

THE HOPI TRIBE
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-148

Decided June 23, 1989

Petition for a discretionary review of order of Administrative Law Judge Harvey C. Sweitzer dismissing appeal from approval of surface mining permits AZ-0002 and AZ-0002A.

Affirmed.

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

The time for filing a request for a hearing with respect to issuance of a surface mining permit under sec. 514(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1264(c) (1982), is limited by the terms of the statute and the regulation at 30 CFR 775.11(a) to 30 days from the time the applicant is notified of the decision of the regulatory authority on the permit application. The timely filing of a request for hearing is essential to establish the jurisdiction of the Office of Hearings and Appeals to review a permit decision and a decision dismissing the appeal will be affirmed where it appears from the record that the request was not filed within the time limit.

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

An appeal will ordinarily be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant.

APPEARANCES: Mark Squillace, Esq., Laramie, Wyoming, and Michael O'Connell, Esq., Kykotsmovi, Arizona, for The Hopi Tribe; Cheryl L. Smout, Esq., Office

of the Solicitor, Washington, D.C., for Office of Surface Mining Reclamation and Enforcement; and James R. Bird, Esq., Washington, D.C., for Peabody Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Hopi Tribe (Tribe) filed a "notice of appeal," citing the regulation at 43 CFR 4.1270, from the decision of Administrative Law Judge Harvey C. Sweitzer dismissing its appeal from approval of certain surface mining permits issued to Peabody Coal Company (Peabody), by the Office of Surface Mining Reclamation and Enforcement (OSMRE). By published order dated March 10, 1989, this Board treated the notice of appeal as a petition for discretionary review of the Administrative Law Judge's decision under 43 CFR 4.1369, 52 FR 39528 (Oct. 22, 1987), and granted the petition for review. The Hopi Tribe v. OSMRE, 107 IBLA 329 (1989). Pursuant to the Board's prior extension order of February 3, 1989, respondents Peabody and OSMRE have now filed their responses to the brief in support of the petition for discretionary review.

The permits at issue in this case involve the Black Mesa/Kayenta Mine, located in Navajo County, Arizona, where coal is being mined under leases from the Navajo and Hopi Tribes. These permits have been the subject of previous administrative and judicial review. 1/ On August 28, 1984, OSMRE issued mine permit AZ-0002 to Peabody for construction of the J-21 haul road. On September 24, 1984, the Tribe requested a hearing on the issuance of this permit pursuant to section 514(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1264(c) (1982). Subsequently, OSMRE promulgated the initial regulations governing issuance of permits under SMCRA for mines on Indian lands, thus necessitating issuance of new permits for operations at the mine. 49 FR 38462 (Sept. 28, 1984). Thereafter, on December 21, 1984, OSMRE issued mine permit AZ-0002A which incorporated mine permit AZ-0002 and authorized mining in the J-21 North Area. The Tribe also filed an appeal of issuance of this permit. The proceedings challenging the two permits were consolidated by Administrative Law Judge Michael L. Morehouse who also granted Peabody's motion to intervene as a party.

Subsequently, the Tribe submitted a settlement agreement entered into by officials of the Tribe and OSMRE. Under the agreement, OSMRE agreed to prepare an environmental impact statement (EIS) covering "all environmental impacts resulting from mining at the Black Mesa and Kayenta Mines including those already permitted under [OSMRE] Permit Numbers AZ-0002 and AZ-0002A." 2/ In addition, OSMRE agreed "not to issue further permits for Black Mesa/Kayenta operations until the [EIS] identified in paragraph 1, above, is complete," while reserving the right prior to completion of the

1/ A detailed statement of the factual background of the initial administrative review is found in our prior decision cited as Peabody Coal Co. v. The Hopi Tribe, 91 IBLA 59 (1986), rev'd, Peabody Coal Co. v. United States, Civ 86-502 PCT CLH (D. Ariz. Mar. 11, 1988).

2/ Settlement Agreement at par. 1.

EIS to "amend existing authorizations as necessary to accommodate unfore-seen mining problems encountered during the mining operations." ^{3/} Further, following completion of the EIS, OSMRE 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." ^{4/} In return, the Tribe agreed to dismiss its challenge to issuance of the permits.

Thereafter, OSMRE filed a motion for summary judgment pursuant to 43 CFR 4.1125 requesting approval of the settlement agreement and dismissal of the cases. This motion was joined in by the Tribe. Peabody, having previously filed a motion to dismiss the challenge to permit AZ-0002A on the ground the Tribe's request for a hearing was not timely filed within 30 days of issuance of the permit, objected to the proposed settlement and contended the Administrative Law Judge lacked authority to approve the settlement in the absence of concurrence by an interested party. Peabody further requested a hearing on the challenges and the proposed settlement.

In his decision, Administrative Law Judge Morehouse denied Peabody's motion to dismiss the challenge to mine permit AZ-0002A as untimely. ^{5/} While acknowledging the right of Peabody to a hearing if the settlement "agreement raises issues of material fact which affect Peabody," ^{6/} the Administrative Law Judge dismissed the cases without affording Peabody a hearing because he found the settlement agreement was proper where "the immediate material interests of no other party have been adversely affected." ^{7/}

On appeal from the decision of Administrative Law Judge Morehouse this Board concluded as a general rule that an operator "is an interested party within the meaning of section 5(c) of the APA, [^{8/}] 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." 91 IBLA at 65 (footnote omitted). Nevertheless, in examining the context of this case we held that:

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

^{3/} Id. at par. 2.

^{4/} Id. at par. 3.

^{5/} Decision of May 22, 1985, at 4.

^{6/} Id. at 5.

^{7/} Id. at 9.

^{8/} Section 5(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 554(c) (1982).

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, [350 F.2d 733, 738 (D.C. Cir. 1965)].

91 IBLA at 66. Applying this standard to the facts of the case, we found that the settlement agreement had no adverse affect on Peabody's interests, including mine permits AZ-0002 and AZ-0002A. Hence, we affirmed the decision of Administrative Law Judge Morehouse. The Board also denied Peabody's request for a hearing on the issue of whether it was adversely affected by the settlement agreement on the ground that no issue of material fact had been raised in this regard. Finally, the Board held that the application for review of mine permit AZ-0002A was timely filed in accordance with section 514(c) of SMCRA and the regulation at 30 CFR 775.11(a).

On judicial review of the Board's decision, the court ruled that:

Peabody has sufficiently pleaded injury to at least raise an issue as to whether the settlement agreement adversely affects its interests. The ALJ's rulings that the damages to Peabody were "speculative" and that Peabody would have to wait until problems actually occurred until being entitled to recourse are unpersuasive. Peabody's claims of damage are not so "speculative" as to deprive it any opportunity to attempt to prove that those damages will probably occur.

Peabody Coal Co. v. United States, Civ 86-502 PCT CLH, slip op. at 6 (D. Ariz. Mar. 11, 1988). Further, the court reversed the Board's finding that the challenge to mine permit AZ-0002A was timely filed, holding that

neither OSMRE nor the Board had authority to extend the statutory time limit of 30 days from notification to the applicant of the final decision on the permit. Id. at 8-9.

On judicial remand, this case was assigned to Administrative Law Judge Sweitzer. Peabody moved for dismissal of the proceedings on the ground the Tribe's petition for review of permit AZ-0002A was untimely and that the petition for review of AZ-0002 was moot. The Administrative Law Judge granted the motion, holding that the failure to file a timely appeal from issuance of permit AZ-0002A was a defect mandating dismissal for lack of jurisdiction. ^{9/} Further, the Administrative Law Judge found that permit AZ-0002 was incorporated in and superseded by permit AZ-0002A and that, hence, the application for review of AZ-0002 was moot and had to be dismissed. ^{10/} Administrative Law Judge Sweitzer further found that having dismissed the proceedings, he had no jurisdiction to hold a hearing or to approve or disapprove any proposed settlement. ^{11/}

On appeal from the decision of Judge Sweitzer, the Tribe asserts error in the finding that the appeal of AZ-0002 is moot and in the failure to apply the doctrine of estoppel in finding the appeal of permit AZ-0002A untimely. With respect to the question of mootness, appellant claims the issue is likely to be repeated yet the type of action involved is too short in duration to permit proper review, thus militating against dismissal for mootness. Regarding the issue of the timeliness of the Tribe's appeal, appellant contends the decision of the district court does not bind the Tribe which was not a party to the case. ^{12/} The Tribe also argues that the court's ruling on the jurisdictional issue of timeliness is essentially a dictum.

In response to the brief of the Tribe, Peabody asserts that the district court reversed the prior Board decision and clearly held that an appeal filed more than 30 days after applicant's receipt of notification of the final decision on the permit is untimely. Peabody contends that the question of whether the Tribe is bound by the decision of the court in a case to which it was not a party is irrelevant in that the Department was a party to the litigation and, hence, the Board is bound by the court's decision. With respect to the question of the mootness of the appeal of permit

^{9/} Decision of Nov. 10, 1988, at 6-7. The Administrative Law Judge cited the recent decision of the Board in a related case, Hopi Tribe v. OSMRE, 103 IBLA 44 (1988), finding that the failure to file within 30 days of notification to the applicant was a jurisdictional defect requiring dismissal.

