

PEABODY COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-625
IBSMA 82-32

Decided February 3, 1984

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement of the decision of Administrative Law Judge Robert W. Mesch vacating Notice of Violation No. 80-5-20-11 on the basis that the regulations cited in the notice were not applicable to Peabody Coal Company's Kayenta Mine. (Docket No. DV 1-10-P).

Affirmed.

1. Indian Lands: Leases and Permits: Minerals -- Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

Where the Office of Surface Mining Reclamation and Enforcement issued a notice of violation charging a violation of regulations in 30 CFR Part 211 (1980) at a surface coal mining operation on Indian land, the notice was properly vacated since the scope provision of those regulations, 30 CFR 211.1(a), specifically excluded from the coverage of 30 CFR Part 211 operations on Indian land.

APPEARANCES: Joseph M. Oglander, Esq., Stuart A. Sanderson, Esq., and Walton D. Morris, Jr., Esq., Washington, D.C., Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement; Gregory J. Leisse, Esq., Flagstaff, Arizona, for Peabody Coal Company.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On June 22, 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) filed a petition for discretionary review with the Board of Surface Mining and Reclamation Appeals (IBSMA) pursuant to 43 CFR 4.1270. 1/

1/ On Apr. 26, 1983, the Secretary issued Secretarial Order No. 3092 which abolished IBSMA and transferred and consolidated the functions of that Board with the Interior Board of Land Appeals. 48 FR 22370 (May 18, 1983).

OSM sought review of a May 14, 1982, decision of Administrative Law Judge Robert W. Mesch vacating Notice of Violation No. 80-5-20-11 on the basis that the regulations cited in the notice (30 CFR 211.10(a)(1)(ii) and 30 CFR 211.10(d)(2)(iii) (1980)) were not applicable to Peabody Coal Company's (Peabody) Kayenta mine located on Indian lands in Arizona. On July 19, 1982, IBSMA granted OSM's petition.

On December 17, 1980, OSM inspectors visited Peabody's Kayenta mine and pursuant to the authority of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (Supp. V 1981), issued Notice of Violation No. 80-5-20-11. The notice charged Peabody with constructing a conveyor beltline extension without prior written approval as required by 25 CFR 177.7(a), 25 CFR 177.7(f), 30 CFR 211.10(a)(1)(ii), and 30 CFR 211.10(d)(2)(ii).

Subsequently, Peabody filed, pursuant to 43 CFR 4.1150, a petition for review of a civil penalty assessed by OSM for the cited violations. The parties waived the opportunity for a hearing and submitted the matter to the Administrative Law Judge on a stipulated basis.

The parties agreed that the only issue to be decided by the Administrative Law Judge was whether 30 CFR Part 211 was applicable to Peabody's operation on Indian lands. 2/ After examining the relevant regulatory provision

2/ The relevant portion of the stipulations provided as follows:

"The Petitioner, Peabody Coal Company (Peabody), and the Respondent, Office of Surface Mining Reclamation and Enforcement (OSM), stipulate and agree as follows:

"1. The only issue in this case is the applicability of cited regulations to this operation. The notice of violation was issued pursuant to both 25 C.F.R. Subpart A [of Part 177] and 30 C.F.R. Part 211. The Petitioner, Peabody, asserts that neither set of regulations is applicable to this mining operation, as it is entirely on Indian lands. The Respondent OSM concedes that 25 C.F.R. Subpart A is not applicable to this mining operation. See DNA -- People's Legal Services, 49 IBLA 307, 313-15 (1980). The Respondent asserts that 30 C.F.R. Part 211 does apply to this mining operation, at least to the extent that certain regulatory requirements are not already covered by 25 C.F.R. Subpart B. Specifically, as there is no requirement for obtaining a permit from the regulatory authority in 25 C.F.R. Subpart B, the requirements to obtain a permit found at 30 C.F.R. Part 211.10(a)(ii) and 30 C.F.R. Part 211.10(d)(2)(ii) apply to this operation.

"2. The Petitioner and Respondent agree that if the cited regulations in 30 C.F.R. Part 211 do not apply to this operation, then the notice of violation must be vacated and all monies including the civil penalty assessment with interest shall be returned to the Petitioner, Peabody.

"3. The Petitioner and Respondent agree that if the cited regulations in 30 C.F.R. Part 211 do apply to this operation, then

"a. The notice of violation as to 30 C.F.R. Part 211.10(a)(1)(ii) and 30 C.F.R. Part 211.10(d)(2)(ii) was properly issued.

"b. The correct penalty is \$1,200. The balance will be returned with interest."

Judge Mesch ruled that 30 CFR Part 211 was not applicable and vacated the notice. Judge Mesch's ruling was based on his conclusion that the plain language of 30 CFR 211.1(a) excluded operations such as Peabody's. ^{3/}

30 CFR 211.1(a) (1980) sets forth the scope of the Part 211 regulations, in relevant part, as follows:

These regulations apply to surface coal mining and reclamation operations on Federal lands * * *. Except as may otherwise be provided in 25 CFR Chapter I and this subsection, these regulations do not apply to such operations on tribal or allotted Indian lands under leases and permits issued subject to 25 CFR Part 177. [4/] [Emphasis added.]

On appeal OSM's principal argument is that 30 CFR Part 211 is expressly made applicable to Peabody's operation by the provision of the leases covering the lands in question which states: "Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases, including but not limited to applicable provisions of 30 CFR 211 and 25 CFR 171 * * *." OSM contends that the scope provision of 30 CFR Part 211 "is irrelevant in light of the clear agreements in the language of Peabody's leases that Part 211 shall govern Peabody's operations" (OSM Brief at 2).

OSM also assigns as error Judge Mesch's failure to follow "relevant precedent," citing DNA -- People's Legal Services, *supra*. OSM further argues that even if the version of 30 CFR Part 211 in effect at the time of the issuance of the notice is found to be inapplicable, the version of 30 CFR Part 211 in force at the time the leases were issued would control. OSM

fn. 2 (continued)

The apparent rationale for stipulating that 25 CFR Part 177, Subpart A (renumbered 25 CFR Part 216, Subpart B, 47 FR 13327 (Mar. 30, 1982)) was inapplicable is that the provisions of Subpart A cited by OSM in the notice are applicable only to leases issued after Jan. 18, 1969, and Peabody's leases were issued before that date (in 1964 and 1966). See 25 CFR 177.2(c) (1980); DNA -- People's Legal Services, 49 IBLA 307, 308, 314 (1980).

^{3/} He specifically found that DNA -- People's Legal Services, *supra*, was not controlling, as OSM had argued. DNA had also involved Peabody's leases at its Kayenta mine. Although the Board dismissed the DNA case on a procedural ground (untimely appeal), the opinion contained a statement that 30 CFR 211 applied to the Kayenta operation. Judge Mesch found the Board's statement to be merely dicta.

^{4/} On July 30, 1982, the 30 CFR Part 211 regulations were revised effective Aug. 30, 1982. 47 FR 33154. The scope regulation, 30 CFR 211.1(a), was revised to read in pertinent part:

"The rules of this Part shall govern the operations for the exploration, development, and production of Federal coal under Federal coal leases, licenses, and permits, regardless of surface ownership * * *. Except as otherwise provided in 25 CFR Chapter I or Indian land leases, these rules do not apply to operations on Indian lands."

states that those regulations required prior approval to mine plan changes, and that the scope of those regulations did not exclude Indian lands.

Peabody contends that the express terms of 30 CFR 211.1(a) control and that its operation on Indian lands is not subject to 30 CFR Part 211. It argues that to rule otherwise would be contrary to the regulatory framework of the Act which established three categories of regulated lands -- State lands, Federal lands, and Indian lands.

Peabody also asserts that OSM did not present what it terms OSM's "lease language" argument to Judge Mesch. ^{5/} It states that the Board should rule that OSM waived the argument. Peabody contends that even if the Board considers OSM's "lease language" argument, it should be rejected as illogical and erroneous. Peabody argues that the controlling provision to determine the applicability of 30 CFR Part 211 is the scope provision and that the scope provision excludes Indian lands.

Finally, Peabody contends that Judge Mesch properly ruled on the applicability of DNA -- People's Legal Services, supra, to this case, and that OSM has failed to establish any error in that ruling.

For the reasons stated below, we conclude that Judge Mesch properly ruled that 30 CFR Part 211 was not applicable to Peabody's Kayenta mine.

The language of 30 CFR 211.1(a), quoted supra, specifically excludes Indian lands from the scope of 30 CFR Part 211. OSM claims, however, that the Peabody leases, executed in 1964 and 1966, contain a provision which makes 30 CFR Part 211 applicable to Peabody's Kayenta operation. That provision, quoted supra, requires lessees to abide by and conform to Departmental regulations "now or hereafter in force", including but not limited to "30 CFR 211 and 25 CFR 171." OSM claims that such a provision "makes, at the very least, some provisions of Part 211 applicable to Peabody's operation" (OSM Brief at 2).

We cannot agree that the lease provision relied upon by OSM has the effect which OSM attributes to it.

[1] At the time the Peabody leases were issued, until the regulations in 30 CFR Part 211 were revised on May 17, 1976 (41 FR 2026), the Part 211 regulations apparently covered coal leasing operations on Indian land. ^{6/}

^{5/} Peabody admits that OSM raised the argument in its original answer to the petition for review filed with the Hearings Division, Office of Hearings and Appeals. It states, however, that OSM abandoned this position in its submissions to Judge Mesch in response to this Feb. 17, 1982, order. OSM disputes that claim, contending that in addition to raising the argument expressly in its answer to the petition for review, it was implicitly set forth in its argument concerning DNA -- People's Legal Services, supra. We will address OSM's "lease language" argument.

^{6/} 30 CFR 211.1(a)(1959) provided:

"(a) The regulations in this part have been issued pursuant to the authority vested in the Secretary of the Interior by section 32 of the act

Thus, it was logical to have enumerated those regulations in the lease provision as being applicable to the lease. In the 1976 rulemaking 30 CFR 211.1(a) was revised specifically to except operations on Indian lands from the Part 211 regulations, except as otherwise provided by "25 CFR Chapter I and this subsection." 41 FR 20261 (May 17, 1976). For that reason, there is no basis for concluding that "some provisions of Part 211 [1980] are applicable to Peabody's operation." In order to determine what provisions might be applicable, the starting point would be the scope provision of Part 211. At the time of the OSM inspection in this case the scope provision stated that "these regulations [30 CFR Part 211] do not apply" to operations on Indian lands. Likewise, as pointed out by the Administrative Law Judge, 30 CFR 211.1(a) (1980) stated that it applied to operations on Federal lands, the definition of which specifically excludes Indian land. See 30 CFR 211.2 and 30 CFR 700.5.

OSM has stated that even if Part 211 was not applicable to Peabody's operation at the time of the inspection, the 30 CFR Part 211 regulations in effect at the time the leases issued should be applicable. OSM asserts that those regulations required prior approval of mine plan changes, and that the terms of the leases provided that Peabody would be bound by regulations "now * * * in force."

OSM is attempting to bootstrap the lease language somehow to cover Peabody's operation. The lease language means nothing more than the lessee agrees to be bound by applicable provisions of Departmental regulations in effect at lease issuance and those subsequently promulgated. If subsequent rulemaking excepts an operation from the purview of regulations that were previously applicable, it is difficult to accept an argument that the operation must comply with the earlier regulations. If such reasoning were accepted, it would allow OSM to enforce regulatory requirements which the Department has said are no longer applicable. In this case OSM charged Peabody with violations of regulations current at the time of inspection; however, those cited Part 211 regulations were not applicable to Peabody's operation.

OSM puts great credence in a prior Board decision, DNA -- People's Legal Services, supra. OSM states that it is "relevant precedent" (OSM Brief at 3). OSM

fn. 6 (continued)

February 25, 1920 (41 Stat. 450, 30 U.S.C. 189), and section 10 of the act of August 7, 1947 (61 Stat. 915, 30 U.S.C. 359). On and after July 1, 1944, the administration of the regulations in this part, save and except for those provisions dealing with inspections for the safety and welfare of miners engaged in mining operations on land covered by coal leases, licenses and permits shall be vested in the Geological Survey, Department of the Interior."

Leased land or tract was defined in 30 CFR 211.3(e) (1959) as "[a]ny land or coal deposit owned by the United States and under lease, permit, license, or application for lease, permit or license, in accordance with the act of February 20, 1920, or the act of August 7, 1947, for the purpose of mining coal therefrom."

OSM also states that that case "turned on the proper construction of the same clause in Peabody's leases" (OSM Brief at 3).

The language relied upon by OSM is, as described by Judge Mesch, "purely dicta." The DNA case was disposed of on a procedural ground, it did not "turn on" the proper construction of the lease term, as OSM suggests. In addition, the statement by the Board in DNA was made, as stated by Judge Mesch, "in reliance on an earlier and different version of 30 CFR Part 211, as evidenced by the Board's citation of 30 CFR 211.19 which was deleted by a May 17, 1976, amendment and modification of 30 CFR Part 211." Since the appeal involved in the DNA case was filed in January 1976, the Board's construction of the applicability of the 30 CFR Part 211 regulations to the Peabody operation was based on the pre-1976 regulations which did not specifically except operations on Indian Lands. Judge Mesch properly found that DNA was not controlling in this case.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 and 48 FR 22370 (May 18, 1983), the decision of the Administrative Law Judge is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge