

Editor's note: Reconsideration denied by order dated May 6, 1997.

DINEH ALLIANCE and MAXINE KESCOLI
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
and PEABODY WESTERN COAL CO.

THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
THE NAVAJO NATION, and THE HOPI TRIBE, Intervenor

IBLA 96-294, 96-295, 96-296,
96-333, and 96-342

Decided October 16, 1996

Petitions for discretionary review of a decision by Administrative Law Judge Ramon M. Child vacating a decision by the Office of Surface Mining Reclamation and Enforcement granting renewal of a mining permit for surface coal mining operations situated on the Navajo Indian Reservation (Permit No. AZ-0001D). Hearings Division Docket Nos. DV 95-3-PR and DV 95-4-PR.

Reversed.

1. Evidence: Sufficiency--Evidence: Weight--Rules of Practice: Evidence--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Findings

A decision by an Administrative Law Judge vacating OSM's renewal of a surface mining permit under sec. 506(d) of SMCRA, 30 U.S.C. § 1256(d)(1) (1994), will be reversed where the findings of fact upon which the decision is based are not supported by substantial evidence in the record, and the conclusions of law are in error.

APPEARANCES: James R. Bird, Esq., Thomas J. Mikula, Esq., and Anne R. Bowden, Esq., Washington, D.C., and G. Irene Crawford, Esq., Flagstaff, Arizona, for Peabody Western Coal Company; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; Stephen E. Crofton, Esq., Phoenix, Arizona, for Salt River Project Agricultural Improvement and Power District; Stanley Pollack, Esq., Navajo Nation Department of Justice, Window Rock, Arizona, for the Navajo Nation; David Neslin, Esq., Denver, Colorado, and Scott Canty, Esq., General Counsel- Hopi Tribe, Kykotsmovi, Arizona, for the Hopi Tribe; Helen A. Gaebler, Esq., Timothy N. Black, Esq., Laura Walker, Esq., Washington, D.C., and Claire Dickson, Esq., Chinle, Arizona, for Maxine Kescoli; M. David Kamas, Esq., Tucson, Arizona, for Dineh Alliance.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Peabody Western Coal Company (Peabody), the Office of Surface Mining Reclamation and Enforcement (OSM), the Salt River Project Agricultural Improvement and Power District (SRP), the Navajo Nation, the Hopi Tribe, and the Dineh Alliance have filed separate petitions for discretionary review of the March 11, 1996, decision of Administrative Law Judge Ramon M. Child vacating OSM's July 6, 1995, decision to grant Peabody's mining permit renewal application for the Kayenta mine ^{1/} filed pursuant to section 506(d)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(d)(1) (1994).

Previously, in accordance with 43 CFR 4.1362(a), Maxine Kescoli, an individual Navajo Native American residing in the permit area, and Dineh Alliance, a group of Native Americans residing near the permit area, had filed separate requests for review of OSM's July 6, 1995, decision. The matter was assigned to Judge Child, who conducted separate hearings in Flagstaff, Arizona, during the 5-day period of August 22 through 26, 1995. He subsequently consolidated the cases and issued the March 11, 1996, decision which is the subject of this review. By order of May 15, 1996, the Board granted intervenor status to SRP, the Navajo Nation, and the Hopi Tribe.

In addition to the petitions and responses filed by the parties pursuant to 4 CFR 4.1369 (b) and (c), Peabody filed a reply brief and a motion for leave to reply to the responses filed by Kescoli and the Dineh Alliance. Kescoli filed an opposition to the motion and Peabody filed a response to the opposition. While Peabody argues that its reply can be of substantial assistance in resolving issues before the Board, we conclude that, given the extensive briefing already filed, additional briefing is not warranted. Accordingly, Peabody's motion is denied.

Petitioners essentially contend that Judge Child exceeded the scope of review for permit renewal and failed to objectively review the evidence presented. Specifically, they assert Judge Child erred in his findings with respect to the issues of owner consent, pattern of willful violations, compliance with permit conditions, compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1994), water quantity, water quality, blasting, and air quality. Each of these issues is examined below.

Owner Consent

The first issue addressed in Judge Child's decision was whether written consent was required of and obtained from those surface owners and building occupants identified in Judge Child's decision. Judge Child held the lands in question are private lands for which written consent

^{1/} A history of the Kayenta mine is set forth in Peabody Coal Co. v. OSM, 125 IBLA 107, 108-10 (1993).

from the "surface owners" is a prerequisite to mining activities under section 510(b)(6) of SMCRA. Judge Child found that "the Navajo Nation with the consent and approval of the Bureau of Indian Affairs (BIA) appears to have entered into a mineral lease which does not treat the rights of the surface occupants" (Decision at 6). Judge Child further determined Peabody intends to mine within 300 feet of Kescoli's dwelling and did not obtain the prerequisite permission mandated by section 522(e)(5) of SMCRA.

Peabody contends Judge Child erred in holding that Kescoli and others are the "surface owners" and argues that the subject land and minerals are held in trust for the Navajo Nation as a sovereign entity, not for individuals. Peabody asserts the requirement that permission be obtained prior to mining within 300 feet of any occupied dwelling is inapplicable here because the permit specifically proscribes such activity. OSM argues section 510 is inapplicable to Indian lands, as individuals do not have private property rights in tribal lands. OSM asserts the record does not substantiate that Kescoli has permission or rights to use the land purportedly at issue. OSM also contends the record does not evince plans by Peabody to mine within 300 feet of any occupied dwelling without the requisite consent. SRP argues that the leases recognize that individual tribal members lack authority to assert property rights and, consequently, Judge Child lacked power to overrule the lease contracts by recognizing individual ownership rights. The Navajo Nation argues Judge Child erred in applying section 510(b)(6) because there is no severed estate to consider, asserting all lands within the mining areas are exclusively tribal lands; it also argues that Judge Child erred in construing the concept of "customary use rights" in this situation and maintains the leases extinguished such rights under the eminent domain powers of the tribal government. The Hopi Tribe argues Judge Child's conclusions overlooked tribal sovereignty and disregarded tribal authority to determine internal issues.

In response, Kescoli contends it is not necessary that she own a fee simple absolute to invoke the protection of SMCRA. She insists her customary use rights, which cannot be extinguished without due process, constitute an interest in the surface estate. Kescoli further asserts SMCRA does not define "private lands" and, because they are not public lands, tribal lands were intended for protection under the statute. As for the application of section 522(e)(5), Kescoli argues the permit grant must be based on the facts at the time of application, and asserts Peabody's renewal application indicates mining will reach her homesite in 1998. She claims Peabody is relying on the expectation she will be removed by the tribe before mining reaches her dwelling, a fact not yet realized.

We find Judge Child erred in his application of section 510(b)(A) of SMCRA, 30 U.S.C. § 1260(b)(A) (1994). That section provides in relevant part:

No permit or revision application shall be approved unless the application affirmatively demonstrates or the regulatory authority finds in writing * * * that—

* * * * *

(6) in cases where the private mineral estate has been severed from the private estate, the applicant has submitted to the regulatory authority—

(A) the written consent of the owner of the surface to the extraction of coal by surface mining methods; * * *.

Concluding that Indian land is not necessarily "public land," Judge Child assumed that there had been a severance of the surface estate from the mineral estate, that both estates were held privately, and that the provisions of this section therefore should apply.

Under SMCRA, any parcel of land is subject to one of three possible classifications. The first is "Federal land," meaning "any land, including mineral interests, owned by the United States * * *, except Indian lands, * * *." 30 U.S.C. § 1291(4) (1994) (emphasis supplied). The second is "Indian lands," meaning "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9) (1994). The third is lands "within any State," meaning "all lands within a State other than Federal lands and Indian lands." 30 U.S.C. § 1291(11) (1994). Thus, it is clear that under SMCRA, Indian lands cannot be defined as "private" lands. See The Pittsburg & Midway Coal Mining Co. v. OSM, 115 IBLA 148 (1990); Powers of Indian Tribes, 55 I.D. 14, 50-56 (1934).

All lands within the permit area are embraced by the Navajo-Hopi Settlement Act of 1974 and thus are "held in trust by the United States exclusively for the Navajo Tribe as part of the Navajo Reservation." 25 U.S.C. § 640d-9(a) (1994). Absent a conveyance from the United States or from the Navajo Nation with the approval of the United States, petitioners do not have any legal or equitable interest in the lands within the permit area. See 25 U.S.C. § 177 (1994). Petitioners produced no evidence of such conversion to private ownership or control. Instead, Judge Child relied on their purported customary use rights. In its petition, the Navajo Nation observes:

Navajo Nation law is express in providing that customary rights do not survive an adverse disposition of lands by the Navajo Nation by lease, and that the former customary user will be compensated by the Navajo Nation as a result:

Whenever as a result of the granting of any lease or permit embracing Navajo Nation land * * * the value of any part of such land for its customary use by any Navajo Indian formerly lawfully using the same is destroyed or diminished, the Navajo Nation will

compensate the former Navajo Indian user in the manner hereinafter specified.

16 N.T.C. § 1402(A). Such adverse disposition is an act of eminent domain creating a right of just compensation within the contemplation of the Navajo Nation legal system.

(Petition of Navajo Nation at 15). As noted previously, there is nothing to indicate that the lands within the permit area have been subjected to any conveyance or proceeding which would have severed such from the whole of the Navajo reservation lands. Indeed, the Kayenta Mine coal leases provide:

Lessor and Lessee hereby reaffirm their prior contractual commitments to provide for the compensation of individual Navajo tribal members for damages to improvements and customary use rights in areas affected by mining operations authorized hereunder. However, subject to the requirement that Lessee meet its existing contractual obligations for such compensation, Lessor shall not, in either its governmental or proprietary capacity, take any action which would empower such tribal members, by virtue of their ownership of improvements or customary use rights, to prevent Lessee from exercising its right granted under this Lease as herein amended.

Art. XXXIX, 1987 Amendment to Lease No. 14-20-0603-8580, at 25; and Art. XXXVI, 1987 Amendment to Lease No. 14-20-0603-9910, at 26.

Thus, the employment of section 510(b)(6) by Judge Child to invalidate the original permit and permit renewal is without foundation as the lands involved are neither private nor severed.

Section 522(e)(5) of SMCRA, 30 U.S.C. § 1272(e)(5) (1994), provides that no surface coal mining operations shall be permitted "within three hundred feet from any occupied dwelling, unless waived by the owner thereof* * *." See also 30 CFR 761.12(e)(1).

Judge Child found Peabody intends to mine within 300 feet of Kescoli's occupied dwelling based on statements made in Peabody's Answer to Kescoli's Amended Request for Review (Decision at 8, 14). However, Peabody also explained therein that the plan to mine the area in question anticipates "that Kescoli will no longer be occupying her current dwelling" based on the rights of the Navajo Nation and the terms of the leases (Peabody's Answer to Kescoli's Amended Request for Review, at 14). Peabody asserts it would mine the subject area only "if the Navajo Nation were to exercise its power of eminent domain to remove Kescoli" (Peabody's Petition at 43).

