

CITIZENS COAL COUNCIL

IBLA 97-280

Decided September 6, 2001

Appeal from an order of Administrative Law Judge James H. Heffeman denying petition to intervene in Hearings Division Case Nos. DV 94-21-R and DV 95-3-P, Amcord v. Office of Surface Mining Reclamation and Enforcement.

Reversed.

1. Intervention–Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention–Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Any person having an interest which is or may be adversely affected by a notice or order or by any modification, vacation, or termination of such notice or order, may petition for review of the order within thirty days of receipt or within thirty days of its modification, vacation, or termination. When the petitioner 1) had a statutory right to initiate the proceeding in which he or she wishes to intervene, or 2) has an interest which is or may be adversely affected by the outcome of the proceeding, the person has the right to intervene.

2. Intervention–Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Intervention–Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

An organization with a member whose interests could be adversely affected by the outcome of a proceeding to review a notice of violation issued under the Surface Mining Act is entitled to intervene in the proceeding.

APPEARANCES: Reed Zars, Esq., Laramie, Wyoming, for the Citizens Coal Council; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement; David E. Moser, Esq., San Francisco, California, for Amcord, Inc.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On March 24, 1997, Citizens Coal Council (CCC) filed an appeal, pursuant to 43 CFR 4.1271, of a February 13, 1997, Order issued by Administrative Law Judge James H. Heffeman. In his Order Judge Heffeman denied CCC's amended petition for intervention in Amcord v. Office of Surface Mining Reclamation and Enforcement (OSM), DV 94-21-R and DV 95-3-P, based on his finding that "[n]either CCC institutionally, nor Mr. Tilden personally, has demonstrated the requisite adverse [e]ffects for purposes of intervention as of right." (Feb. 13, 1997, Order at 7.)

This case originated on September 19, 1994, when OSM issued Notice of Violation (NOV) No. 94-02-116-2 citing Amcord, Inc. (Amcord) for "[f]ailure to cover acid-forming combustible materials with a minimum of 4 feet of nontoxic and noncombustible materials; or, if necessary, treat to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses" on approximately 67 acres of the Amcoal Mine near Gallup, New Mexico, in violation of 25 CFR 216.105(j). On October 21, 1994, Amcord sought review of the NOV and requested a hearing pursuant to rules at 43 CFR 4.1160 through 4.1171 (Hearings Division Docket No. DV 94-21-R). After receiving notice of the proposed assessment of a civil penalty, Amcord petitioned for review under 43 CFR 4.1150 (Hearings Division Docket No. DV 95-3-P). The cases were consolidated by the Hearings Division, and on March 13, 1995, CCC filed its petition to intervene in the consolidated proceeding.

By Order dated September 8, 1995, Administrative Law Judge Ramon M. Child dismissed CCC as an intervenor. CCC appealed to this Board and, by Order dated March 6, 1996, we set aside inter alia that portion of Judge Child's Order dismissing CCC as an intervenor because Judge Child provided insufficient reasoning for his conclusion. On remand, the case was reassigned to Judge Heffeman, who gave effect to the Board's Order by granting CCC's motion to file an amended petition to intervene and providing a de novo opportunity for the parties to present evidence and file briefs on whether CCC met the requirements for intervention as a matter of right. Following briefing, Judge Heffeman issued the order now on appeal.

In its statement of reasons (SOR), CCC contends that Judge Heffeman "erred in dismissing CCC as an intervenor where CCC demonstrated with uncontroverted affidavits that it had a member whose environmental, recreational and spiritual interests could be adversely affected by the outcome of the proceeding." (SOR at 1.) CCC argues that it should be allowed to intervene as a matter of right pursuant to 43 CFR 4.1110(c)(2). 1, 2/ Both

1/ On April 25, 1997, CCC filed a motion seeking to clarify the status of its appeal, asserting that it is not interlocutory but is pursued under the procedural rule at 43 CFR 4.1271(a), which provides that "[a]ny aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under §§ 4.1160 through 4.1171 * * *." By Order dated June 6, 1997, we recognized that this appeal was properly taken under 43 CFR 4.1271(a).

2/ CCC also asks the Board to consider error in Judge Heffeman's decision to not grant its motion for partial summary decision on the issue of

OSM and Amcord have filed answers, arguing that Judge Heffernan should be affirmed because the procedural regulations require the showing of an adversely affected interest which they assert CCC has failed to demonstrate.