^{10/} Decision of Nov. 10, 1988, at 8.

^{11/} Id. Finally, Judge Sweitzer also vacated Judge Morehouse's approval of the settlement agreement. Id. at 9-10.

^{12/} The Tribe acknowledges in its brief that it was dismissed as a party from the litigation on its own motion on the ground of sovereign immunity. However, the court found the Tribe was not an indispensable party to the case, declined to dismiss the action generally, and proceeded to consider the merits of the case against OSMRE.

AZ-0002, Peabody argues that the piecemeal issuance of authorization is not likely to recur in that further authorizations for this project would be in the nature of amendments to an existing permit rather than new permits. Further, Peabody notes the expedited review procedures provided by regulation and the availability of a stay at both the administrative appeal stage under section 514(d) of SMCRA, 30 U.S.C. § 1264(d) (1982), and the judicial review stage under section 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1982), provide relief from any improper piecemeal permit issuance.

In response to the brief of the Tribe in support of its petition, OSMRE asserts the Tribe has failed to show error in the decision of Judge Sweitzer. At the time permit AZ-0002 issued to Peabody on August 28, 1984, there were no regulations governing issuance of SMCRA permits for mines on Indian lands. Such regulations were promulgated thereafter on September 28, 1984, requiring that "operators, such as Peabody Coal Company, obtain new permits under the new regulations for previously-permitted mining operations" (Response at 2). Permit AZ-0002A was issued under the new regulations to Peabody on December 21, 1984, authorizing operations in the J-21 area of the mine, including the operations previously authorized by permit AZ-0002. OSMRE contends that review of permit AZ-0002A is precluded by the court's ruling on the timeliness of that appeal and Peabody may now conduct operations under the authority of that permit regardless of the propriety of issuance of the earlier permit, AZ-0002. Hence, OSMRE asserts the appeal of permit AZ-0002 is now moot. Further, OSMRE takes issue with the Tribe's assertion that issuance of a permit for a part of an operation, as happened here, is either likely to be repeated or capable of evading review. Finally, OSMRE asserts that filing of an appeal in a timely manner is jurisdictional and that the Board is bound by the finding of the court that the Tribe's appeal of permit AZ-0002A was not timely filed under section 514(c) of SMCRA.

The context of this appeal from Judge Sweitzer's decision on judicial remand raises two fundamental issues. The threshold question is whether the challenge to permit AZ-0002A under section 514(c) of SMCRA is barred by a failure to file a timely request for a hearing. If the answer is affirmative, the remaining question is whether this renders the appeal of permit AZ-0002 moot.

[1] This case was remanded by the court on an appeal from a prior Board decision in this matter affirming the decision of Judge Morehouse issued in response to the Tribe's request under section 514(c) of SMCRA for a hearing regarding issuance of these permits. ^{13/} The court issued two critical rulings in its remand order. First, it found Peabody was entitled to a hearing to attempt to prove that the settlement agreement adversely affects its interests and, consequently, that Peabody is an interested party within

^{13/} Section 514(f) of SMCRA, 30 U.S.C. § 1264(f) (1982), recognizes the right of an applicant who is aggrieved by the decision of the regulatory authority to seek judicial review pursuant to section 526 of SMCRA, 30 U.S.C. § 1276 (1982).

the meaning of section 5(c) of the APA entitled to a hearing in the section 514(c) permit review proceedings in the absence of consent to the settlement agreement. Slip op. at 4-6. Further, the court reversed the holding of the Board that the request for a hearing regarding issuance of permit AZ-0002A was timely filed under section 514(c) of SMCRA. Noting that section 514(c) of SMCRA restricts requests for review of permits to those filed "within 30 days after the applicant is notified of the final decision," the court held that:

The statute clearly states that the time for appeals is thirty days from the time that the applicant is notified of the final decision. There is no basis for a claim that [OSMRE] can unilaterally add a requirement for newspaper publication or that [OSMRE] can hold that the permit applicant has not been notified when it has received the actual permit. Moreover, once Peabody received the permit, [OSMRE] had no authority to alter the finality of that decision after the fact by sending the letter lengthening the time for appeals. Cf. Salehpour v. INS, 761 F.2d 1442, 1447 (9th Cir. 1985) ("Where the objective criteria of a regulation are clearly met, there is no room for an agency to interpret a regulation so as to add another requirement.") [Emphasis in original.]

(Slip op. at 8-9.) We concluded that although the Tribe was not a party to the litigation at the time the court rendered its decision, the Department was a party to this proceeding and, hence, the Board is bound by this decision on judicial review. The opinion of the court makes it clear that OSMRE was without authority to unilaterally extend the time for seeking review of permit approval, particularly where the permittee had already received the permit.

We note that the Board has frequently held that the timely filing of a notice of appeal is essential to establish jurisdiction to review the decision under appeal and failure to file the appeal within the time allowed mandates dismissal of the appeal. E.g., Ilean Landis, 49 IBLA 59 (1980); see Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978); Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960). We have noted that although this Board is generally reluctant to take any action which would preclude review of appeals on the merits, strict adherence to the rule is necessary to achieve the purpose of the rule which is to establish a definite time when administrative proceedings regarding a claim are at an end in order to protect other parties to the proceedings and the public interest. Ilean Landis, supra at 61-62; see Browder v. Director, Ill. Dept. of Corrections, supra at 264. This is clearly the purpose of the statutory limitation. Indeed, this Board has recently held in a related appeal involving a request for a hearing under the regulation at 30 CFR 775.11(a) 14/ concerning approval of permit revisions that the appeal must

14/ We recognize that subsequent to approval of the permits in this case the Department promulgated a regulation effective Nov. 23, 1987, requiring the request for a hearing to be filed within 30 days of notification to

be dismissed for lack of jurisdiction where it was not filed within 30 days of receipt by the applicant of notice of the decision on the application. Hopi Tribe v. OSMRE, *supra* note 9. ^{15/} Accordingly, the decision of Judge Sweitzer dismissing the petition for review of permit AZ-0002A for lack of jurisdiction must be affirmed.

[2] With respect to the issue of mootness, it appears from the record that mine permit AZ-0002A supersedes and includes authorization for operations previously permitted under AZ-0002. The latter permit solely authorized the construction of the J-21 haul road at the Black Mesa/Kayenta Mine. One of the grounds for the Tribe's appeal of this permit was that it "constitutes approval of a component part of a larger permit area currently under review by [OSMRE]" and, thus, an improper fragmentation of the environmental review process (Notice of Appeal dated Sept. 24, 1984). This permit, however, was superseded by permit AZ-0002A issued on December 28, 1984, under which "the permittee is authorized to conduct surface coal mining and reclamation operations on Indian lands * * * shown on the attached J-21 north affected land map" (Permit AZ-0002A, Sec. 2). The cover letter of December 28, 1984, by which the permit was transmitted from OSMRE to Peabody expressly states that: "Permit No. AZ-0002A incorporates the previously issued J-21 haul road permit (AZ-0002) into a single permit." ^{16/} Thus, that aspect of Peabody's operations at the mine formerly authorized under permit AZ-0002 is now authorized under permit AZ-0002A which has been found to be beyond the reach of further review. An appeal is ordinarily dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford to the appellant. The Sierra Club, 104 IBLA 17 (1988); see Blackhawk Coal Co. (On

fn. 14 (continued)

the applicant "by publication in a local newspaper of notice of [OSMRE's] written decision approving or disapproving the permit." 43 CFR 4.1362(a), 52 FR 39527 (Oct. 22, 1987). This does not alter the regulation at 30 CFR 775.11(a) in effect at the time of approval of Peabody's permits which is operative in this case. We also note the recent issuance of a proposed revision to 43 CFR 4.1362(a) requiring the request for review to be filed within 30 days after the applicant/permittee is notified by OSMRE of the written decision by certified mail or overnight delivery service. 54 FR 9853 (Mar. 8, 1989).

^{15/} In this case on appeal from a decision of the Administrative Law Judge approving the permit revision, the Board found that jurisdictional challenges may be raised at any point in the proceedings and vacated the decision of the Administrative Law Judge while dismissing the appeal. 103 IBLA at 47.

^{16/} The regulations governing the permitting under SMCRA of Indian lands were promulgated with an effective date of Sept. 28, 1984. 49 FR 38462 (Sept. 28, 1984). These regulations required the issuance of new permits for existing operations on Indian lands. See 30 CFR 701.11(c), 49 FR at 38477.

Reconsideration), 92 IBLA 365, 93 I.D. 285 (1986). 17/ Accordingly, the dispute as to the former permit is now properly dismissed as moot and the decision of Administrative Law Judge Sweitzer is properly affirmed in this regard.

Therefore, 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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

17/ We reject the Tribe's contention that the appeal should not be dismissed as moot because the issue is "capable of repetition yet evading review." In considering the likelihood of such an occurrence, we must take cognizance of the availability of a stay in the form of temporary relief both at the administrative appeal stage under sec. 514(d) of SMCRA, 30 U.S.C. § 1264(d) (1982), and on judicial review pursuant to sec. 526(c) of SMCRA, 30 U.S.C. § 1276(c) (1982).