Judge Child cited Peabody Coal Co. v. OSM, 125 IBLA 107, 122-24 (1993), for the proposition that the regulations do not allow a permit to be granted based on an assumption the occupant will be removed against her will before the mining reaches her dwelling. In Peabody, cemetery

sites had been researched but the likelihood of additional locations had not been determined. Id. at 122. As OSM concluded it could not support the necessary finding with the data it possessed, the case was remanded for the gathering of more information. Id. at 124.

In this case, however, OSM testified at the hearing that mining under the original permit did not occur within 300 feet of an occupied dwelling, with or without consent, and there are no situations anticipated where mining would occur within any such area under the renewal (Kescoli Transcript (K-Tr.) 50-53, 58-59, and 140). Peabody testified unequivocally it would not conduct any mining activities under the permit within 300 feet of an occupied dwelling as the permit precludes such activities (K-Tr. 370-71). Peabody insists it has not proposed and is not proposing to mine within 300 feet of an occupied dwelling.

Based on the record before us, if the Navajo Nation does not remove Kescoli or obtain her consent, mining will not occur in the buffer area around her dwelling. Accordingly, there is no need for consent to mine within 300 feet of an occupied dwelling because there are no apparent plans under the permit to do so.

Pattern of Willful Violations

Judge Child's finding of a pattern of willful violations is based on his conclusion that "between March and October 1993, Peabody mined through sites that it not only had a statutory obligation not to disturb, but that it had pledged not to disturb" (Decision at 10). The disturbed areas, according to Judge Child's findings of fact, included 4 sites containing 11 human burials and 4 midden sites with a high probability for containing burials. Judge Child concluded Peabody had shown a "plain indifference to legal requirements" which OSM should have investigated under SMCRA and, having knowledge of those disturbances, OSM should not have acted on the permit renewal absent such an investigation.

Peabody argues that Judge Child's finding is factually incorrect, asserting that OSM did consider and rejected Kescoli's charges, and that the Navajo Nation, employed to investigate the disturbed sites, rescinded its conclusion that the sites in issue had been disturbed by mining. OSM contends Judge Child made his decision based on an exhibit submitted after the hearing without considering other evidence impeaching it. OSM maintains there are no grounds for allegations Peabody abrogated its obligation not to disturb, stating that evidence shows the four impacted sites at issue (those containing human burials) were not impacted by mining, two of the four purportedly disturbed midden sites were not disturbed, the third was destroyed by local road construction, and the fourth was destroyed by topsoil removal operations only after treatment and mitigation. OSM reports that notices of violation were never issued for the alleged incidents and argues that neither a pattern nor an intent not to comply were established in Judge Child's ex parte determination.

Kescoli replies that Judge Child correctly held OSM was obligated to resolve Kescoli's claims of repeated violations before considering the renewal application. She insists she has been attempting to secure a ruling from OSM and the one referred to by the petitioners did not address the issues raised.

Section 510 (c) of SMCRA, 30 U.S.C. § 1260(c) (1994), provides that

no permit shall be issued to an applicant after a finding by the regulatory authority, after the opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of the Act.

See also 30 CFR 773.15(b)(3). Before such a finding becomes final, an adjudicative hearing on the matter must be held. 30 CFR 773.15(b)(3).

Judge Child's evidence of a pattern of willful violations is a report prepared by the Navajo Nation Archeological Department (NNAD) on all sites containing trash middens within the area proposed to be mined (Kescoli Exh. P-10). Excavation and mitigation on the sites, and preparation of the report was done by NNAD at the request of Peabody because middens had been shown to be most closely associated with burials. The NNAD report described disturbances within 100 feet of four sites which were found, once excavated, to contain human remains and four midden sites which were found to be thoroughly disturbed. The report was available to OSM but OSM did not find any violations based on that information. Kescoli submitted the report as evidence after the hearing, and argued that OSM should have found Peabody had engaged in a "pattern of intentional violations."

Judge Child's finding is reversed because such conclusion was not final absent a hearing on the matter and, more importantly, the record does not support his conclusion. The facts in this case underscore the rationale for affording due process by the required hearing.

According to OSM, the facts available to it when the permit renewal application was submitted indicated the four burial sites in question, 494, 517, 518, and 704, were all mapped and collected prior to 1984, and none were subsequently impacted by mining (OSM Petition at 22-23). OSM states that the four midden sites were incorrectly reported as "thoroughly disturbed" in the NNAD report and these facts were known when the renewal application was reviewed. Id. As to sites 24 and 120, NNAD acknowledged by letter dated September 8, 1994, that those sites were improperly listed, and that neither site has been or ever will be disturbed by mining operations. Site 418 was destroyed in 1992 by local road construction; and site 528 was destroyed "by topsoil removal operations in 1985, but only after treatment and mitigation in 1983." Id.

Peabody explains that all disturbances in question resulting from Peabody's activities occurred prior to any non-disturbance obligation. Peabody reports it submitted affidavits and evidence to the effect that the disturbances noted by Kescoli had occurred outside Peabody's scope of responsibility but Judge Child did not consider its evidence.

We find the basic elements for a finding of a pattern of willful violations do not exist. There has never been a notice of violation issued for wrongful activities of the nature cited by Judge Child, and the purported violations cited by Judge Child do not exist on the basis of the record before us. Without any evidence of a violation or violations, there is no pattern of offending activities which may be deemed willful or construed as causing irreparable harm to the environment. Thus, we must find Judge Child's finding in this matter to be in error.

Compliance with Permit Conditions

Stating "OSM cannot renew a permit if it finds that the terms and conditions of the existing permit are not being satisfactorily met" (Decision at 11), Judge Child concluded OSM had not evaluated Special Condition 1 in accordance with the terms of a settlement agreement reached on June 26, 1992. Judge Child also held the record did not support OSM's determination that Special Conditions 3 and 4 had been satisfied or the human burials would be protected.

Peabody charges that Judge Child did not identify behavior by the operator which would preclude renewal and ignored reality by refusing to recognize tribal participation. Peabody and OSM both aver Judge Child had no authority to address whether Special Conditions 3 and 4 had been satisfied, as the issue had already been decided finally for the Department. OSM also asserts Peabody has exceeded its regulatory obligations regarding Special Condition 1. The Navajo Nation claims the required committees have been established, not necessarily under the identifying titles recognized by Judge Child, and the intended dialogue has taken place.

In rebuttal, Kescoli asserts OSM has admitted there is not enough "hard" information generated through the Special Condition 1 processes, and OSM has violated its responsibilities in this aspect. Kescoli contends Judge Child's conclusions regarding Special Conditions 3 and 4 were correct.

Condition 1

Special Condition 1 is the result of a settlement agreement and is summarized in Peabody Coal Co. v. OSM, supra at 110-11. OSM's primary reason for imposing the condition was to foster communication between Peabody and Native Americans regarding sacred and ceremonial site concerns. 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. Id. at 112. Upon review of Kescoli's challenge, the Administrative Law Judge concluded, and the Board concurred, the settlement agreement adequately implemented the provisions of Condition 1. Id. at 116-17.

Upon review of the record, we find Judge Child's ruling that "OSM's failure to review Special Condition 1 breaches the Settlement Agreement pertaining thereto and invalidates the permit renewal" (Decision at 16) ignores the substantial body of evidence that Peabody and OSM did precisely what the settlement prescribed. Because Condition 1 is unique, there are no specific standards or case law by which compliance may be measured. OSM concluded in its Decision Document that Peabody has complied with Condition 1 (Dec. Rec., Vol. I at 0011-12). Indeed, the record reflects Peabody has made substantial, reasonable efforts to accommodate the concerns of people living in the permit area as to the location of sacred and ceremonial sites.

Rather than focusing on the activities of Peabody, Judge Child declared, as the basis for holding the permit renewal invalid for noncompliance with Special Condition 1, a failure by OSM to evaluate the experiences of the parties in identifying and protecting religious and ceremonial sites under Condition 1, and OSM's awareness that the required tribal committee had not been established by the Navajo Nation pursuant to Condition 1 (recognizing the Hopi Tribe had established a committee which had conducted dialogue with Peabody and OSM). We find both reasons to be without support.

The Navajo Nation, in its petition, states that it created the Historic Preservation Department to be

"the Navajo Nation's lead agency responsible for protection, preservation and management planning for historic, archaeological and cultural resources on the lands of the Navajo Nation or on lands in which the Navajo people have a traditional interest." See Historic Preservation Department Plan of Operation, Section II, adopted by Navajo Tribal Council Advisory Committee Resolution No. ACJA-15-87, January 6, 1987.

(The Navajo Nation's Petition at 20). Judge Child's failure to recognize the Navajo Nation's employment of an existing tribal forum, rather than the creation of a new committee, does not obviate the fact that the conduit for dialogue envisioned by Condition 1 does exist.

Judge Child's conclusion that OSM has not evaluated Condition 1 ignores OSM's report found in the Decision Document:

OSM has concluded this evaluation (see technical analysis report dated June 29, 1995 developed by OSM Archeologist, attachment II). OSM's evaluation indicates that the Special Condition should be modified. OSM is concerned that the process provided

for in the current condition and settlement agreement is not being used by the local peoples, as was originally intended.

(Dec. Rec., Vol. I, 0011). OSM recommended modifications, including "language indicating OSM will evaluate the success of [Peabody's] proposed enhancement plan and other efforts undertaken in response to sacred and ceremonial site issues after 18 months" (Dec. Rec., Vol. I, 0012).

Thus, we find Special Condition 1 is being satisfactorily met.

Conditions 3 and 4

Pursuant to the following findings, Special Conditions 3 and 4 were not included in the renewal permit:

[Status for Special Condition 3:] In submittals dated April 1, 1993, April 14, 1993, and April 20, 1993, [Peabody] provided revision application materials addressing the requirements of the Special Condition. OSM deemed this application "complete" on April 21, 1993. * * * All field work required in this condition was completed on July 9, 1993. OSM approved [Peabody's] submittals addressing the requirements of Special Condition No. 3 on July 28, 1994. * * * The requirements of this condition have been satisfactorily addressed.

[Status for Special Condition 4:] Same as Condition No. 3.

(Dec. Rec., Vol. I, 0013). Judge Child held the record does not support OSM's findings inasmuch as the requirements imposed on Peabody "have not achieved their purpose of assuring compliance with the requirement of SMCRA that there be no mining within 100 feet of a cemetery" (Decision at 12).

Conditions 3 and 4 required Peabody to submit information to OSM pertaining to whether human remains are located, or prehistoric human remains are likely to be located, within 100 feet of a minesite. Peabody had challenged these special conditions, arguing that no statutory or regulatory authority supported their imposition. Upon review, Administrative Law Judge John R. Rampton, Jr., held Conditions 3 and 4, with specified modifications, were appropriate. The Board reversed Judge Rampton's modification and approval, and remanded the matter to OSM for further evaluation of the adequacy of the permit application. Peabody v. OSM, supra at 123-24. The Board held that the information sought through Conditions 3 and 4 was essential to support the required findings that no mining will occur in areas designated unsuitable for surface mining. Therefore, OSM must obtain such information prior to approval of the permit application. Id. The permit revision was approved by OSM on July 28, 1994.

Notwithstanding OSM's approval, Judge Child held that the record shows Peabody will disturb up to 100 burial sites (Decision at 12).

The record upon which Judge Child relies is a footnote to page 23 of Kescoli's comments to the permit renewal:

Moreover, numerous archaeological sites still remain which have not been investigated for the presence of human remains. See FEIS [Final environmental impact statement], vol. I, at III-31 (June 1990) (2,737 archaeological sites inventoried; only approximately 1,112 have been excavated or tested). Based on the Peabody Submission, it is certain that a substantial number of the approximately 1,625 archaeological sites yet to be investigated will contain human remains. Based on the findings summarized in the Peabody submission, more than 100 of the unexplored sites can be expected to contain human burials.

(Dec. Rec., Vol. I, 0353). The document was included as an offered public comment to which OSM responded.

Judge Child misapplied the requirements imposed in this situation. 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 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:

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. * * * 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.

52 FR 4244, 4254 (Feb. 19, 1987). Thus, there must be a "likelihood" of finding human remains to consider an area to be a cemetery within the protection of the statutes and regulations.

Archaeological examination of the leases and permit area 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. A

report of the findings, 10,000 Years on Black Mesa, Arizona, was prepared in 1990, which declared at 1.43: "The Peabody leasehold on northern Black Mesa is unique in both the intensity of archeological fieldwork and the completeness of published reports." In a follow-up report, Peabody reported "it is highly likely that many if not most of the burials on the Peabody lease area were recovered" (Peabody Submission, Mar. 31, 1993, at 18). Peabody concluded it "does not possess any information beyond that discussed in [the] report that would lead it to believe that any human burials exist within the Black Mesa leasehold" (Peabody Submission at 20). Judge Child observed, citing Peabody's report: "[O]f the sites that were not excavated or tested, there was a 33 percent chance that a burial would be present in a midden" (Decision at 9). Peabody actually reported "human remains might be found at approximately one-third of the remaining sites with middens (30 to 40 percent). Sites without middens have very little probability of having human remains" (Peabody Submission at 17). Considering middens will not be found on all sites, the likelihood is less than probable that untested sites will contain burials. As archaeological sites were tested in priority based primarily on midden characteristics (Peabody Submission at 17), Peabody asserts it is unable to identify any more sites which may be considered as likely containing human remains (Peabody Submission at 20).

The fact Judge Child can extrapolate figures to conclude that, in the presence of over 1600 untested sites, at least 100 burials may be found is not evidence Peabody failed to identify any particular site with a high probability of human remains. Peabody has undertaken a reasonable program to identify and mitigate human burials in the areas to be disturbed, as evidenced by its testing of those archaeological sites with a less than a likely chance to contain human remains in addition to candidate sites.

We therefore reverse Judge Child's determination that OSM erred in finding Peabody complied with the requirement to identify cemetery sites and make proper assurances not to mine within 100 feet thereof. We note, with respect to unidentified historic and prehistoric resource sites discovered during operations, the permit requires Peabody to preserve those sites in accordance with measures specified by OSM, the Navajo Nation, and the Hopi Tribe (Permit Condition 9, Historic and Prehistoric Resources Protection).

NEPA Compliance

As to the issue of compliance with NEPA, Judge Child found that OSM's regulations

provide that NEPA review may be completely dispensed with only "as long as none of the 10 exceptions listed in 516 DM 2, Appendix 2 in the OSM NEPA handbook Appendix III apply." * *

* Among other circumstances, an environmental document must be prepared if the proposed action might have "highly controversial" or "highly uncertain" environmental effects.

Despite these clear provisions, OSM totally rejected application of NEPA to the renewal decision, and in doing so it failed to consider whether any of the 10 factors identified in OSM's NEPA Handbook required application of NEPA.

(Decision at 12-13).

Peabody argues OSM adequately considered the application of NEPA in declaring a categorical exclusion, and contends the renewal action involved is not a major Federal action involving a new environmental analysis. Peabody and OSM assert the 1990 environmental impact statement (EIS) was a study for the life of the mine, and no new environmental impacts have been identified since 1990 which would make further analysis necessary. Peabody and OSM insist Judge Child failed to properly apply the regulations involved.

Kescoli responds that OSM erred in stating the action was "categorically excluded" because it was required to conduct a "hard look" at whether mining operations complied with NEPA.

NEPA is implemented by regulations promulgated by the Council on Environmental Quality (CEQ), 40 CFR Part 1500, which specifically require each Federal agency to publish its procedures to implement NEPA. 40 CFR 1507.3. OSM's regulations speak directly to the application of NEPA to permit renewals:

[T]he following OSM actions (SMCRA sections are in parentheses) are designated categorical exclusions unless the actions qualify as an exception under 516 DM 2.3(A)(3):

* * * * *

(11) Five-year permit renewal on life-of-mine plans under the Federal lands program or the Federal program for a State where the environmental impacts of continued mining are adequately analyzed in a previous environmental document for the mining operation (506(d)).

(516 DM 6, Appendix 8.4.B). In its Decision Document, OSM evaluated the applicability of NEPA as follows:

* * * The permit renewal application submitted by [Peabody] did not contain new proposals that would alter the environmental impacts already analyzed/identified in the Black Mesa/Kayenta [Environmental Impact Statement, issued in July 1990]. * * * [P]ermit renewal applications are categorically excluded from NEPA requirements because they are not deemed as being "major Federal actions."

For the reasons above, the application of NEPA to this action was neither necessary nor required.

Dec. Rec., Vol. I, 0006. Judge Child specifically that held OSM erred in its position that the application was categorically excluded from NEPA review simply because it is a renewal (Decision at 16).

Under 40 CFR 1508.4, the effect of a categorical exclusion is to eliminate the necessity for preparation of an environmental document for specific fact situations which, because of their nature, may generally be deemed to have no significant impact on the quality of the human environment. See Oregon Natural Desert Association, 125 IBLA 52, 57-58 (1993); Utah Chapter Sierra Club, 120 IBLA 229, 232 (1991). Individual actions, however, may be excepted under certain circumstances, thereby requiring the preparation of an environmental document, but any such exception to a normally excluded action shall occur only under extraordinary circumstances. Id.; see 40 CFR 1508.4.

Judge Child did not specify any "extraordinary circumstances" under which the categorical exclusion should be excepted, but simply implied OSM did not sufficiently review possible exceptions. The record, however, indicates OSM adequately reviewed the environmental issues involved and determined the renewal application contained no new proposals or information which would alter the conclusions reached in the 1990 EIS. Judge Child also suggests the action may be highly controversial. In determining whether an action "significantly" affects the environment, one of the factors that must be considered is "[t]he degree to which the effects on the the quality of the human environment are likely to be highly controversial." 40 CFR 1508.27(b)(4). In Glacier-Two Medicine Alliance, 88 IBLA 133, 143 (1985), we held that the mere fact that there is opposition to a proposed action does not make that action "highly controversial" within the meaning of the regulation. Rather, the phrase "should properly refer to a case where a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use." Id. at 144, quoting Rucker v. Willis, 484 Fed. 2nd 158, 162 (4th Cir. 1973). Applying the above holdings to the case at hand, the permit renewal is not "highly controversial."

The record supports OSM's conclusion that the categorical exclusion applies; we find nothing to support Judge Child's determination an exception thereto exists. We therefore find Judge Child erroneously concluded that OSM erred in recognizing and applying the categorical exclusion to NEPA review listed in 516 DM 6, Appendix 8.4.B(11).

Water Quantity

Judge Child concluded Peabody's mining activity at the Kayenta Mine has caused diminution of water quantity at the ground surface level. OSM reported the Kayenta Mine uses approximately 350 acre-feet (about 114 million gallons) of D- and N-aquifer water per year for drinking water for the public and mine personnel, bathing, and dust suppression (Dec. Rec., Vol. I, 0141).

OSM found such use was in accordance with projections in the EIS wherein OSM concluded the impact of the Kayenta Mine operations to surface water would be negligible (Dec. Rec., Vol. I, 0143). Judge Child's contradiction is based on "a study published by Ron Morgan, Water Rights Hydrologist, in June of 1993 [Dineh Exhibits (D-Exhs. 10 and 38)]" which, Judge Child opined, "causes one to seriously question such assurances." However, that study for the Hopi Tribe, under the title "Alternative Transportation System for Delivery of Coal," focused on water used for the Black Mesa Mine operations, particularly the slurry pipeline for coal extracted from Hopi lands. The study admitted it provided no information about the quantity of surface water available (D-Exh. 10 at 12). Moreover, the study does not relate to lands impacted by the Kayenta Mine.

Philip Reinholtz, OSM hydrologist, testified that the relatively small amount of water extracted from the N-aquifer for the Kayenta Mine is insubstantial in comparison to the recharge rate of this aquifer, and that extracting the water from the N-aquifer would have no impact on the surface water, i.e., springs or shallow wells (Dineh Transcript (D-Tr.) 561, 570). Evidence also suggests recent shortages of surface water are due to an extended drought (D-Tr. 86, 162-63, 696).

As the evidence in the record weighs against a finding that surface water has been impacted by the Kayenta Mine, we find no support for Judge Child's findings as to water quantity.

Water Quality

Citing the testimony offered at the Dineh Alliance hearing, Judge Child found that the Kayenta Mine operations have caused the following adverse effects to water quality:

- (a) Black grit is observed when water is poured from a container or allowed to puddle (D-Tr. 60).
- (b) Water containers must be covered to prevent coal dust from contaminating the water therein (D-Tr. 61).
- (c) Sheep have died from drinking the water (D-Tr. 62, 168, 211).
- (d) Surface water is discolored and coal can be seen on the surface (D-Tr. 86, 87, 162).
- (e) Oily contamination of the water is visible (D-Tr. 149).
- (f) Livestock is dying from contamination (D-Tr. 161, 162).
- (g) Sheep and goats have died within 4 hours of drinking water from MOENKOPI Wash (D-Tr. 167, 254; D-Ex. 2).

(h) Contaminants were found in water at Wide Ruins Canyon by OSM (D-Tr. 192).

(i) EPA [Environmental Protection Agency] report notes potential water pollution (D-Tr. 408, 456).

(Decision at 15). However, review of those citations from the hearing transcript reveal vague speculations from lay witnesses. Items (a) through (f) are based on testimony from Mae Pulinos, Hazel Lou Nez, and Louise Benally, Navajo (Dineh) living in the Big Mountain area. Their personal, visual observations were unsupported by objective data or evidence that the Kayenta Mine was the source or cause of the alleged water pollution. Item (g) refers to testimony from Louise Benally, but elsewhere she testified she did not see sheep actually drink contaminated water before dying. See D-Tr. 211. The exhibit cited, D-Exh. 2, does not allude to any animal deaths but is a citizen's complaint regarding seepage into the Moenkopi Wash from the Black Mesa Mine coal slurry pipeline, an event unrelated to the Kayenta Mine permit renewal. Item (h), stating that OSM found contaminants, is based on Louise Benally's comments that OSM had examined the Wide Ruins Canyon area:

[Answer by Louise Benally].

I believe that it's poisoned through contamination.

[Question].

Do you know what contaminants are in the water?

A. There's lead, there's sulfur, there's selenium. There's-- there's--we have a list of this, but I don't have it this minute, but I can give you the list.

Q. How do you know that these materials are in the water?

A. Because it has been examined.

Q. By whom?

A. By OSM. [End of questioning in this matter.]

(D-Tr. 192). However, no specific OSM report ascertaining contamination was then offered in proof thereof. Item (i), stating that a EPA report notes potential water pollution, is derived from Louise Benally's reading of an Environmental Protection Agency report of a multi-agency investigation of the Black Mesa Complex, D-Exh. 14-A at A-15:

"In general, the issue of seeps from and/or below NPDES and impoundments continues to be of concern to Region IX [EPA]. It is apparent that at least a couple of impoundments are seeping from the dam structures (J7 dam, J-3 E).

"It is not clear whether the water quality from these seeps is such that either site poses a hazard to either the local environment and/or public health.["]

(D-Tr. 408). The other citation, D-Tr. 456, is testimony from Wayne O'Daniel, a Navajo (Dineh) living in the Big Mountain area, not related to the EPA report but focusing on general observations of "oily filament" and "cloudy" contaminations of the water in the Big Mountain area.

Judge Child failed to properly evaluate the testimony of OSM's hydrologist, Philip Reinholtz; the official in charge of the Navajo Nation's EPA, Marvin Jim Smith; a veterinarian employed by the Navajo Nation, Dr. Joseph Bahe; and information in OSM reports relating to water quality. Reinholtz explained that the oily sheen, discolor, and dissolved solids in surface water sources are the result of naturally occurring elements (D-Tr. 547-53, 585-92). Smith testified that the problems found by the EPA multi-agency investigation were all promptly corrected and water quality complied with Federal standards (D-Tr. 621, 632). The EPA report stated that "the mines' compliance status was good" (D-Exh. D-14A at ES-2).

OSM reported that a veterinarian, Dr. Gail Pate, U.S. Department of Agriculture, was retained in 1994 to investigate citizen complaints of livestock illnesses and concluded there is no evidence to support a claim that mining is harming livestock (D-Exh. 9). The report of her investigation and her own notes reflected that the health concerns expressed in the citizen complaints were due to husbandry practices and not mining impacts. Id. Dr. Bahe testified that, based on his experiences and investigations, the primary causes of livestock death and illness in the mining area and throughout the reservation relate to husbandry practices (D-Tr. 720-21). He concluded livestock in the mining area are no less healthy than those he has observed in other areas of the reservation (D-Tr. 729-30).

OSM's technical responses to public comments, Dec. Rec., Vol. I, 0140-63, presented OSM's conclusions, based on monitoring data available for review, that mining was not the source of water pollution complained of by area residents. OSM reported that data indicated selenium and other heavy metal concentrations, a purported source of water pollution, have not increased due to mining activities (Dec. Rec., Vol. I, 0140, 0142-43).

We find that the overwhelming evidence in the record and derived from the hearing clearly evinces that those water pollution problems identified by Judge Child resulted from natural sources and were not caused by the Kayenta Mine operation. None of the testimony or exhibits referenced by Judge Child affirmatively demonstrated Peabody violated SMCRA or any other standard.

Blasting

In making his finding that Peabody's operations have caused blasting damages, Judge Child again relied on the casual observations of lay

witnesses to the exclusion of expert witnesses and professional reports. His finding of blasting damages is based on statements that nearby dwellings have developed visible cracks (D-Tr. 59, 173-77).

In its technical response to public comments, OSM reported "[b]lasting operations are being conducted according to Federal law, regulation and the approved permit application" (Dec. Rec., Vol. I, 0154), "[s]urface coal mining and reclamation operations are inspected regularly and must meet specific standards of Federal law, regulation and conditions of the permit" (Dec. Rec., Vol. I, 0154-55), "[a]ll blasts at the mine are monitored with a seismograph in order to verify compliance with the vibration and air concussion standards", and "[t]he terms and conditions of the existing permit are being satisfactorily met" (Dec. Rec., Vol. I, 0156).

Michael Rosenthal, OSM blasting specialist, testified that he conducted an investigation of Peabody's operations as a result of citizens complaints, including the review of more than 1000 pages of blasting data on the Kayenta Mine (D-Tr. 467, 515-17). He concluded OSM's data showed little or no measurable effects at distances beyond 1/2 mile from blasting sites and blasting could be ruled out as the cause of the damage alleged (D-Tr. 492, 499). See also D-Exh. 23 (Blasting Complaint Report). He testified that similar dwellings located 12 to 13 miles from the blast site showed the same damage as complained of by those living nearby (D-Tr. 492-508).

Because of the controversy, OSM did not rely solely on Rosenthal's report but hired an independent engineering firm to review this matter. The independent study, confirming Rosenthal's methods and determinations, concluded "[t]he most likely cause of the observed defects is the construction practice" and "it is highly unlikely that the observed damage is blasting related" (D-Exh. 24 at 10, 27).

Again, the overwhelming evidence found in the record and derived from the hearing clearly evinces those problems identified by Judge Child were not caused by the Kayenta Mine operation. None of the testimony referenced by Judge Child affirmatively demonstrated Peabody violated SMCRA or any other standard.

Air Quality

In finding Kayenta Mine activities "have caused air pollution to the health detriment of petitioners and their animals," Judge Child relied on general statements from Pulinos, Nez, and Benally: "[the mine] hurts my head and it makes me sick," "you can see the coal dust as it blows in the window," "you can smell it," "I think it's the air from the mine, the dust," "leg hurts and all of my body," "[e]ach day I observe haze and the smell of sulfur, and also the dust that never settles, the smell of coal or the sulfur that never goes away and it causes health problems, breathing in the dust, looking in the dust, being in the dust" (D-Tr. 56, 60, 61, 135, 170). The witnesses attribute health problems in their animals—slower pace of walk, loss of hair, birth defects, internal maladies—and among themselves—heart surgery, head and body aches—to fugitive air pollution

(contaminating both air and water resources). However, no medical or veterinarian records or opinions were presented to document the conclusion that mining activities were the cause of alleged health problems.

OSM's technical response to public comments reported "OSM found that the [Permit Application Package] contained a fugitive dust program sufficient to comply with the requirements of 30 CFR 780.15(a)(2)," "OSM does not believe that there is any need to modify the fugitive dust control plan that is being used at the Kayenta mine," and

review of the PM[10] data from the existing air quality monitoring network shows that there has not been any exceedances of the 24-hour or annual PM[10] National Ambient Air Quality Standard. This data suggests that there is not excessive fugitive dust generated by mining activities. Therefore, OSM believes that there is not sufficient evidence to suggest that illnesses in people or livestock is a result of coal dust.

(Dec. Rec., Vol. I, 0163).

Floyd Johnson, OSM, testified that Peabody operates full-time air-monitoring stations in accordance with EPA standards and the Kayenta Mine operations never exceeded the EPA standards during the 5-year term of the original permit (D-Tr. 536-38). As noted above, veterinarians concluded poor husbandry practices, not mining impacts, were responsible for the state of livestock health (D-Tr. 721-56; D-Exh. 9).

Again, the overwhelming evidence found in the record and derived from the hearing demonstrates the alleged air pollution problems cited by Judge Child were not conclusively caused by the Kayenta Mine operation. None of the testimony referenced by Judge Child affirmatively demonstrated Peabody violated SMCRA or any other standard.

Conclusion

It is well established that the Board has full authority to reverse findings of fact made by an Administrative Law Judge. See, e.g., United States v. Knoblock, 131 IBLA 48, 101 I.D. 123 (1994). However, the Board will not ordinarily disturb such findings where the resolution of disputed facts is influenced by the Judge's findings of credibility based on his reaction to the demeanor of witnesses, and such findings are supported by substantial evidence. Bureau of Land Management v. Carlo, 133 IBLA 206, 211-12 (1995).

In the case at hand, we conclude that Judge Child's findings of fact as to the issues of water quantity, water quality, blasting, and air quality must be reversed because they are not supported by substantial evidence in the record. We also conclude that his conclusions of law as to the issues of owner consent, pattern of willful violations, compliance with permit conditions, and NEPA compliance are in error and must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Administrative Law Judge Ramon M. Child's decision of March 11, 1996, is reversed. 2/

John H. Kelly
Administrative Judge

2/ We note that our decision is not issued within the time frame set forth in 43 CFR 4.1369(d) because of a delay in the Board's receipt of the complete record.

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

I found it interesting to compare the lead opinion in this decision with the majority opinion and dissent in Peabody Coal Co. v. OSM, 125 IBLA 107 (1993) (Peabody I). By reading the majority opinion in Peabody I, one can better understand why Administrative Law Judge Ramon M. Child erred when reaching many of the conclusions now being overturned.

The majority in Peabody I held that "no permit application shall be approved unless the application affirmatively demonstrates * * * that the area proposed to be mined is not within 100 feet of a cemetery." Peabody I at 123. Based upon the archeological evidence then available the majority in Peabody I found that "OSM must require the information which would enable it to make the required findings * * *." Id.

In Peabody I the majority rejected a Office of Surface Mining Reclamation and Enforcement (OSM) determination that no mining would occur within 100 feet of a cemetery. In this decision the lead opinion correctly found a similar pronouncement by OSM satisfactory. Compare Exh. P-52, Finding 3.h. (rejected OSM finding) and Dec. Rec. Vol. I, 0013 (OSM finding found acceptable). A further interesting comparison can be made by examining the evidence Judge Child relied upon (which was correctly rejected in the lead opinion) and what the majority relied upon in Peabody I when finding insufficient evidence that the area proposed to be mined would not be within 100 feet of a cemetery (Tr. D82, D278; OSM's Response to Peabody's Petition at 13).

In this case, the lead opinion recognizes a statistical possibility that other grave sites may be within the permit area, and correctly finds the application to be complete and the approval to be proper, referring to a response to comments to the proposed regulations printed in the Federal Register in support of that finding. The response to comments to the proposed regulations (which is quoted in pertinent part in the lead opinion) correctly stated that there must be a likelihood of finding human remains to consider an area to be a cemetery within the protection of the statute and regulations. Compare the discussion of the likelihood of finding human remains in the lead opinion to that in Peabody I at 128-29.

The scope of the initial, but unsatisfactory, archeological examination of the permit area is outlined at page 125 of the Peabody I decision, which was rendered on January 14, 1993. Peabody submitted additional data on April 1, 14, and 20, 1993. OSM examined this information and deemed Peabody's application complete on April 21, 1993. The field work was complete on July 9, 1993, and approved on July 28, 1994. I am pleased that we now agree that there is sufficient evidence to support a finding that no mining will take place within 100 feet of a cemetery.

R. W. Mullen
Administrative Judge