Our review begins with an examination of 43 CFR 4.1110, the procedural regulation at issue in this case. ^{3/} That regulation states that any person may file for leave to intervene at any stage of a proceeding (§ 4.1110(a)) and that the petition shall be granted where either the petitioner has a statutory right to initiate the proceeding or the petitioner "[h]as an interest which is or may be adversely affected by the outcome of the proceeding" (43 CFR 4.1110(c)(2)).

The Board has explained the meaning of "adversely affected" under 43 CFR 4.410(a), the regulation governing who has the right of appeal from Bureau of Land Management decisions:

The issue is whether [the Appellant] is "adversely affected." The interest of Appellant affected by the Decision under review must be a legally cognizable interest and the allegation of adverse effect must be colorable, identifying specific facts which give rise to a conclusion regarding the adverse effect. National Wildlife Federation v. BLM, [129 IBLA 124 (1994)] at 127; Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). While the interest affected need not be a property or economic interest, a deep concern for a problem is not enough. Robert M. Sayre, 131 IBLA 337 (1994). This Board has recognized that the use of the land involved or ownership of adjacent land may encompass a sufficient interest. The Wilderness Society, 110 IBLA 67, 70 (1989). Nevertheless, we have held that the threat of injury and its effect on the Appellant must be more than hypothetical. Missouri Coalition for the Environment, 124 IBLA 211 (1992); George Schultz, 94 IBLA 173, 178 (1986). The threat of injury must be real and immediate before standing will be recognized. Salmon River Concerned Citizens, 114 IBLA 344 (1990).

El Paso Electric Co., 146 IBLA 145, 147-48 (1998).

fn. 2 (continued)

Amcord's liability in the NOV matter. As Judge Heffernan did not rule on that issue, we will not address it here.

^{3/} Regulation 43 CFR 4.1110, entitled "Intervention" and found under Subpart L, Special Rules Applicable to Surface Coal Mining Hearings and Appeals, reads in full:

"(a) Any person, including a State, or OSM may petition for leave to intervene at any stage of a proceeding in OHA [Office of Hearings and Appeals] under the act [Surface Mining Control and Reclamation Act of 1977 (SMCRA)].

"(b) A petitioner for leave to intervene shall incorporate in the petition a statement setting forth the interest of the petitioner and,

Judge Heffernan summarized CCC's basis for seeking intervenor status under its amended petition as follows:

Under its Amended Petition, CCC seeks to intervene as of right under the purview of 43 CFR 4.1110(c)(2). CCC asserts two alternative grounds for intervention. First, CCC asserts a generalized, organizational interest in this case on behalf of all of its various members. Second, CCC alleges that Mr. Mervyn Tilden will be personally adversely affected by the outcome of this case. Mr. Tilden is a member of the Zuni Mountain Coalition, which, in turn, is a corporate member of CCC.

With respect to its first ground for intervention, CCC states that it is a national organization composed of groups and individuals who live in coal producing regions and who are active in environmental and reclamation enforcement proceedings. CCC also avers that it has participated as a party in other Department of [the] Interior proceedings and that it has commented extensively on proposed rules issued by OSM. (See CCC's Amended Petition To Intervene As A Party, p. 2 (April 26, 1996).)

With respect to its second ground for intervention, CCC clarifies in its Amended Petition that Mr. Mervyn Tilden has certain interests which may _

fn. 3 (continued)

where required, a showing of why his interest is or may be adversely affected.

"(c) The administrative law judge or the Board shall grant intervention where the petitioner--

"(1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or

"(2) Has an interest which is or may be adversely affected by the outcome of the proceeding.

"(d) If neither paragraph (c)(1) nor (c)(2) of this section apply, the administrative law judge or the Board shall consider the following in determining whether intervention is appropriate--"

"(1) The nature of the issues;

"(2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding;

"(3) The ability of the petitioner to present relevant evidence and argument; and

"(4) The effect of intervention on the agency's implementation of its statutory mandate.

"(e) Any person, including a State, or OSM granted leave to intervene in a proceeding may participate in such proceeding as a full party or, if desired, in a capacity less than that of a full party. If an intervenor wishes to participate in a limited capacity, the extent and the terms of the participation shall be in the discretion of the administrative law judge or the Board."

be adversely affected by the outcome of this enforcement proceeding; that Mr. Tilden is a member of the Zuni Mountain Coalition; and that the Zuni Mountain Coalition is, in turn, an organizational member in good standing with CCC. Mr. Tilden's declaration avers that he lives near, travels and conducts various religious activities in the vicinity of the Amcoal Mine. (Declaration of Mervyn C. Tilden, attached to CCC's Opening Legal Brief In Support Of Its Status As Intervenor.) CCC asserts that Mr. Tilden may continue to be adversely affected in the future based upon alleged degradation of the aesthetic value of the area around the mine, which allegedly will also affect the cultural and religious practices and purposes for which Mr. Tilden utilizes the surrounding land. CCC also asserts that Mr. Tilden may be adversely affected by sub-surface water pollution resulting from the mine's past operations and/or its reclamation. (Tilden Declaration, p.p. 3-5.)

(Feb. 13, 1997, Order at 3-4.)

Judge Heffernan examined the Board's treatment of the term "adversely affected" under 43 CFR 4.410, and concluded that the facts in this case were similar to those set out in Laser, Inc., 136 IBLA 271, 273-74 (1996): "Laser is a non-profit organization composed of individual, group and corporate members. * * * One of Laser's supporting organizations is Local 350 of the United Association of Plumbers, which claimed generalized, adverse impacts from mining [in the area, and] it was more specifically claimed that two individual members of Local 350 regularly hunted mule deer in the area." (Feb. 13, 1997, Order at 5.) Judge Heffernan noted that the Board denied standing because the specific facts iterated by Laser did not give rise to a conclusion that the members of the union it represented would be adversely affected. He determined that "CCC's Amended Petition to Intervene suffers many of the same deficiencies that are reiterated in the Laser case." (Feb. 13, 1997, Order at 6.) He specifically decided that most of Tilden's grievances emanate from past impacts, such as the removal of trees and shrubs. He further reasoned that "[n]othing in his statement establishes real and immediate injury to himself emanating from the reclamation program or this particular enforcement action." (Feb. 13, 1997, Order at 7.)

CCC argues that the Board has established that even threatened injuries to aesthetic and environmental interests are sufficient to establish a party as "adversely affected," citing Stebly v. OSM, 109 IBLA 42, 245 (1989) and Citizens for the Preservation of Knox County, 81 IBLA 209, 214 (1984). CCC distinguishes the adverse effects suffered by Tilden from those in Laser, contending that in Laser the Board focused on the fact that the hunters could only say that they hunted in the same state in which the mine was located and speculated that the project might diminish forage throughout the general hunting area. (See SOR at 8). CCC argues that Tilden's specific and real injuries directly result from Amcord's failure to reclaim the Amcoal Mine and that adequate redress is accomplished only through proper reclamation.

In support of its right to intervene, CCC avers that Tilden lives near and conducts religious activities in the area of the Amcoal Mine. We paraphrase the statements found in Tilden's March 8, 1995, affidavit:

- CCC represents my interest in obtaining a healthy environment and enforcement of the surface mining laws.
- I live on the Navajo Nation in McKinley County, New Mexico, because I am able to enjoy the great beauty of the Navajo Nation's unspoiled landscapes. These unspoiled landscapes are essential for living my life within the Navajo culture and for my practice of Native American religion.
- I conduct traditional Native American ceremonies to seek spiritual harmony of my body and mind with the earth.
- I am familiar with Amcord's Amcoal Mine located on Navajo Nation land next to and visible from the Sundance Mine Road. Amcord has not completely and successfully reclaimed the minesite.
- I frequently travel the Sundance Mine Road and have seen the mine site from the road. I gather branches of a special sage plant used in traditional purification ceremonies from a spot on a hill overlooking the mine site.
- What I see at the mine site is death and desecration of our mother earth. The mining left steep slopes and highwalls and these are eroding and have gullies. The mined land has not been successfully reclaimed with native vegetation. There is very little vegetation and much of the land is bare and appears gray and brown. The mine area is within the Puerco River watershed and I fear the acid from the mine site will harm children and livestock.
- When I visit the mine site I become very spiritually disturbed, and I have shed tears at the destruction of the land and the water. This destruction takes away from my enjoyment of the landscape and my efforts to achieve spiritual harmony.
- Complete and successful reclamation and revegetation of the Amcoal Mine would benefit me by returning beauty to the landscape and allow me to gain harmony and by enabling me to collect native plants for spiritual ceremonies in a peaceful frame of mind.

[1] In our view, Judge Heffeman erred when he applied "adversely affected" as interpreted in our decisions analyzing the right of appeal under 43 CFR 4.410(a) rather than applying our interpretation of that phrase in decisions addressing standing under the Surface Mining Act.

