



PEABODY WESTERN COAL COMPANY

182 IBLA 183

Decided April 24, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

PEABODY WESTERN COAL COMPANY

IBLA 2012-128

Decided April 24, 2012

Interlocutory appeal from an order of an administrative law judge denying a motion to dismiss appeals as untimely. DV-2012-2-R, *et al.*

Petition for interlocutory appeal granted; order affirmed; petition for stay denied as moot.

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

Any person with an interest which is or may be adversely affected may file a request for a hearing on a permit decision within 30 days after the applicant or permittee is notified of OSM's final decision. OSM must notify the applicant or permittee of the written decision by certified mail or by overnight delivery service.

2. Surface Mining Control and Reclamation Act of 1977: Appeals--
Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Generally

If OSM fails to notify a permittee of its decision by certified mail or overnight delivery service, a permittee receives actual notice of OSM's decision when a final written decision is dispatched out of OSM's custody and is successfully delivered to the permittee on a date certain, *not* when information about the decision, or even a copy of the decision itself, becomes otherwise available.

APPEARANCES: George M. Soneff, Esq., Craig A. Moyer, Esq., and Bryan C. LeRoy, Esq., Los Angeles, California, for Peabody Western Coal Company; Lisa M. McKnight, Esq., Scott M. Deeny, Esq., and Karilee Ramaley, Esq., Phoenix, Arizona, for Salt River Project; David L. Abney, Esq., Phoenix, Arizona, for Black Mesa Trust; Brad A. Bartlett, Esq., Durango, Colorado, and Margot J. Pollans, Esq., and Hope M. Babcock,

Esq., Washington, D.C., for To' Nizhoni Ani, Coalition, Diné Citizens Against Ruining our Environment, Sierra Club, and Center for Biological Diversity; Mick G. Harrison, Esq., Bloomington, Indiana, for the Forgotten People; Arthur R. Kleven, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining, Reclamation, and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Peabody Western Coal Company (Peabody) has filed a petition for interlocutory appeal (Interlocutory Appeal Petition) from a March 13, 2012, Order by Administrative Law Judge Andrew S. Pearlstein, Office of Hearings and Appeals, Departmental Cases Hearings Division (Hearings Division), denying three motions to dismiss appeals as untimely. Peabody also requests that the Board stay the Hearings Division proceedings during the pendency of the interlocutory appeal. For the following reasons, we grant the Interlocutory Appeal Petition, affirm ALJ Pearlstein's Order, and deny the petition for stay as moot.

The background of this case, as explained in ALJ Pearlstein's Order, is briefly recounted here. Peabody is the holder of Permit No. AZ-0001-D, issued by the Office of Surface Mining, Reclamation and Enforcement (OSM), granting Peabody permission to operate the Kayenta Mine in Arizona. OSM issued a Decision, dated January 6, 2012, approving Peabody's permit renewal application. OSM sent this Decision to Peabody by regular U.S. mail. Peabody retrieved the Decision from its post office box on January 17, 2012. Interlocutory Appeal Petition at 3.¹ On February 14 and 16, 2012, several parties² filed a total of three requests for review of the permit renewal.

Peabody moved to dismiss all three requests for review, asserting that they were not timely filed. ALJ Pearlstein denied these motions, but granted Peabody's request that the question of whether the appeals were timely filed be certified for interlocutory appeal to the Board. ALJ Pearlstein's Order at 10. Peabody then petitioned the Board to appeal from that interlocutory ruling, pursuant to 43 C.F.R. § 4.1272. We now grant Peabody's Interlocutory Appeal Petition.

¹ "On January 17, 2012, [Peabody's] Operations assistant checked the post office box which [Peabody] maintains in Kayenta [AZ] and found an envelope from OSM, addressed to [Peabody] (to my attention), which contained the January 6, 2012 approval letter." Interlocutory Appeal Petition, Ex. 3 Declaration of Gary W. Wendt, Manager Permits Southwest, Peabody, at 2 (Mar. 2, 2012).

² These parties are To' Nizhoni Ani, Black Mesa Water Coalition, Diné Citizens Against Ruining our Environment, Sierra Club, Center for Biological Diversity, Black Mesa Trust and the Forgotten People (collectively, "Parties Seeking Review").

The Board is faced with a single question of law and has already received voluminous pleadings from Peabody and other parties to the case. Therefore, the Board will dispense with further briefing and proceed to decide the matter. 43 C.F.R. § 4.1272(d).

[1] Under section 514 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1264(c) (2006), and implementing regulations at 30 C.F.R. § 775.11 and 43 C.F.R. § 4.1362(a), “any person with an interest which is or may be adversely affected” may file a request for a hearing on a decision to, *inter alia*, renew a permit. The request for review must be filed “[w]ithin 30 days after the applicant is notified of the final decision.” 30 U.S.C. § 1264(c) (emphasis added). OSM must notify the applicant or permittee “of the written decision by certified mail or by overnight delivery service.” 43 C.F.R. § 4.1362(a). In this case, OSM failed to send its decision to Peabody by either certified mail or overnight delivery service, but rather sent it by regular U.S. mail. ALJ Order at 8-9.

Peabody asserts that the 30-day appeal period ended before the Parties Seeking Review filed their requests for review, because Peabody had “actual notice” of the decision, which notice triggered the 30-day appeal period earlier than its receipt of the decision on January 17, 2012.³ Peabody does not pin down precisely when this notification occurred, but it asserts that one or all of the following events may have triggered notification: (1) when OSM signed the decision letter and telephoned Peabody and left a voicemail stating that a decision letter was issued, even though no Peabody employee was available to receive the telephone call; (2) when a Peabody employee listened to OSM’s voicemail message; (3) when OSM posted notice of the decision on its website and a Peabody employee printed a copy of the decision from the website (4) when the Associated Press reported the OSM decision, spurring additional reports on other news organizations’ websites, presumably heard by Peabody employees; and (5) when Peabody checked its post office box and actually received the original written decision. Interlocutory Appeal Petition at 3.

In the context of notices of appeal, the Board has held that conclusive proof of actual notice of a government action by a putative appealing party may trigger that party’s appeal period. *Trails Preservation Alliance*, 180 IBLA 177, 180 n.6 (2010) (citing *Minchumina Homeowners Association*, 93 IBLA 169, 173 (1986)). However, the Board does not subscribe to an interpretation of SMCRA which allows the undefined, unpredictable, or unanticipated actions of one party to foreclose the rights of other persons to file a request for review. Under Peabody’s interpretation of the

³ If the 30-day appeal period was triggered on Jan. 17, 2012, then the period ended on Feb. 16, 2012, and the requests for review are timely.

statute, either a permittee or OSM might not know precisely when OSM “notified” a permittee. If, as a courtesy, OSM updates its website or informally tries to contact a permittee (by voicemail or even email) about a renewal decision, Peabody asserts that “actual notice” could occur when OSM takes those actions even without the permittee knowing about it. Likewise, when the permittee checks OSM’s website, listens to the voicemail, reads the email, or sees a news report about the decision, “actual notice” could occur without OSM knowing about it. Given that, Peabody might even assert “actual notice” if a permittee overheard a casual conversation on the street concerning the decision. Confronted by these unpredictable circumstances, neither OSM, nor indeed this Board, could reasonably predict or necessarily confirm when “actual notice” occurred or determine whether a subsequent request for review was timely filed.

Clearly, the broad concept of actual notice does not hold up here in the context of SMCRA, where parties with appeal rights are not directly served with the decision. *See* 30 U.S.C. § 1264(c). The Board is not persuaded by Peabody’s argument that failure to impose the concept of actual notice, under one of its own offered definitions, constitutes an illegal expansion of OSM’s authority in conflict with the statute. *See* Interlocutory Petition at 6-8. The Board cases cited by Peabody are distinguishable, as they involve the putative appellant itself receiving actual notice of a decision, not the circumstance we confront here. *See, e.g., Save Medicine Lake Coalition*, 156 IBLA 219, 227 (2002), *aff’d, sub nom., Pit River Tribe v. BLM*, 306 F. Supp.2d 929 (E.D. Calif. 2004), *rev’d on other grounds*, 469 F.3d 768 (9th Cir. 2006); *Nabesna Native Corp., Inc.*, 83 IBLA 82, 84 (1984). Even in *Peabody Coal Company v. U.S.*, where the Court found that OSM could not extend the appeal period beyond Peabody’s having received actual notice, the Court’s holding centered on actual notice occurring when Peabody physically received the actual signed permit from OSM, *not* when Peabody found out about the permit by surfing the web or listening to news reports. *See* CIV No. 86-502 PCT CLH, 1988 WL 114133, at *3-4 (D. Ariz. Mar. 11, 1988) (finding no basis for OSM to “hold that the permit applicant has *not* been notified when it *has* received the actual permit.” (emphasis in original)).

[2] We agree with ALJ Pearlstein’s conclusion that *Peabody Coal Company* confirmed that “the 30-day period to file a request to review an OSM permit decision begins when the permittee actually receives a written copy of the permit or approval letter.” ALJ Order at 7. This is consistent with the policy evident in the preamble to OSM’s regulation. “It was proposed to amend 43 C.F.R. § 4.1362 to provide that the period for filing a request for review of an [OSM] decision begins on the day an applicant or permittee receives the written decision by certified mail or by overnight delivery service.” 56 Fed. Reg. 2140 (January 22, 1991). We conclude that the purpose of this notification process, as contemplated by both the statute and the regulations, is to allow OSM (1) to control the transmittal of the decision by

requiring OSM's affirmative action to notify a permittee by transmitting the written decision by certified mail or by overnight delivery service, and (2) to verify the permittee's receipt of the transmitted decision from OSM by creating a record in the form of delivery verifications or receipts of when the permittee was duly notified. See ALJ Order at 9. Without such conclusive evidence in the record as to when a permittee was notified, thereby triggering the appeal period, we are unable to dismiss a subsequent appeal as untimely. *Northern Plains Resource Council v. OSMRE*, 112 IBLA 266, 267-68 n.2 (1990). As a result, we find that a permittee receives actual notice of OSM's decision when a final written decision is dispatched out of OSM's custody and is successfully delivered to the permittee on a date certain, *not* when information about the decision, or even a copy of the decision itself, becomes available via a website, an email, a voicemail, or a news report.

In this case, notwithstanding OSM's failure to follow the regulatory requirement of dispatching its written decision by certified mail or overnight delivery, instead sending it by regular U.S. mail, Peabody received actual notice of the decision when it checked its post office box on January 17, 2012, and retrieved OSM's written decision as sent by OSM. Peabody's receipt of OSM's written decision on January 17, 2012, triggered the appeal period. Consequently, the three requests for review of OSM's decision that were submitted by the Parties Seeking Review were timely filed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Interlocutory Appeal Petition is granted, ALJ Pearlstein's Order is affirmed, and Peabody's petition for stay is denied as moot.

_____/s/
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge