

PEABODY COAL COMPANY, Appellant
v.
THE HOPI TRIBE
and
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, Appellees

IBLA 85-667

Decided February 28, 1986

Appeal from decision of Administrative Law Judge Michael L. Morehouse, approving settlement agreement and dismissing cases challenging issuance of mine permits. TU 4-3-PR and TU 5-2-PR.

Affirmed.

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

An appeal of a decision by an Administrative Law Judge which approves a settlement agreement between the party that filed an application for review of issuance of a mine permit pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), and OSM, which issued the permit, in the absence of consent by the permittee, will be affirmed where the agreement, which includes withdrawal of the application for review, does not adversely affect any of the permittee's interests and the permittee is, therefore, no longer an interested party in the proceedings.

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

An application for review of issuance of a mine permit filed pursuant to sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), will be considered timely filed where the evidence establishes that the receipt for certified mail was postmarked within 30 days of notification to the permittee of the final decision of OSM to issue the permit.

APPEARANCES: James R. Bird, Esq., Washington, D.C., and Gregory J. Leisse, Esq., Flagstaff, Arizona, for Peabody Coal Company; Mark Squillace, Esq., Morgantown, West Virginia, for the Hopi Tribe; Joseph M. Oglander, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Peabody Coal Company has appealed from a decision of Administrative Law Judge Michael L. Morehouse, dated May 22, 1985, approving a settlement agreement and dismissing two cases, TU 4-3-PR and TU 5-2-PR, initiated by the Hopi Tribe challenging the issuance to appellant of mine permits AZ-0002 and AZ-0002A for the Black Mesa/Kayenta Mine, situated in Navajo County, Arizona, by the Office of Surface Mining Reclamation and Enforcement (OSM). 1/

On August 28, 1984, OSM issued mine permit AZ-0002 to appellant for the construction of the J-21 haul road. On December 21, 1984, OSM issued mine permit AZ-0002A to appellant, which incorporated mine permit AZ-0002 and provided for mining in the J-21 North Area. On September 24, 1984, and February 15, 1985, the Hopi Tribe filed "notices of appeal" challenging the issuance of mine permits AZ-0002 and AZ-0002A, respectively, and requesting a hearing pursuant to section 514(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1264(c) (1982). 2/ These notices of appeal are properly termed applications for review of the permits.

On December 24, 1984, appellant filed a motion to intervene in the application for review proceeding docketed as TU 4-3-PR, which concerns mine permit AZ-0002, either as a statutory party under section 514(c) of SMCRA, and 43 CFR 4.1105(b) and 4.1110(c)(1), or, in the alternative, a necessary party under 43 CFR 4.1110(c)(2). Appellant stated that it should also be recognized as a "necessary party to any negotiated settlement which might result in the dismissal of these proceedings." By order dated January 16, 1985, Judge Morehouse granted appellant's motion to intervene, characterizing the motion as a motion for "party status" under section 514(c) of SMCRA and stated that appellant "must be included in such settlement proceedings as may take place in the future." 3/

On April 19, 1985, the Hopi Tribe submitted a settlement agreement for approval by Judge Morehouse, signed by representatives of the tribe and OSM

1/ Having reviewed the record in connection with appellant's request for expedited consideration of this appeal, the Board has determined to grant appellant's motion.

2/ By order dated Mar. 21, 1985, Judge Morehouse consolidated the two cases pursuant to a motion filed by appellant on Feb. 25, 1985, which stated that there were "settlement negotiations ongoing between the Hopi Tribe, the Office of Surface Mining and Peabody Coal Company" which would affect both cases.

3/ In his Mar. 1985 order consolidating the two cases, Judge Morehouse specifically stated that appellant had been made a "statutory party" in connection with the application for review docketed as TU 4-3-PR. By virtue of the consolidation, appellant became a party with respect to both cases.

with respect to the two cases involved herein. Under the agreement, OSM agreed principally to prepare an environmental impact statement (EIS) "covering the proposed action of permit issuance * * * for all surface coal mining operations at the Black Mesa and Kayenta Mines" and the tribe agreed to file a motion to dismiss its two "challenges to OSM's permitting actions at the Black Mesa/Kayenta Mine denoted as docket numbers TU 4-3-PR and TU 5-2-PR." In a cover letter dated April 17, 1985, the Hopi Tribe stated that appellant had been "apprised of all aspects of our negotiations but chose not to participate in this agreement." ^{4/}

On April 15, 1985, appellant filed a motion to dismiss the application for review docketed as TU 5-2-PR because the Hopi Tribe had failed to file its application within 30 days after appellant was notified of OSM's approval of mine permit AZ-0002A, as required by section 514(c) of SMCRA, and 30 CFR 775.11(a). On April 17, 1985, appellant filed a motion to dismiss both cases claiming the Department lacked jurisdiction to entertain applications for review challenging the issuance of mine permits on Indian lands under section 514(c) of SMCRA. In the alternative, appellant requested that a hearing be held "on the appeals of the Hopi Tribe."

On May 13, 1985, OSM filed a motion for summary judgment pursuant to 43 CFR 4.1125, requesting that the settlement agreement be approved and the two cases dismissed. In a memorandum in support of the settlement agreement, filed May 15, 1985, the Hopi Tribe stated that it joined in OSM's motion for summary judgment. On May 13, 1985, appellant filed a memorandum in part contending that Judge Morehouse did not have the authority to approve the settlement agreement, in the absence of concurrence by appellant, because appellant is an interested party under section 5 of the Administrative Procedure Act (APA), as amended, 5 U.S.C. § 554 (1982), who is adversely affected by the settlement agreement. Appellant again requested a hearing on the "appeals" of the Hopi Tribe, including the "attempted settlement."

In his May 1985 decision, Judge Morehouse denied appellant's two motions to dismiss, concluding that the Hopi Tribe timely filed an application for review from the December 1984 issuance of mine permit AZ-0002A and

^{4/} In an Apr. 23, 1985, letter to Judge Morehouse, appellant stated that it had been apprised of the negotiations "only to the extent that we were provided with drafts of proposed settlement agreements and asked for our comments," but that "[w]e were never given an opportunity to participate directly in negotiation discussions between OSM and the Hopi Tribe." The record contains an Apr. 11, 1985, letter to appellant from the Office of the Solicitor, which accompanied a copy of the settlement agreement signed by OSM on that date. The letter stated:

"As you can see, the agreement is similar in most respects to the draft agreement we have discussed. We have modified the agreement to be responsive to your concerns whenever possible. However, I understand that you may still not be in complete agreement with the terms of the settlement. In the interest of timely resolution of this matter, I suggest you notify Judge Morehouse of any additional concerns you may have."

In a supplemental memorandum filed May 13, 1985, appellant stated that it received the Apr. 11, 1985 letter from OSM on Apr. 15, 1985.

that the Department has jurisdiction under section 514(c) of SMCRA, to consider an application for review challenging a mine permit on Indian lands. With respect to appellant's request for a hearing on the Hopi "appeals," Judge Morehouse concluded that appellant did not have a right to a hearing on the "merits" of issuance of the mine permits under section 514(c) of SMCRA, because it did not request a hearing within 30 days of notification of permit issuance. Judge Morehouse also concluded that appellant would have a right to a hearing "concerning the proposed settlement agreement between OSM and the tribe if such agreement raises issues of material fact which affect Peabody." However, Judge Morehouse dismissed the two cases because the settlement agreement was "proper where neither party has exceeded its authority, and the immediate material interests of no other party have been adversely affected."

Under the settlement agreement, as noted above, OSM agreed to prepare an EIS considering "all environmental impacts resulting from mining at the Black Mesa and Kayenta Mines including those already permitted under OSM Permit Numbers AZ-0002 and AZ-0002A" and "not to issue further permits for Black Mesa/Kayenta operations until the [EIS] * * * is complete." Prior to completion of the EIS, OSM stated that it "may amend existing authorizations as necessary to accommodate unforeseen mining problems encountered during the mining operations." After completion of the EIS, OSM agreed "to require changes as expeditiously as practical to permit numbers AZ-0002 and AZ-0002A as may be necessary to assure full compliance with the law." In particular, OSM stated that it would "assure that the cumulative hydrologic impact analyses and the determination of probable hydrologic consequences for these permits are revised to include all available data and information" and "assure that the handling of toxic overburden for these permits is reviewed and reconsidered in light of any data gathered during the EIS process." In addition, OSM agreed to provide copies of its environmental analyses to the Hopi Tribe for comment, provide training to the tribe "under the Hopi-OSM Cooperative Agreement" and regularly inspect the mine.

In reviewing the settlement agreement, Judge Morehouse held that at worst the agreement provided that at some future time OSM might seek to change conditions in existing permits or refuse to issue new permits requested by appellant in light of preparation of the EIS, but that appellant would have "administrative or judicial recourse at that time." Judge Morehouse could discern no immediate adverse effect on appellant by virtue of the settlement agreement.

In its statement or reasons for appeal, appellant contends principally that Judge Morehouse improperly approved the settlement agreement without the concurrence of appellant where section 5 of the APA, requires a hearing and decision on the merits of a case in the absence of a settlement by all interested parties. In the alternative, appellant contends that Judge Morehouse improperly approved the settlement agreement because there are material unresolved factual issues regarding the substance of the Hopi Tribe's challenges to the mine permits and the intent of the settlement agreement, including the full extent of its effect on appellant's interests, and that a hearing is required to resolve these issues. Appellant also states that the judge erroneously concluded that the settlement agreement would have no effect on its "immediate material interests" because OSM has agreed to prepare an EIS

prior to issuing additional permits to appellant and such an EIS is unnecessary in view of a February 1972 EIS which considered the "Navajo Project," including coal mining operations at the Black Mesa/Kayenta Mine.^{5/} In a Reply Brief, appellant states that "the threatened injury is delay," inherent in the EIS process. Appellant also questions whether it will, at some future time, be permitted to challenge OSM's attempt to change existing permit conditions or refusal to issue new permits in view of the settlement agreement, approved by the Administrative Law Judge. Appellant further argues that the adverse effect on its interests by virtue of the settlement agreement also bars the judge from approving the agreement, without its consent. Finally, appellant contends that Judge Morehouse improperly approved the settlement without fully assessing the relative advantages of settlement and whether settlement is in the public interest, especially in view of the fact that OSM has committed itself to prepare an EIS, "by contract with a private party," rather than exercising its discretionary authority. ^{6/}

Appellant also contends Judge Morehouse should have dismissed the Hopi Tribe's application for review docketed as TU 5-2-PR because the application was not filed timely in accordance with section 514(c) of SMCRA. Appellant expressly states that it does not press its contention that the Department lacks jurisdiction to entertain applications for review challenging mine permits on Indian lands under section 514(c) of SMCRA, in view of Departmental regulations which provide for Departmental jurisdiction. See 30 CFR 750.12(c)(1)(iii) (49 FR 38478 (Sept. 28, 1984)). Appellant, thus, has withdrawn its jurisdictional challenge and we will not consider that matter.

Appellant requests the Board reverse the May 1985 decision of Judge Morehouse approving the settlement agreement and either remand for a hearing "on the merits of the Hopi appeals," or, if the Board concludes that the settlement agreement may be approved without appellant's consent, either deny approval of the settlement because of an inadequate justification or order a hearing to consider the factual issues raised by any justification. In its Reply Brief, appellant offers an additional alternative, i.e., the Board may remand for a hearing on whether appellant's interests are affected by the settlement agreement, making appellant an indispensable party to any settlement.

^{5/} Appellant also notes that it may also be adversely affected by the agreement to prepare the EIS to the extent that proposed regulations envision passing along the cost of preparing an EIS to the permit applicant. See 50 FR 7527 (Feb. 22, 1985). In light of the fact that the settlement agreement on appeal by the Hopi Tribe from issuance of the permits was reached without the consent and over the objection of Peabody, we find no basis in the record for charging Peabody for the cost of the resulting EIS.

^{6/} Appellant also argues that it was not afforded an adequate opportunity to respond to the memoranda submitted by OSM and the Hopi Tribe on May 13 and 15, 1985, in support of the settlement agreement, prior to the May 1985 decision of Judge Morehouse. While we note that appellant did not have this opportunity, which properly should have been afforded, appellant did submit numerous comments on the settlement agreement in its Apr. 23, 1985, letter to Judge Morehouse and its supplemental memorandum filed May 13, 1985, thereby apprising Judge Morehouse of its objections.

In a response to appellant's statement of reasons, the Office of the Solicitor, on behalf of OSM, contends Judge Morehouse properly approved the settlement agreement and dismissed the cases, considered the claims of the Hopi Tribe, the advantages of settlement and the objections of appellant, and concluded that the settlement did not adversely affect appellant. The Solicitor also argues that Judge Morehouse properly determined the settlement agreement did not adversely affect appellant as a matter of law and no hearing on this issue was necessary. The Solicitor further argues appellant is not entitled to a hearing on the merits of the claims of the Hopi Tribe. With respect to the timeliness of the application for review docketed as TU 5-2-PR, the Solicitor contends it was filed timely, but, even if it was not filed timely, the settlement agreement was directed at resolving the application for review docketed as TU 4-3-PR.

The Hopi Tribe has also filed a response to appellant's statement of reasons in which it contends Judge Morehouse properly approved the settlement agreement, using the analysis set forth in Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 2668 (1984), regarding the rights of third-party intervenors to interfere with settlement agreements. The Hopi Tribe argues that appellant should not be allowed to upset the settlement agreement where there is a "strong" public policy in favor of settling cases and the agreement "in no way affects [appellant's] legal interests." The Hopi Tribe also argues appellant is not entitled to a hearing on the merits of the settlement agreement because appellant has raised no factual issue regarding the agreement. The Hopi Tribe states that the question of whether OSM is required to prepare an EIS is "purely a legal question." Finally, the Hopi Tribe contends that its application for review docketed as TU 5-2-PR was filed timely and, in any case, the settlement agreement was properly based on the first application for review docketed as TU 4-3-PR.

[1] The primary question raised by this case is whether Judge Morehouse properly approved the settlement agreement signed by OSM and the Hopi Tribe absent the consent of appellant. Appellant essentially contends it is an indispensable party to any settlement of the Hopi Tribe's applications for review of the two mine permits filed pursuant to section 514(c) of SMCRA. Section 514(c) states that an interested party may request a hearing on the reasons for a final determination to approve a mine permit by a regulatory authority and "[i]f the Secretary is the regulatory authority the hearing shall be of record and governed by section 554 of Title 5." 30 U.S.C. § 1264(c) (1982). Appellant argues that section 5(c) of the APA, which is invoked by section 514(c) of SMCRA, provides that unless interested parties are able "to determine a controversy by consent," there shall be a "hearing and decision," and that, because it is an interested party in the present case, a "hearing and decision" is required as it has not given its consent to the settlement agreement. ^{7/}

^{7/} Section 5(c) of the APA, provides in full:

"The agency shall give all interested parties opportunity for --

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

Appellant cites Marine Engineer's Beneficial Association v. NLRB, 202 F.2d 546 (3rd Cir.), cert. denied 346 U.S. 819 (1953), in support of its contention that a settlement agreement must be "concurrent in by all parties." In that case, the court concluded that the party who had charged an unfair labor practice was entitled to a hearing and decision on that charge despite a stipulated agreement entered into between the charged party and the National Labor Relations Board, which would consider the charge. The court noted that such a result was "require[d]" by the APA, citing the statutory provision currently codified at 5 U.S.C. § 554(c) (1982). Id. at 549.

However, in Local 282, International Brotherhood of Teamsters, Etc. v. NLRB, 339 F.2d 795 (2d Cir. 1964), the court concluded in similar circumstances that the APA did not require a hearing and decision in the absence of consent to a stipulated agreement by the charging party. The court based this result on its conclusion that the charging party was not an interested party under the statute which formed the basis for its unfair labor practices charge, because that statute sought to vindicate a "public interest." Id. at 800. However, the court did not depart from the conclusion that a hearing and decision would be required in the absence of consent by an interested party under the APA. See also Concrete Materials of Georgia, Inc. v. National Labor Relations Board, 440 F.2d 61 (5th Cir. 1971). In Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board, 350 F.2d 733, 738 (D.C. Cir. 1965), the court further clarified that a party will be considered an interested party under section 5(c) of the APA, and, therefore, entitled to a hearing and decision if it has a legal right which "has been adversely affected by agency action." In Fugazy, the court concluded that the petitioner, a travel agent, did not have such a legal right because the interest affected by the Civil Aeronautics Board's approval of an agreement between scheduled airlines, in part covering the monthly remittance of ticket sale proceeds, was merely a "privilege" which could be "terminated at will." Id. at 739.

We conclude that appellant, generally speaking, is an interested party within the meaning of section 5(c) of the APA, in any proceeding under section 514(c) of SMCRA, involving its mine permits and, thus, is an indispensable party to any settlement which seeks to conclude that proceeding. Breswick & Co. v. United States, 134 F. Supp. 132, 147-49 (S.D.N.Y. 1955). The fact that appellant is an interested party in this case was settled by the Administrative Law Judge in his January 1985 order granting appellant party status under section 514(c) of SMCRA. Indeed, appellant clearly had an interest in the applications for review filed by the Hopi Tribe challenging issuance of its mine permits, and a legal right which could be adversely affected by OSM's response to those applications. However, the nature of the settlement agreement must be examined to ascertain if appellant has a legal interest which was adversely affected when OSM and the Hopi Tribe subsequently

fn. 7 (continued)

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."

The term "party" under the APA "includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding." 5 U.S.C. § 551(3) (1982).

negotiated and signed a settlement agreement under which the applications for review would be withdrawn, thus allowing appellant to continue its mining operations under existing mining permits without further challenges.

The question of whether appellant is an interested party within the meaning of section 5(c) of the APA, and, thus, entitled to a hearing and decision, in lieu of its consent to the settlement agreement, must be decided on the basis of the long-standing rule regarding judicial approval of settlement agreements. The parties agree that a settlement agreement can not be approved and litigation must proceed if the agreement in some way adversely affects the interests of an indispensable party who has not consented to the settlement agreement. See Wheeler v. American Home Products Corp. (Boyle-Midway Division), 563 F.2d 1233 (5th Cir. 1977). As the court stated in In re Beef Industry Antitrust Litigation, 607 F.2d 167, 174 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981): "Parties to a dispute should be able to settle it themselves without interference from nonprejudiced third parties, especially when the settling parties are acting under judicial scrutiny." (Emphasis added.)

We conclude that section 5(c) of the APA incorporates this judicially enunciated rule and a settlement agreement may be approved and a hearing and decision avoided where the settling parties have effectively "determine[d] [the] controversy by consent." See Singer Manufacturing Co. v. Wright, 141 U.S. 696 (1891). A third party who was originally interested in the matter giving rise to the controversy will not be permitted to perpetuate the controversy by interposing objections which do not seek to vindicate any affected interest without a showing that the settlement is prejudicial. A party who is no longer interested in adjudicative proceedings as a result of a settlement approved by a Federal agency is simply not at that point entitled under the APA to a hearing and decision, in lieu of its consent to the settlement, by virtue of that agency action. Cf. Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board, *supra*.

In response to the question of whether appellant has any interest which could be adversely affected by the settlement agreement and, thus, survive the purported resolution of the matter in controversy by the immediate parties to the agreement, OSM and the Hopi Tribe contend the settlement agreement creates no adverse effect on appellant's interests, including mine permits AZ-0002 and AZ-0002A, and that this was properly determined by Judge Morehouse as a matter of law. We agree.

To the extent that the agreement sets forth the procedure to be employed by OSM in conducting the environmental analyses of appellant's overall mining operations, it has no effect on appellant's interests. To the extent that the agreement provides that OSM "may" amend existing permits prior to completion of the EIS, the agreement merely acknowledges OSM's existing authority under 30 CFR 774.11. Revisions imposed by the regulatory authority under 30 CFR 774.11 are subject to administrative and judicial review at the time of imposition. 30 CFR 774.11(c). No specific action is envisaged by the agreement. To the extent that the agreement provides that OSM will, after completion of the EIS, require changes in permits AZ-0002 and AZ-0002A "to assure full compliance with the law," the agreement merely states OSM's obligation under

SMCRA and its implementing regulations. Again, no specific action is envisaged by the agreement. 8/

Nevertheless, under the agreement, OSM did agree to prepare an EIS with respect to all surface coal mining operations at the Black Mesa/Kayenta Mine and to delay issuance of further permits until completion of the EIS. While the agreement appears to go beyond the scope of the Hopi Tribe's original challenge to the two mine permits, it obviously was in response to the primary concern raised in the Hopi Tribe's initial application for review that approval of permit AZ-0002, which was part of an anticipated larger permit area, was part of an "incremental" process of approval of a major Federal action "without adequate evaluation of the environmental consequences." 9/ Judge Morehouse concluded that appellant was not adversely affected by the agreement to prepare an EIS because OSM "may properly prepare an EIS on a proposed action if it considers the subject matter to be of sufficient importance," and that the effect on existing or future permits was "an exercise in speculation." OSM argues that appellant is not adversely affected by its agreement to prepare an EIS. OSM points out that appellant is not entitled to a decision on whether to approve additional permits by any particular time, concluding that by OSM agreeing to prepare an EIS, appellant is placed "in no situation other than where it would be if OSM had decided to do an EIS on the operation in the absence of the agreement."

It is not apparent that the agreement to prepare an EIS necessarily affects appellant's existing or future permits. 10/ However, the decision to prepare an EIS, regardless of whether it is required under NEPA, may have the effect of delaying the process of permit review and, thus, the issuance of additional permits to appellant. The extent of the probable delay was set forth in the tentative schedule of review of appellant's permit application package (PAP) for the Black Mesa/Kayenta mine, including preparation of an EIS, which appellant received from OSM on August 21, 1985, and is attached to appellant's motion to expedite as Exhibit A. The schedule indicates that OSM anticipated that the notice of intent to prepare an EIS would be published on September 16, 1985, the PAP is due on December 2, 1985, the final EIS would be distributed to the public on June 16, 1987, and the earliest date for a decision based on the EIS would be July 27, 1987. Appellant argues that the

8/ We note that the agreement provides that OSM did specifically agree to "assure that the cumulative hydrologic impact analyses and the determination of probable hydrologic consequences * * * are revised" and to reconsider the handling of toxic overburden, but the agreement did not specify any action to be taken in such circumstances or even state that any action would be taken, which would affect appellant's two permits.

9/ Under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1982), an EIS is required prior to approval of a major Federal action which would significantly affect the quality of the human environment.

10/ The agreement does not specifically state how appellant's existing and future permits would be affected. Even if it did, appellant's right to object to any future actions affecting such permits is not foreclosed by the agreement, where appellant is not a party to the agreement. Wheeler v. American Home Products Corporation (Boyle-Midway Division), *supra*.

anticipated delay is itself an adverse effect resulting from the settlement agreement. On the other hand, OSM argues that the delay is "highly unlikely."

OSM and Judge Morehouse would make the determination of whether appellant is adversely affected by the agreement to prepare an EIS and to delay issuance of additional permits dependent on whether that agreement has violated the law. Because they conclude that OSM has the discretionary authority whether to prepare an EIS and when to issue permits, there can be no violation. However, these arguments go to the merits of appellant's objections, not to the question of the effect of the settlement agreement on appellant's interests.

On the other hand, we conclude that the simple answer to appellant's assertion of adverse effect is that the matter is too speculative to be the basis for a conclusion that appellant is adversely affected by the settlement agreement. We can only speculate on whether preparation of the EIS will delay consideration of the PAP longer than OSM would have taken in the absence of preparation of the EIS. In any case, section 510(a) of SMCRA, 30 U.S.C. § 1260(a) (1982), only provides that the regulatory authority shall either grant, modify or deny a permit application "in a reasonable time." We cannot anticipate that OSM will violate this statutory provision. Nor can we speculate about the time frame required to consider permit applications, the conditions which would be imposed, or whether appellant would in any case be issued additional permits.

Appellant has also, at various times, suggested that it is independently entitled to a hearing on the Hopi "appeals" under section 514(c) of SMCRA, which right it must specifically waive pursuant to 43 CFR 4.1115. ^{11/} Judge Morehouse concluded that appellant is not so entitled because appellant's request for a hearing was untimely. The result of this analysis would require a permit applicant to make a section 514(c) request even if it had no objection to OSM's adjudication of a permit application merely to avoid being foreclosed from asserting its right to a hearing. We conclude an applicant's right to a hearing under 43 CFR 4.1115 arises by virtue of its status as an interested party in any proceeding under section 514(c) of SMCRA, challenging approval of its permit application. A hearing must be held unless the applicant waives that right. However, in the present case, the appellant is not "entitled to a hearing" under 43 CFR 4.1115 precisely because it is not entitled to a hearing under section 514(c) of SMCRA, incorporating section 5(c) of the APA. The settlement agreement has effectively negated appellant's status as an interested party. This is also the logical result. Otherwise, OSM and the Hopi Tribe would be forced to litigate a matter which has been fully resolved with no prejudice to appellant.

Accordingly, we conclude that although appellant was an indispensable party to the applications to review the permits, appellant was not an indispensable party to the settlement agreement signed by OSM and the Hopi Tribe and that, absent its consent to the agreement, Judge Morehouse could properly

^{11/} That regulation provides in relevant part that: "Unless all parties to a proceeding who are entitled to a hearing waive, or are deemed to have waived such right, a hearing will be held." 43 CFR 4.1115.

approve it. We, therefore, affirm Judge Morehouse's May 1985 decision approving the settlement agreement and dismissing the two cases before him.

Appellant has also requested a hearing on the question of whether it is adversely affected by the settlement agreement. While the Board may grant a request for a hearing on an "issue of fact" pursuant to 43 CFR 4.415, the question of adverse effect raises no factual issue. No useful purpose would be served by granting appellant's request for a hearing, further delaying adjudication, and we hereby deny the request. KernCo Drilling Co., 71 IBLA 53 (1983); see United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971).

Finally, appellant contends that Judge Morehouse failed to fully consider whether the settlement agreement comports with the standards enunciated in Citizens for a Better Environment v. Gorsuch, *supra* at 1126, and other cases cited therein, including weighing the relative advantages of settlement and whether settlement is in the public interest. ^{12/} Judge Morehouse basically stated that the settlement would avoid the costs, risks and uncertainties of litigation and thus benefit both parties thereto and be in accord with the judicially enunciated public policy favoring the settlement of cases. We agree that Judge Morehouse could certainly have addressed more fully the general question of whether the settlement agreement was fair and in the public interest. However, appellant has not established and we can discern no reason to conclude that the agreement is either unfair to the parties or not in the public interest. OSM and the Hopi Tribe have avoided the expense and risk of adjudication and in the process have neither compromised the interests of third parties nor that of the public nor circumvented their own authority and responsibilities. ^{13/} There is also no evidence that the agreement was not the result of good faith, arm's length bargaining between the parties. See United States v. Hooker Chemicals & Plastics Corp., 540 F. Supp 1067 (W.D.N.Y. 1982). Appellant's request for

^{12/} The judicial criteria, as set forth in Citizens for a Better Environment v. Gorsuch, *supra* at 1126 (quoting from Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980), are:

"The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." A settlement must exhibit "overall fairness to beneficiaries and consistency with the public interest." United States v. Allegheny-Ludlum Industries, 517 F.2d 826, 850 (5th Cir. 1975).

^{13/} Appellant states that concern for the public interest is "heightened" in this case because OSM has contractually obligated itself to prepare an EIS, a discretionary action, in the absence of justification for doing so, citing National Audubon Society, Inc. v. Watt, 678 F.2d 299 (D.C. Cir. 1982). In that case, the court construed a stipulation entered into by the Secretary of the Interior and a private party in the course of litigation, which provided that the parties would "suspend litigation on the merits, and that the government would not proceed with major construction on the Garrison [water development] project until the Secretary had completed two environmental studies and

a hearing on the question of whether the settlement agreement is fair and in the public interest is denied, as appellant has identified no factual issue that needs to be resolved. 14/

[2] Appellant also contends that the application for review of the Hopi Tribe docketed as TU 5-2-PR was not filed timely under section 514(c) of SMCRA, which provides.

Within thirty days after the applicant is notified of the final decision of the regulatory authority on the permit application, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final determination.

See also 30 CFR 775.11(a). That statutory provision also requires a hearing within 30 days of a request and a written decision "granting or denying the permit in whole or in part and stating the reasons therefor," within 30 days after the hearing. 30 U.S.C. § 1264(c) (1982).

fn. 13 (continued)

submitted proposed legislation to Congress, and until Congress had adopted legislation either reauthorizing, modifying, or deauthorizing the project." Id. at 301. The court concluded that the Government's obligations under the stipulation had been discharged, thereby avoiding "potentially serious constitutional questions about the power of the Executive Branch to restrict its exercise of discretion by contract with a private party." Id. (Emphasis added.) However, the court later indicates that the "exercise of discretion" referred to is the Government's policy-making discretion and not its discretion under NEPA to prepare an EIS, in specifically declining to issue an advisory opinion on "whether the government may be bound by an agreement to introduce legislation into Congress, whether the government may commit itself not to implement authorizing legislation until Congress takes further action, and more generally whether the government may enter into judicially enforceable contracts relinquishing or limiting its policymaking discretion." Id. at 311. In fact, the court discusses at some length the implications of NEPA, including public policy considerations, and cites Gulf Oil Corp. v. Morton, 493 F.2d 141, 146 (9th Cir. 1973), for the proposition that, in addition to requiring the preparation of EIS's in the case of major Federal actions, "NEPA also confers limited discretionary power on federal officials to postpone implementation of authorized federal programs or projects which may have serious environmental consequences." National Audubon Society, Inc. v. Watt, supra at 309. Thus, we conclude that OSM's decision to prepare an EIS, although in the context of a settlement agreement, fully comports with the public policy inherent in the authority conferred on Federal agencies by NEPA. 14/ Appellant has expressed its concern for a potential conflict of interest should the Hopi Tribe assume a regulatory role. However, this is a matter of much speculation. Appellant has also stated that it wishes to pursue the nature of the Hopi Tribe's original objections to the mine permits, as well

The record indicates that OSM sent a letter, dated December 28, 1984, to appellant, which was received on January 5, 1985, and stated that enclosed was a permit "signed by the Administrator, Western Technical Center, [OSM] * * * on December 21, 1984, approving with conditions Peabody Coal Company's permit application for the J-21 North Area (permit No. AZ-0002A)." OSM further stated.

OSM will provide notification of the decision in the Arizona Daily Sun. You or any person with an interest which is or may be adversely affected has 30 days from the date of newspaper publication to request a hearing on the reasons for the decision in accordance with 30 CFR 775.11.

OSM subsequently published the notification in the Arizona Daily Sun on January 16, 1985, which stated that interested parties "may request an adjudicatory hearing on the final decision within 30 days after publication of this notice." 15/

The record does not contain a copy of permit AZ-0002A. However, we presume that it was signed by OSM on December 21, 1984. Nevertheless, we conclude that the permit must be viewed in light of the December 28, 1984, letter to appellant, which accompanied the signed permit and was apparently also copied to Don Ami, Director of the Office of Natural Resources for the

fn. 14 (continued)

as the relative cost of preparation of an EIS versus adjudication of the Hopi Tribe's objections. However, the nature of the Hopi Tribe's objections, *i.e.*, their purported "legal rights," need not be reviewed in detail in the context of deciding whether the settlement agreement should be approved. Citizens for a Better Environment v. Gorsuch, *supra* at 1126. The record contains sufficient information regarding the nature of the tribe's objections to determine whether the settlement is fair. See United States v. Hooker Chemicals & Plastics Corp., *supra* at 1072. Indeed, the agreement is eminently fair. Preparation of an EIS is the paramount method for addressing the tribe's primary concern, indicated in its initial application for review, for the environmental consequences of operation of the Black Mesa/Kayenta mine as a whole, including the two permitted areas involved herein. With respect to relative costs, we cannot conclude that OSM's tradeoff is not in the public interest.

15/ The applicable regulations at one time provided that a regulatory authority shall publish a summary of its decision approving a permit application "in a newspaper * * * of general circulation in the general area of the proposed operation." 30 CFR 786.23(e) (1980). However, effective Oct. 28, 1983, OSM deleted that regulation and substituted 30 CFR 773.19(b), which provided in part for written notification to the applicant and each party who filed comments or objections to the permit application. 48 FR 44395 (Sept. 28, 1983). In the preamble to the final rulemaking, OSM stated that notice to the general public, *i.e.*, those who had not submitted comments or objections, was satisfied by newspaper publication upon the initial filing of a permit application, pursuant to 30 CFR 773.13(a), and the fact that, therefore, the public "will be able to track processing of the permit if they are interested." 48 FR 44371 (Sept. 28, 1983).

Hopi Tribe. That letter essentially qualified OSM's signing of the permit such that it was not considered a "final decision" of OSM until the date of publication in the Arizona Daily Sun, for purposes of applications for review under section 514(c) of SMCRA. Thus, in order to invoke that statutory provision, the Hopi Tribe was required to request a hearing within 30 days of the date of publication, *i.e.*, on or before February 15, 1985. Indeed, in its brief herein, OSM states that "the Tribe had until February 15, 1985 to file."

The certificate of service which accompanies the Hopi Tribe's application for review states that it was mailed on February 15, 1985. The Hopi Tribe also submitted the affidavit of Barbara J. Schmidt, dated April 22, 1985, which states that the tribe's application for review "with reference to Permit No. AZ-0002A" was "hand carried to the U.S. Post Office, Kykotsmovi, AZ, prior to closing, on February 15, 1985," and mailed by certified mail. The application was received by the Hearings Division, OHA, on February 25, 1985.

In its motion to dismiss filed April 15, 1985, appellant stated that it had "been advised that the Hopi appeal * * * was postmarked February 16, 1985." Indeed, the record includes an envelope postmarked February 16, 1985, in Kykotsmovi, Arizona, attached to the Hopi Tribe's "notice of appeal."

43 CFR 4.1107(f) provides that the "effective filing date for documents initiating proceedings before the Hearings Division, OHA, * * * shall be initiating proceedings before the Hearings Division, OHA, * * * shall be initiating proceedings before the Hearings Division, OHA, * * * shall be * * * the date such document is postmarked, if filed by mail." Accordingly, it would appear that the Hopi Tribe's application for review of permit AZ-0002A was not filed timely in accordance with section 514(c) of SMCRA, where it was not filed with the Hearings Division, OHA, on or before February 15, 1985, because it was sent in an envelope postmarked February 16, 1985. 16/

In his May 1985 decision, Judge Morehouse concluded that the application for review was filed timely on February 15, 1985. However, the judge apparently based his decision on the fact that OSM had the authority to

16/ The record also indicates that, at the request of the Hopi Tribe, notice of the decision to approve the permit application was published in four papers on the reservation, with the last notice being published on Jan. 25, 1985. These notices apparently also stated that an interested party would have 30 days from the date of publication to file a request for a hearing under section 514(c) of SMCRA. By letter dated Feb. 7, 1985, the Chief, Federal and Indian Programs Branch, OSM, also informed the attorney for the Hopi Tribe that "the 30 day appeal period began on January 25, 1985." The tribe argues that the Department is estopped from holding that its application for review was not filed timely, citing Brandt v. Hicke, 427 F.2d 53 (9th Cir. 1970). However, both the notices published in the reservation papers and the Feb. 1985 letter are at odds with the statutory requirement that section 514(c) applications for review must be filed within 30 days after notification to the permit applicant of a final decision and the fact that appellant was notified of a "final decision" on Jan. 16, 1985, with publication of the notice in the Arizona Daily Sun, as envisaged in the Dec. 28, 1984, letter to appellant.

extend the deadline for filing in order to take into account the fact that the "means of notification * * * must obviously vary depending upon the types of individuals or entities involved in the permitting process." We disagree with this analysis. The statutory deadline may not be waived.

Nevertheless, the record indicates that the application for review was delivered to the U.S. Post Office on February 15, 1985. The affidavit of Barbara J. Schmidt refers to an attached copy of a certified mail receipt, date stamped February 15, 1985, in Kykotsmovi, Arizona. The number on that receipt matches the number on the envelope which contained the application for review. Therefore, we conclude that the application for review docketed as TU 5-2-PR was postmarked February 15, 1985, and was thus filed timely in accordance with section 514(c) of SMCRA.

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

Gail M. Frazier
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge.

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

The majority opinion has properly found that OSM has the discretionary authority to require the preparation of an environmental impact statement (EIS) if it finds the proposed action will significantly affect the quality of the human environment. The majority is also correct when noting that the agreement between the Hopi Tribe and OSM acknowledges this authority. However, the majority opinion addresses only one side of this issue.

Absent the agreement, if, after conducting an environmental assessment of the impact of the proposed action, OSM were to find that the proposed action (in this case the issuance or amendment of a mining permit) did not result in a significant effect on the quality of the human environment, no EIS would be necessary. However, the agreement precludes this option, no matter how insignificant the impact. In fact, under the terms of the agreement, OSM would be required to prepare an EIS, even if the proposed action contemplated under a permit or permit amendment was clearly found to have no impact upon the human environment.

Recognizing that OSM is now committed to prepare an EIS prior to issuance of further permits for Black Mesa/Kayenta operations, what effect would this have on appellant? First, there is little question as to who will pay for the study and preparation of the statement. ^{1/} In addition, I note OSM states that delay is "highly unlikely." Considering the time it normally takes to prepare an EIS, I interpret this statement to be that there is some likelihood of delay.

I thus find the settlement agreement will impact appellant. Proof of this impact can be found at 50 FR 45945 (Nov. 5, 1985). OSM has ordered an EIS to analyze the impacts of continued mining at the Black Mesa/Kayenta Mine. I therefore cannot hold that appellant has not identified factual issues to be resolved. The factual issues clearly are whether the action to be undertaken under a pending or contemplated permit or permit renewal will have significant impact on the human environment requiring an EIS. As public policy dictates that a permittee need not incur the cost of an EIS when one is not required, I cannot agree with the findings that preparation of an EIS

^{1/} The majority has chosen to downplay this problem by suggesting that, since the settlement agreement was reached without Peabody's consent, there is no basis in the record for charging Peabody for the costs of the resulting EIS. See footnote 5 in the majority opinion. When an EIS is prepared Peabody will incur in-house costs associated with furnishing the information required by OSM in the preparation of the EIS. I seriously question the majority statement that Peabody will not be adversely affected because "there is no basis in the record for charging Peabody for the cost of the resulting EIS." This reasoning is contrary to the regulatory requirement that all necessary information be submitted when applying for a permit, permit amendment, or permit renewal. Peabody will be adversely affected because information will be required for preparation of an EIS which would not otherwise be necessary.

[*75] is the paramount method of addressing the Hopi Tribe's concerns. This conclusion ignores the intermediate step of preparation of an environmental assessment. See Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). The agreement has precluded the option of not preparing an EIS.

R. W. Mullen
Administrative Judge.

