

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

IBLA 86-1627 Decided June 27, 1988

Appeal from a decision of Administrative Law Judge Michael L. Morehouse holding that the Office of Surface Mining Reclamation and Enforcement properly approved permit revisions under the Surface Mining Control and Reclamation Act of 1977. TU 6-3PR; Permit No. AZ-0001.

Appeal dismissed, decision vacated.

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 30 CFR 775.11(a), a request for a hearing must be filed within 30 days after an applicant or permittee is notified of OSMRE's final decision on an application for a permit revision. The timely filing of a request for a hearing is jurisdictional and failure to file the request within the time allowed requires dismissal of the proceedings.

APPEARANCES: James R. Bird, Esq., Washington, D.C., and Gregory J. Leisse, Esq., Flagstaff, Arizona, for Peabody Coal Company; Michael P. O'Connell, Esq., Kykotsmovi, Arizona, for the Hopi Tribe; Susan K. Hoven, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

On January 29, 1982, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued permit No. AZ-0001 to Peabody Coal Company (Peabody) under the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (1982), for the Black Mesa/Kayenta mines. In 1985 and 1986 Peabody submitted two proposals to OSMRE to revise that permit. The proposed revisions were for construction of the Wild Ram Valley Dam and for relocation of the airport facilities. By decision dated May 30, 1986, OSMRE approved the revisions.

The Hopi Tribe (the Tribe) filed a request for a hearing pursuant to 30 CFR 775.11, and Peabody was allowed to intervene. A hearing was held on July 28 through 30, 1986, before Administrative Law Judge Michael L. Morehouse. Judge Morehouse issued his decision on August 15, 1986, which concluded that OSMRE's approval of the two permit revisions was proper and that the appeal should be dismissed. On September 11, 1986, the Tribe filed its notice of appeal.

Peabody filed a Motion to Dismiss the Tribe's appeal, arguing that the Judge's decision became in effect the final decision of the Secretary 30 days after the close of the hearing on July 30, 1986, and that the decision was not subject to further administrative review. That motion was denied by order of the Board dated January 30, 1987. On May 12, 1987, Peabody filed a motion for expedited consideration of this appeal. By order of June 26, 1987, the Board denied that motion. Peabody appealed these Board actions to the U.S. District Court for the District of Arizona. In that proceeding, the Secretary requested the court to dismiss Peabody's interlocutory appeals. In an order dated September 9, 1987, the court denied the motion without opinion but stated: "It appears to the Court (but is not the Court's ruling at this time) that the Hopi Tribe's request for a hearing was not timely filed, which would suggest that the regulatory authority was without jurisdiction to hold the hearing." Peabody Coal Co. v. United States, Civ. No. 87-373 (D. Az., Sept. 9, 1987).

On September 25, 1987, Peabody filed with the Board a motion to dismiss the Tribe's appeal to the Board and to vacate the Administrative Law Judge's decision on the grounds that the Tribe's request for a hearing was not timely filed and that the Administrative Law Judge lacked jurisdiction. On October 23, 1987, the Tribe filed a response contending that any jurisdictional issue was conceded and no longer subject to litigation. Both OSMRE and Peabody filed replies urging that the appeal should be dismissed.

The following facts are not in dispute. OSMRE's decision approving the permit revisions was received by Peabody on June 2, 1986. The Tribe received a copy of the same decision on June 4, 1986. The Tribe's request for a hearing on the granting of the revisions was dated July 3, 1986, 31 days after Peabody had received notice. Timeliness of the Tribe's request for hearing was not challenged by either OSMRE or Peabody before the Administrative Law Judge.

The pertinent regulation, 30 CFR 775.11(a), reads:

§ 775.11 Administrative review.

(a) General. Within 30 days after an applicant or permittee is notified of the decision of the regulatory authority concerning an application for approval of exploration required under Part 772 of this chapter, a permit for surface coal mining and reclamation operations, a permit revision, a permit renewal, or a transfer, assignment, or sale of permit rights, the applicant, permittee, or

any person with an interest which is or may be adversely affected may request a hearing on the reasons for the decision, in accordance with this section.

Peabody and OSMRE contend that under 30 CFR 775.11(a) it is the date of notice to the applicant, not other interested parties, which controls the deadline for filing a request for a hearing, and that under the facts herein, the Tribe's request for a hearing was not timely filed. Peabody asserts that a jurisdictional defect may be raised at any time and may be raised by the Board sua sponte even if not raised by the parties. OSMRE contends that a jurisdictional issue may not be waived. OSMRE points out that the Board has often held that timely filing of a notice of appeal is jurisdictional.

The Tribe concedes that the period for filing a request for a hearing runs from the time of notice by OSMRE to the applicant. The Tribe suggests however, that interested parties are entitled to notice on an equal basis with applicants. The Tribe argues that the notice it received was defective because service of the notice failed to satisfy the requirements of various statutes and failed to provide due process. The Tribe asserts it should have been apprised that Peabody had received notice 2 days before the Tribe received notice. Based on principles of administrative finality, res judicata, and collateral estoppel, the Tribe also contends that the jurisdictional issue may not now be invoked or litigated.

[1] In his decision of August 15, 1986, the Administrative Law Judge characterized the Tribe's request for a hearing as timely filed on July 3, 1986, the date of the document. Indeed, the parties all refer to July 3, 1986, as the filing date of the Tribe's request for a hearing. The record, however, fails to establish that the request was in fact filed on July 3. The envelope in the case file which contained the Tribe's request for a hearing which was mailed to the Office of Hearings and Appeals (OHA) and received on July 14, 1986, has a postmark date of July 7, 1986.

43 CFR 4.1107(f) provides that the "effective filing date for documents initiating proceedings before the Hearings Division, OHA, * * * shall be * * * the date such document is postmarked, if filed by mail." Thus, when the initiating document was filed with OHA it was 35 days after the applicant received OSMRE's decision. Under 30 CFR 775.11(a), the Tribe's request for a hearing was not timely filed. The filing of a request for a hearing is similar to the filing of an appeal. As has been stated by the Supreme Court, the taking of an appeal within the prescribed time is mandatory and jurisdictional. Browder v. Director, Dept. of Corrections of Ill., 434 U.S. 257, 264 (1978); United States v. Robinson, 361 U.S. 220, 229-30 (1960). We would reach the same conclusion if the request for a hearing had been hand delivered by the Tribe on July 3, 1986. The purpose of a deadline for filing an appeal is to set a definite point of time when litigation shall be at an end and to apprise prospective appellees that they are freed of the appellant's demands. See Browder, supra at 264. The same rationale holds true for the filing of a request for a hearing. Thompson v. Immigration & Naturalization Service, 375 U.S. 384 (1964), cited by the Tribe,

does not compel a different result. That case, sometimes referred to as the Thompson exception, holds that a party who files an untimely notice of appeal should not be penalized where, in so filing, it relied on the explicit assurance of the district court that its filing was timely. Herein, the Tribe relied on no assurance from any tribunal that its filing would be regarded as timely.

It is a well established rule that jurisdictional challenges may be raised at any time in a proceeding or thereafter, see Reeves v. IT&T Corp., 616 F.2d 1342, 1349 (5th Cir. 1980), cert. denied, 449 U.S. 1077 (1981), and the mere consent of the parties cannot confer jurisdiction to hear and decide a case. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 18 (1951), citing People's Bank v. Calhoun, 102 U.S. 256, 260-61 (1880). Subject matter jurisdiction is not waivable, Monaco v. Carey Canadian Mines, Ltd., 514 F. Supp. 357 (E.D. Pa. 1981), and where it does not exist it cannot be conferred by estoppel or consent of the parties. Adorno Enterprises, Inc. v. Federated Dept. Stores, 629 F. Supp. 1565, 1570 (D. R.I. 1986). See McPeck Mining v. OSMRE, 101 IBLA 389 (1988).

The Tribe's allegations of improper notice are without merit. The manner of notice to interested parties is not specified in 30 CFR 775.11(a) nor are we aware of any regulatory requirement specifying how such notice should be given in 1986. ^{1/} Under the circumstances herein, the Tribe had ample time to file a request for a hearing, and must bear the consequences of its untimely filing.

Therefore, 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 and the decision of the Administrative Law Judge is vacated.

Gail M. Frazier
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

^{1/} For the current rule, see 43 CFR 4.1372(a), 52 FR 39528 (Oct. 22, 1987).