

Appeal from a decision of the Director, Office of Surface Mining Reclamation and Enforcement, determining that appellant did not have a valid existing right to mine within the boundaries of the Friendship Hill National Historic Site. PA Friendship Hill.

Dismissed.

1. Appeals: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing -- Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Under 43 CFR 4.1282(b), notice of appeal must be filed on or before 20 days from the date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

2. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Generally -- Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Areas Designated by Congress

Under sec. 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977, 43 U.S.C. § 1272(e)(1) (1982), after Aug. 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on Aug. 3, 1977, shall be permitted on any lands within the boundaries of units of the National Park System. If the owner of coal underlying National Park System lands admits that there was no surface coal mining operations prior to Aug. 3, 1977, on the tract in question, and that an application for a permit to conduct such operations had not been filed prior to that date, the coal owner is prohibited from conducting surface coal mining operations within the boundaries of a unit of the National Park System.

APPEARANCES: Vincent J. Barbera, Esq., for appellant; Joseph M. Oglander, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Ruth Z. Ainsley (Ainsley) appeals from a decision of the Director, Office of Surface Mining Reclamation and Enforcement (OSMRE), dated December 3, 1986, in which he determined appellant had no valid existing rights to mine within the boundaries of the Friendship Hill National Historic Site (Friendship Hill), Fayette County, Pennsylvania, under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(e)(1) (1982). In section 522(e)(1) of SMCRA, 30 U.S.C. § 1272(e)(1) (1982), Congress enunciated a prohibition against conducting surface coal mining operations "on any lands within the boundaries of units of the National Park System," unless (1) an operator can establish "valid existing rights," or (2) the surface coal mining operation existed on August 3, 1977, the date of enactment of SMCRA.

Ainsley is the apparent owner of a coal seam and mining rights to coal underlying the surface of lands in Friendship Hill, a unit of the National Park System, located in Springhill Township, Fayette County, Pennsylvania. In 1984, Ainsley brought suit in the Claims Court contending her coal had been "taken" by SMCRA's prohibition of mining in units of the National Park System and sought compensation pursuant to the Fifth Amendment of the United States Constitution. The Claims Court noted that Ainsley had not sought the administrative determinations which could authorize her to mine, and dismissed the case. Ainsley v. United States, 8 Cl. Ct. 394 (1985).

On October 4, 1985, Ainsley filed a request with OSMRE seeking a determination, pursuant to 30 U.S.C. § 1272(e)(1) (1982), that she had a valid existing right to mine coal underlying Friendship Hill. In his decision letter dated December 3, 1986, the Director, OSMRE, found that Ainsley had failed to satisfy the permitting requirements under the Pennsylvania program on or before August 3, 1977, and therefore had no valid existing rights to mine within the boundaries of Friendship Hill.

Subsequently, Ainsley filed another action in the Claims Court in December 1985. The court suspended that proceeding pending Ainsley's exhaustion of administrative remedies. Ainsley then moved to lift the suspension order on the ground that OSMRE had issued a determination that she does not have a valid existing right to mine. The court denied Ainsley's motion to lift the stay, stating that under 43 CFR 4.1280 Ainsley had 120 days to appeal to this Board from the Director's decision of December 3, 1986. Ainsley v. United States, No. 758-85L (Feb. 20, 1987).

On April 3, 1987, Ainsley filed her notice of appeal. Ainsley contends that in light of the facts and the applicable law, the Director's decision that she has no valid existing rights is correct, but on February 20, 1987, the United States Claims Court indicated she should appeal the Director's

decision. Ainsley states that in compliance with the court's order, she is appealing the Director's decision denying the existence of valid existing rights to mine the coal underlying Friendship Hill.

[1] The applicable Departmental regulations at 43 CFR Part 4 provide as follows:

§ 4.1281 Who may appeal.

Any person who is or may be adversely affected by a written decision of the Director of OSM or his delegate may appeal to the Board where the decision specifically grants such right of appeal.

§ 4.1282 Appeals; how taken.

(a) A person appealing under this section shall file a written notice of appeal with the office of the OSM official whose decision is being appealed and at the same time shall send a copy of the notice to the Board of Land Appeals, 4015 Wilson Boulevard, Arlington, Va. 22203.

(b) The notice of appeal shall be filed within 20 days from the date of receipt of the decision. If the person appealing has not been served with a copy of the decision, such appeal must be filed within 30 days of the date of the decision.

The Director's decision was issued December 3, 1986. Ainsley's notice of appeal was filed with the Board on April 3, 1987, well after the 20 days permitted for filing. The timely filing of a notice of appeal is jurisdictional. This Board does not possess general supervisory authority over constituent agencies within the Department of the Interior. Unless its jurisdiction is properly invoked, the Board is without power to act in any matter. An appeal that is not filed timely must be dismissed. Lyman J. Ipsen, 96 IBLA 398 (1987); Oscar Mineral Group #3, 87 IBLA 48 (1985); Johnson v. Office of Surface Mining Reclamation and Enforcement, 84 IBLA 169 (1984).

Even if the Board did have jurisdiction to review the merits of this case, we would affirm the Director's decision. Section 522(e)(1) of SMCRA, 30 U.S.C. § 1272(e)(1) (1982), sets forth a prohibition on certain Federal, public, and private surface coal mining operations. That section states that "[a]fter August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted -- (1) on any lands within the boundaries of units of the National Park System \* \* \*." With respect to valid existing rights, section 522(a)(6) of SMCRA, 30 U.S.C. § 1272(a)(6) (1982), provides:

The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on August 3, 1977, or under a permit issued pursuant to this chapter,

or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

In his letter to OSMRE dated April 11, 1986, counsel for Ainsley states that, to appellant's knowledge, there has never been any surface mining of the Pittsburgh seam of coal in question. Counsel also admits that Ainsley has not applied for any mining permits for the tract in question. Nor has he introduced evidence that Ainsley made substantial legal and financial commitments to such operation prior to January 4, 1977. Since Ainsley does not fall within the exception to section 522(e)(1), the prohibition against surface coal mining operations on lands within the boundaries of units of the National Park System is applicable. Therefore, appellant cannot conduct surface coal mining operations within the boundaries of Friendship Hill.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

R. W. Mullen  
Administrative Judge

I concur:

John H. Kelly  
Administrative Judge.

## ADMINISTRATIVE JUDGE HARRIS CONCURRING:

On December 3, 1986, the Director, Office of Surface Mining Reclamation and Enforcement (OSMRE), issued his decision determining that Ruth Z. Ainsley did not have "valid existing rights" (VER) to mine within the boundaries of the Friendship Hill National Historic Site. That decision informed Ainsley of her right to appeal to this Board in accordance with 43 CFR 4.1280 et seq. It also stated that the appeal had to be filed within 20 days of "the date of receipt of this decision." <sup>1/</sup>

Ainsley did not file a timely notice of appeal with the Board. <sup>2/</sup> Instead, Ainsley moved the United States Claims Court to lift a suspension order which the court had entered on May 19, 1986, suspending proceedings in Ainsley v. United States, No. 758-85L, pending the exhaustion by Ainsley of available administrative remedies. <sup>3/</sup> Ainsley alleged in her motion that the Director, OSMRE, had determined that she had no valid existing rights. The Government opposed the lifting of the stay on the ground that she had not fully exhausted her administrative remedies.

The following language appears at page 3 of the United States Claims Court's order dated February 20, 1987, in Ainsley v. United States, No. 758-85L:

The December 3, 1986 determination by the Office of Surface Mining Reclamation and Enforcement (OSM) held that plaintiff failed to show that she had any valid existing rights (e.g. a permit to mine the land in question) on August 3, 1977, (part (a)(2)(i) of the above cited regulation [30 CFR 761.4]), and failed to show she was conducting an existing coal mining operation on those lands on August 3, 1977 (part (a)(2)(ii) of the above cited regulation). Plaintiff had a right of appeal under regulations, 43 C.F.R. 4.1280, et seq. (1986), of the OSM ruling

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<sup>1/</sup> The decision actually states that "[n]otice of the intent to appeal must be filed" within the stated time. The regulation does not require a "notice of intent" to appeal; rather, it requires a "written notice of appeal." 43 CFR 4.1282(a).

<sup>2/</sup> The record does not contain a certified mail return receipt card showing the date of receipt of the Director's decision by counsel for Ainsley. However, Ainsley's subsequent motion in the United States Claims Court evidenced her receipt of the Director's decision. See Ainsley v. United States, No. 758-85L at 1 (Feb. 20, 1987).

<sup>3/</sup> Ainsley had filed a complaint with the United States Claims Court in 1984 on the basis that her property was being "taken" without just compensation. That complaint resulted in the court's decision, Ainsley v. United States, 8 Cl. Ct. 394 (1985), dismissing the complaint without prejudice in order to allow her to exhaust her administrative remedies. However, on Dec. 27, 1985, Ainsley filed a second complaint with the United States Claims Court. That complaint resulted in the May 19, 1986, order.

to the Board of Land Appeals of the Department of Interior (BLA) within 120 days from the date of receipt of said OSM ruling. Plaintiff took no appeal from the OSM ruling arguing that plaintiff now agrees with the OSM ruling that she has no valid existing rights as of August 3, 1977 and that she was not conducting any mining operation on her lands on August 3, 1977. Since she accepts the OSM ruling, plaintiff argues, she has exhausted her administrative remedies and thus her motion lifting the suspension of proceedings should be granted. Plaintiff argues she should not be forced to pursue futile administrative proceedings. Plaintiff relies on the case of Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) to support her position.

Further, the court stated at page 6:

To allow plaintiff to proceed with her action in this court, at this point, would not be in the interest of justice because it has not yet been fully determined at the administrative level whether or not she can satisfy certain requirements that would allow her to mine her property.

Clearly, the court was mistaken when it stated that Ainsley had 120 days from receipt of the decision of the Director, OSMRE, dated December 3, 1986, in which to appeal to the Board. <sup>4/</sup> The applicable regulation, 43 CFR 4.1282(b), allows only 20 days in which to appeal. Thus, at the time the court issued its February 20 order, the time for appealing the December 3, 1986, decision had expired. Any implication that Ainsley at that time could defend against the Government's claim of failure to exhaust administrative remedies by filing a notice of appeal of the December 3, 1986, decision was incorrect. As pointed out in the lead opinion, an appeal to this Board that is not timely filed must be dismissed.

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On April 3, 1987, the Board received Ainsley's appeal. As counsel for OSMRE states in his response, the Department's VER permanent program definition has been the subject of considerable litigation and numerous Departmental rulemakings. He points out that in a Federal Register notice the Department suspended its VER definition, 30 CFR 761.5(a), effective December 22, 1986. 51 FR 41952 (Nov. 20, 1986). That notice included the following statement:

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<sup>4/</sup> There is no indication the court intended to extend the time for filing. It did not state that the regulation allowed 20 days, but that it was directing the Board to accept an appeal filed beyond that time deadline. As the Board stated in Johnson v. Office of Surface Mining Reclamation and Enforcement, 84 IBLA 169, 171 (1984): "In the absence of any direction to this Department to waive its time limit for filing, we must conclude that the court intended any appeal filed by appellant to be adjudicated under the same rules that apply in all other Departmental proceedings." (Footnote omitted).

The Federal regulations at 30 CFR 740.11(a) which were adopted on February 16, 1983, provide that upon approval or promulgation of a regulatory program for a state, that program and the Federal lands rules, 30 CFR Subchapter D, shall apply to surface coal mining and reclamation operations on Federal lands. However, under 30 CFR 740.4(a)(4) and 745.13(o), the Secretary is responsible for making VER determinations on Federal lands within the boundaries of any areas specified in section 522(e)(1) or (e)(2) of the Act, which includes national parks and forests. The Secretary may not delegate that responsibility to a State.

During the period of the suspension OSMRE has decided, consistent with 30 CFR 740.11(a), to make VER determinations on Federal lands, and on non-Federal lands within the boundaries of (e)(1) areas where operations would affect the Federal interest, using the VER definition contained in the appropriate State or Federal regulatory program. Where the State regulatory program contains a VER definition similar to OSMRE's 1979 "all permits" test, OSMRE will apply the test to include the District Court's suggestion that a good faith effort to obtain all permits would establish VER. In States where the State program provides for a "takings" test, OSMRE will not process VER applications within units of the National Park System until a Federal rule is finalized. This decision is based on National Park Service concerns over potential impacts on such units. To date, no such VER applications have been received. [Emphasis added.] 5/

Id. at 41955.

In this case the Director, OSMRE, applied the VER definition included in the Pennsylvania State program. 6/ He stated that the Pennsylvania definition established a two-part test. 7/ First, one seeking to establish a VER must possess property rights that were in existence on August 3, 1977. Ainsley met this part. The second part required the person to have held on

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5/ This action by the Department was precipitated by Judge Flannery's memorandum opinion in In Re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (D.D.C. Mar. 22, 1985), wherein he held that the promulgation of the VER definition in 30 CFR 761.5(a) violated the Administrative Procedure Act, 5 U.S.C. § 553 (1982), and remanded the regulation to the Secretary for proper notice and comment. 6/ Although the Nov. 20, 1986, notice of suspension stated it was effective Dec. 22, 1986, the Director's decision in this case, dated Dec. 3, 1986, applied the procedure outlined in that notice.

7/ That definition provides:

"Valid existing rights -- Includes the following:

"(i) Except for haul roads, those property rights in existence on August 3, 1977, that were created by a legally-binding conveyance, lease, deed, contract, or other document which authorizes the applicant to produce minerals by a surface mining operation; and provided further that the person proposing to conduct surface mining operations on such lands holds all

August 3, 1977, all State and Federal permits necessary to conduct operations on those lands or to have made by that date a complete application for such authorizations.

With regard to this part, the Director held:

Ainsley must also demonstrate that she either held on August 3, 1977, or had by that date applied for, necessary permits to conduct surface coal mining operations on the property identified in the copy of the deed submitted to OSMRE. In your letter to OSMRE dated April 11, 1986, you conceded that Ainsley had never applied for any mining permits for the property in question. Not having applied for permits to mine means that Ainsley fails to satisfy the permitting portion of the test for VER under the Pennsylvania program.

(Decision at 2).

Ainsley's subsequent appeal filed with this Board admits that she has no VER, and that the Director's decision was correct. Counsel for Ainsley states, however, that "the United States Claims Court indicated that Mrs. Ainsley should take an appeal from the Department of the Interior's decision."

As stated, the appeal filed by Ainsley must be dismissed for lack of jurisdiction, and even if the Board were to entertain the appeal, it would conclude, as did the Director, that Ainsley has no VER.  
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Bruce R. Harris  
Administrative Judge

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fn. 7 (continued)

current state and Federal permits necessary to conduct such operations on those lands and either held those permits on August 3, 1977 or had made by that date a complete application for the permits, variances, and approvals, required by the Department." (Emphasis in original.)  
25 Pa. Admin. Code § 86.1 (Shepard's 1986).

8/ I note that the court announced at page 6 of its Feb. 20, 1987, order that if Ainsley decided to file an application for a permit, the process for consideration of the application should be expedited. It is unclear whether the court was implying that Ainsley should file a permit application. Nevertheless, the record contains a letter from counsel for Ainsley to the Permitting Division, OSMRE, dated Mar. 30, 1987, stating "[p]lease accept this as an application for a mining permit." Under the applicable law, any application for a permit to mine filed after Aug. 3, 1977, would not satisfy the VER definition.

