and 1,026 being historic sites. Approximately 1,345,000 artifacts and 178 burials were found (Exh. P61 at 2). A report of the findings, 10,000 Years on Black Mesa, Arizona, was prepared in 1990 (Exh. P64). This report is approximately 7-1/2 inches thick, or about twice the size of the final environmental impact statement for the project. "The Peabody leasehold on northern Black Mesa is unique in both the intensity of archeological fieldwork and the completeness of published reports." 10,000 Years on Black Mesa, Arizona at 1.43.

Based upon this and other information submitted to OSM, it issued its July 6, 1990, decision that a permit should issue, specifically finding that:

1. The permit application is complete and accurate as it applies to the Kayenta Mine, and the applicant has complied with all requirements of the Surface Mining and Control and Reclamation Act of 1977 (SMCRA) and the Indian Lands Program at 30 C.F.R. Part 750.

^{1/} As a necessary step in the issuance of these permits, OSM formally determined that the land subject to the permits was suitable for mining.

* * *

3. The proposed permit area is:

a. Not within an area under study or administrative proceedings under a petition, filed pursuant to 30 C.F.R. Parts 764 and 769, to have been designated as unsuitable for surface coal mining operations;

* * *

e. Not on any lands where mining will adversely affect any publicly owned parks or any places included on the National register of Historic Places;

* * *

h. Not within * * * 100 feet, measured horizontally, of a cemetery.

* * *

15. OSM has taken into account the effect of the proposed mining operations on properties listed on or eligible for listing on the National Register of Historic Places and has included in the permit four special conditions that OSM, after consultation with the Arizona State Historic Preservation Officer, the Bureau of Indian Affairs, and the Hopi and Navajo Tribes, determined appropriate to further protect these resources.

(Exh P-52).

Proposed permit AZ-0001C covers only the Kayenta Mine and would replace permit AZ-0002A and a portion of permit AZ-0001. 2/ This new permit contains 18 Special Conditions (Conditions) not found in the original permits. Four of these Conditions are intended to protect and, if necessary preserve, Native cultural resources, including prehistoric and historic human remains. Other provisions were also added or amended to require the upgrade of a number of existing mining-related facilities to meet current Federal performance standards. See Exh. P-52 at 3 and the Final Environmental Impact Statement (FEIS), Exh. J-2, at Appendix D.

The propriety of the imposition of three of the conditions (Conditions 1, 3, and 4) was the subject of this appeal, but the majority has expanded the scope of review. When the majority reversed OSM's decision to incorporate Conditions 3 and 4, and directed OSM to obtain and consider the information called for in those Conditions prior to issuing the permit,

2/ Permit AZ-0001C was prepared in partial response to PCC's 1985 request, but has yet to be issued. PCC is continuing operations under the previously issued permits, in accordance with 30 CFR 750.11(c) (1988).

they also reversed or vacated OSM's July 7, 1990, decision that a permit could issue. OSM will be required to issue a new decision, especially with respect to those portions of the OSM decision set out above. For reasons that will soon become apparent, I begin my discussion of why I am dissenting with a discussion of Conditions 3 and 4.

The majority has reversed Judge Rampton's decision that Conditions 3 and 4, as amended by him, are appropriate "[b]ecause OSM approved PCC's permit before it had sufficient evidence to justify a statutorily mandated finding, its approval of the application violates 30 U.S.C. § 1260(b)(1) and (4) (1988)" (Majority Opinion at 123 (emphasis added)). Specifically, they "reverse Judge Rampton's decision to the extent it upheld OSM's imposition of Conditions 3 and 4, as modified, and remand the proceeding to OSM for further evaluation of the adequacy of PCC's permit application. If OSM determines that it cannot make the required findings without the information sought by the modified conditions, it must obtain that information prior to approval of the permit application." *Id.* at 123-24 (emphasis added). The majority finds "that the timing of OSM's request for the information sought by [Conditions 3 and 4] fatally flaws the imposition of those conditions." *Id.* at 123. Pointing to 30 U.S.C. § 1260(b)(4) (1988) in support of their finding, they state, categorically, that

no permit application shall be approved "unless the application affirmatively demonstrates, and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant," that the area proposed to be mined is not included within an area designated unsuitable for surface mining pursuant to 30 U.S.C. § 1272 (1988), which includes an area within 100 feet of a cemetery. This SMCRA provision and its implementing regulation, 30 CFR 773.15(c)(3)(ii), clearly require that the information necessary to make the written finding be obtained before the finding is made and the permit application approved. Similarly, the preamble to the regulatory definition of cemetery, cited by both OSM and Judge Rampton in support of OSM's authority to require the information sought by the modified conditions, envisions that prior to approval of the application, OSM must require the information which would enable it to make the required findings, including the finding at 30 CFR 773.15(c)(1) that the permit application is complete and accurate (*see* 30 U.S.C. § 1260(b)(1) (1988)), prior to approval of the application. 52 FR 4244, 4254 (Feb. 19, 1987).

Id. at 123.

The majority recognizes that OSM has the right to impose the conditions found in Conditions 3 and 4, but finds that OSM cannot do so unless and until Conditions 3 and 4 are no longer necessary. Their stringent interpretation of the statute clouds the meaning of the term "cemetery."

A "cemetery" means any area of land where human bodies are interred. 30 CFR 761.5. This term has been found to include both marked and unmarked graves, and the applicant must submit proof that it has examined the permit area in an attempt to locate all unmarked graves. The intensity of this search for unmarked graves was considered when the regulations were promulgated. An OSM statement made in response to comments to the proposed regulations printed in the Federal Register was quoted at length at pages 13 and 14 of Judge Rampton's decision and cited by the majority at page 123 of its opinion. OSM stated that:

Numerous commentators were concerned about the process for identifying unmarked cemeteries. Some suggested that permit applicants should be required to identify and locate all cemeteries within the permit area, whether presently marked or not. [OSM] believes this would be unduly burdensome on the applicant. The regulatory authority is required * * * to make a written finding that a proposed permit area is not within an area designated as unsuitable for mining, which includes cemeteries and a 100 foot zone around them. * * * Sections 799.24(j) and 783.24(j) require the applicant to include maps showing each cemetery that is located in or within 100 feet of the proposed permit area. If the regulatory authority has reason to believe that the information in the permit application was inadequate concerning these resources, the regulatory authority must require the information that would allow [the] findings to be made, as well as the finding that a permit application is complete and accurate. However, it is not practical to require an applicant to undertake possibly expensive identification projects in the absence of information indicating the likelihood that a cemetery might be present. [Emphasis added.]

52 FR 4244, 4254 (Feb. 19, 1987).

The intent expressed by OSM when promulgating its regulations must be compared with the result imposed by the majority. It is neither necessary nor sound to interpret 30 U.S.C. § 1272 (1988) so stringently that a permit application cannot be approved unless the application affirmatively demonstrates, and the regulatory authority finds that the area proposed to be mined does not include land within 100 feet of any previously examined site that did not show human remains, but might later be found to contain human remains. The majority either acknowledges and dismisses, or dismisses without comment: (1) an exhaustive \$ 7 million, 20 year archeological examination of the proposed permit area; (2) OSM's specific statement that no further archaeologic investigation need take place prior to permit issuance; (3) specific permit provisions requiring a cooperative effort to protect any unmarked and undisclosed remains that might subsequently be found in the course of permit operations; and (4) PCC's continuing operations under existing permits having no conditions calling for protection of human remains within the permit areas.

In the face of these unrefuted facts, the majority finds that, "given the record in this case, the imposition of the modified conditions to the permit cannot be upheld" (Majority Opinion at 123). They do so because they

cannot find sufficient evidence in this record to support an OSM finding that information in the application and information otherwise available to OSM is sufficient to support its decision that no mining will occur within 100 feet of a known cemetery. They make reference to two pages of the transcript and one statement in an appeal document in support of their conclusions but ignore both the overwhelming evidence to the contrary and the context of the three statements.

The fact remains that OSM made the required finding that no mining would occur within 100 feet of a cemetery (See Exh. P-52, Finding 3.h.). There is no contention that PCC failed to advise OSM of the location of all known burial sites or that the location of remaining known sites was not considered when OSM issued its July 6, 1990, decision. There had been a survey of possible sites on a 2 by 2 meter grid, and those sites deemed significant were excavated. OSM's findings were not made in a vacuum, but were based upon voluminous evidence. The majority finds this evidence so deficient that they are unable to conclude that the evidence supports OSM's finding. The majority's decision places OSM in the difficult position of not being able to issue a permit when there is a recognized possibility that an unfound, unmarked grave might exist within a proposed permit area.

This is not a case of putting off the suitable-for-mining determination. OSM considered the consequences of having honestly missed remains during the course of a very intense investigation. The majority decision leaves me not knowing how sure must OSM be before it issues a suitable-for-mining determination. I am sure that OSM will be left with the same question. OSM found no fault with the studies conducted or with the depth of studies, and has already imposed a standard higher than that set out in the comments when the regulations were proposed. There is ample evidence that PCC has submitted all documents necessary for OSM's consideration of permit issuance, and for a finding that there will be no mining within 100 feet of a known cemetery, and that mining would not endanger a known historic site.

OSM is understandably sensitive to the Navajo and Hopi culture, and clearly recognizes the reality that unmarked human remains could have been missed. ^{3/} Conditions 1, 3, and 4 are intended to protect sacred and ceremonial sites, and prehistoric and historic cultural sites (which include burial sites), because these sites are of particular significance to the Native American people in the area. See Exh. P-61 at 6. The Conditions set out required action in the eventuality that yet undiscovered remains are found. Judge Rampton stated the reasons for these provisions in his decision and that statement has been set out in the majority decision at pages 112-13. These conditions should be viewed in the context of their intended purpose, and not as some vague attempt to avoid a determination that land is not suitable for mining.

^{3/} It should be remembered that the human remains have been accumulating in unmarked graves for up to 10,000 years with an equal amount of time for obliteration of the sites.

When identifying the sites contemplated in Conditions 3 and 4, potential sites are to be identified from existing information, with no further physical inventory or excavation required. Although the language of Conditions 3 and 4 is not as precise as it might be, when that language is examined in light of the archeological and surface studies previously undertaken, the OSM written findings, the testimony of the parties at the hearings, and the Judge's decision, it is clear that all known cemeteries are protected. Responding to the Native American concerns, OSM also made sure that anything that could be considered a cemetery in the future will also be protected by Conditions 3 and 4.

I find no basis for remanding this case. If Judge Rampton's decision is affirmed, the permit will issue and PCC will identify those sites that might contain remains (even though the probability is slight), convey that information to the Hopi Tribe and Navajo Nation, and state what it would do to preserve those sites if remains are subsequently found. Known cemeteries and historic sites have been protected and after-found cemeteries and historic sites will be protected by Conditions 3 and 4. Absolutely nothing is gained by interpreting 30 U.S.C. § 1260(b) (1988) and 30 CFR 773.15 so stringently that a remand for further information is needed -- especially in this case.

On the other hand, the permit area has undergone what is undoubtedly the most thorough archeological investigation ever undertaken in the course of the permitting process. It has taken 8 years to get the permitting process to this point. The question now before us was referred to an Administrative Law Judge over 2 years ago. By reversing Judge Rampton and remanding the case to OSM for an initial decision on the issue of whether the land is suitable for mining, we have directed OSM to once again make a determination as to whether a permit should issue -- the point it was at before the hearings and before the appeals to this Board. ^{4/} It can be reasonably expected that the new permit will not be issued for at least another 2 or 3 years. In the meantime PCC continues mining under the old permit, with none of the safeguards provided by the permit now under consideration. This includes any finding that the land is unsuitable contemplated by the remand, as well as the further safeguards provided by those provisions presently found in Conditions 3 and 4 (which would provide for additional protection of undiscovered historic and prehistoric human remains).

And now I offer my observations concerning the majority opinion regarding Judge Rampton's affirmance of the settlement agreement regarding Condition 1. The majority addressed this issue first. Their conclusions should be reexamined after taking into consideration their finding that Conditions 3 and 4 cannot be imposed.

^{4/} The appeals process will once again be available to any party, just as it was in 1990, and any affected party can once again call for a hearing before an Administrative Law Judge on the decision.

First, the majority states that a settlement between the parties will be affirmed if it is reasonable. I agree, but will not forget that Maxine Kescoli is a party, and that she did not agree to the settlement.

The majority concludes that Kescoli's allegations that her interests are not protected by Condition 1 have no merit and support Judge Rampton's conclusion that the settlement should be upheld. Kescoli appealed because Condition 1 as expressed in the settlement agreement did not adequately protect grave sites of her ancestors which were known to her but not disclosed to PCC and OSM. As noted at page 113 of the majority opinion, Judge Rampton found that the argument that PCC was not required to protect grave sites known to local residents to be unsupported by the facts. He rejected her arguments that Condition 1 did not afford adequate protection after finding that Conditions 3 and 4 met her concerns. There is no longer a Condition 3 or Condition 4, and the adequacy of Condition 1 must be examined in this light. If the protection afforded by Condition 4 is a basis for refusing to overturn the settlement agreement for Condition 1, when the majority threw out Condition 4 it reinstated this argument for overturning the settlement agreement.

Judge Rampton's decision should be affirmed.

R.W. Mullen
Administrative Judge