The regulation at 30 CFR 842.15 provides that "[a]ny person who is or may be adversely affected by a * * * surface coal mining and reclamation

operation" may ask for informal review of a decision to not inspect or take enforcement action by the Director, OSM. In Citizens for the Preservation of Knox County, *supra*, we considered whether the appellant in that case could request informal Director review of a decision that a mine would not be inspected, issued in response to a request for inspection filed under 30 CFR 842.12. We concluded that the appellant, which had stated that it had approximately 300 members, "many of whom live in close proximity to [a surface coal mine] and are adversely affected in their property, aesthetic, and recreational interests as a result of [the company's] failure to comply with the permitting requirements of [the] approved Illinois program, . . . ha[d] standing to bring this action." 81 IBLA at 214.

In Stebly v. OSM, *supra*, the appellant lived about ½ to ¾ of a mile from the coal-washing plant that had been granted a permit. The appellant also traveled the road which would be used by coal trucks transporting coal from a nearby mine to the plant. We found that the appellant was entitled to request a hearing under section 514(c) of the Surface Mining Act, 30 U.S.C. § 1264(c) (1994), which provides that "any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination" on an application for a permit. The basis for this determination was that the appellant "may be adversely affected by the traffic and air pollution caused by such trucks and noise from the plant." 109 IBLA at 245. We noted that 30 CFR 700.5 defined "[p]erson having an interest which is or may be adversely affected" as any person "(a) [w]ho uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Secretary or the State regulatory authority" and concluded that the traffic and air pollution, "whether regarded as threatened injuries to Stebly's aesthetic or environmental interest, come within the meaning of 30 CFR 700.5." 4/ *Id.* See also Natural Resources Defense Council v. OSM, 89 IBLA 1, 7-10, 92 I.D. 389, 393-94 (1985).

4/ In sec. 101(c) of SMCRA, 30 U.S.C. § 1201(c) (1994), Congress recognized that

"many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water and other natural resources."

Thus, in enacting SMCRA Congress desired to establish a program "to protect society and the environment from the adverse effects of surface coal mining operations" and to provide for "public participation in the * * * enforcement of * * * reclamation plans." 30 U.S.C. § 1202(a), (i) (1994). Accordingly, regulations implementing SMCRA should be interpreted with that perspective in mind.

Section 525(a) of the Surface Mining Act, 30 U.S.C. § 1275(a), provides that a permittee who has been issued a notice or order under section 521(a)(2) or (3) of the Act, 30 U.S.C. § 1271(a)(2) or (3), or "any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order," may apply for review of the order within thirty days of receipt or within thirty days of its modification, vacation, or termination. Further, 43 CFR 4.1110(c) provides that when the petitioner 1) had a statutory right to initiate the proceeding in which he or she wishes to intervene, or 2) has an interest which is or may be adversely affected by the outcome of the proceeding, the administrative law judge or this Board shall grant intervention.

CCC states that Tilden is a member of the Zuni Mountain Coalition, which in turn is a member of CCC. Tilden would not be adversely affected by the NOV issued to Amcord, and he could not initiate a proceeding to review it. Therefore, according to CCC, he does not have a right to intervene pursuant to 43 CFR 4.1110(c)(1). However, 43 CFR 4.1110(c)(2) provides that intervention shall be granted when the person seeking to intervene has an interest which is or may be adversely affected by the outcome of the proceeding. We agree. Under 30 CFR 700.5, a person having an interest which is or may be adversely affected includes a person who uses any resource of aesthetic or environmental value that may be adversely affected by a surface coal mining or reclamation operation or by any related action of the Secretary or the state regulatory authority.

Tilden states that his aesthetic and environmental enjoyment of the land is adversely affected when he views the unreclaimed Amcoal Mine from the Sundance Mine Road and from the hillside overlooking the mine, where he gathers sage. Tilden's interest in restoration of the aesthetic and environmental value of the resource he uses could be adversely affected if the outcome of the proceeding to review the NOV were to vacate or modify the NOV requiring reclamation. Based on this potential adverse effect on Tilden's interest and based on Tilden's membership in an organization that is part of the CCC, we conclude that CCC has demonstrated it is entitled to intervene under 43 CFR 4.1110(c)(2).

[2] An organization with a member whose interests could be adversely affected by the outcome of a proceeding to review a notice of violation issued under the Surface Mining Act is entitled to intervene in the proceeding, in accordance with 43 CFR 4.1110(c)(2). Having made that finding, we must reverse Judge Heffernan. Upon return of this matter, the assigned administrative law judge and CCC should determine CCC's level of participation in the proceedings in Amcord v. Office of Surface Mining Reclamation and Enforcement (OSM), DV 94-21-R and DV 95-3-P, in the manner set out in 43 CFR 4.1110(e).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is reversed.

R.W. Mullen
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge