

NORTHERN PLAINS RESOURCE COUNCIL, ET AL.
V.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
MONTCO, A MONTANA GENERAL PARTNERSHIP, INTERVENOR

IBLA 88-270

Decided January 4, 1990

Appeal from a decision of Administrative Law Judge John R. Rampton, concluding that Federal surface coal mining permit No. MT-013 had been properly issued. Hearings Division Docket No. DV-6-1-PR

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Permits: Approval

OSMRE properly applies state program requirements in determining whether or not to approve a permit application in a state with a cooperative agreement, and where, at the time of permit approval, the applicant complies with those requirements for the disclosures of entities and their compliance histories and OSMRE makes the necessary findings based thereon, an application for a permit is properly approved.

APPEARANCES: James A. Patten, Esq., Billings, Montana, for appellants; Mary Dee Martoche, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Thomas E. Ebzery, Esq., and W.H. Bellingham, Esq., Billings, Montana, for Montco.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Northern Plains Resource Council (NPRC), and others, 1/ (hereinafter, collectively referred to as NPRC) have appealed from a decision dated February 8, 1988, by Administrative Law Judge John R. Rampton, concluding

1/ The other appellants are the Tongue River Agricultural Protection Association, the Tri-County Ranchers Association, and the Rosebud Protective Association.

that the Office of Surface Mining Reclamation and Enforcement (OSMRE) had properly issued surface coal mining permit No. MT-013 to Montco, a Montana general partnership composed of two 50-percent partners, Thermal Energy, Inc., a Washington corporation, and Tongue River Resources, Inc., a Delaware corporation.

Procedural and Factual Background

On November 14, 1980, Montco filed an application for a surface mining permit with the Montana Department of State Lands (DSL), seeking permission to open a surface coal mining operation in the Tongue River valley near Ashland, Montana. The land involved included, in part, privately owned surface overlying unleased Federal coal, which, pursuant to section 701(4) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1291(4) (1982), is considered "Federal lands" for regulatory purposes. On January 19, 1981, pursuant to sections 201 and 523 of SMCRA, 30 U.S.C. §§ 1211 and 1273 (1982), the Secretary approved a cooperative agreement with the State of Montana. That agreement is set forth at 30 CFR 926.30. Under the terms of the agreement, the laws, regulations, and terms and conditions of Montana's permanent State program, approved effective April 1, 1980, as amended, for the administration of SMCRA were made applicable to Federal lands within Montana. 30 CFR 926.30, Article III.

On November 15, 1984, DSL, with the concurrence of OSMRE, approved the application and issued Montco State permit No. SMP-84015. On January 8, 1985, OSMRE notified Montco that its application for a Federal permit was administratively complete. Notice of this determination was published in local papers pursuant to State regulations. Thereafter, NPRC and others requested an informal conference on the permit application. 30 U.S.C. § 1263 (1982). A conference was held in Billings, Montana, on July 16, 1985.

On December 20, 1985, OSMRE issued Montco Federal permit No. MT-013. On February 12, 1986, NPRC filed with OSMRE a request for a hearing on Montco's permit approval. ^{2/} All parties waived the requirement in

^{2/} NPRC filed its request pursuant to 30 CFR 775.11(a), which provides that any person with an interest which is or may be adversely affected by approval of a permit may request a hearing "[w]ithin 30 days after an applicant * * * is notified of the decision of the regulatory authority concerning an application * * *." See 30 U.S.C. § 1264(c) (1982); 43 CFR 4.1362(a) (promulgated Oct. 22, 1987, 52 FR 39527). NPRC's request was not filed until the 53rd day following approval of the permit and, thus, would appear to be untimely; however, there is no evidence in the record of when Montco was "notified" of the permit approval. This Board has held on a number of occasions in the context of proceedings involving applications for review of notices of violation or cessation orders issued by OSMRE that the time limit for filing such applications is jurisdictional and that failure to file timely must result in dismissal. McPeck Mining & Mark E. McPeck v. OSMRE, 101 IBLA 389, 392 (1988); P&K Coal Co. v. OSMRE, 98 IBLA 26, 33 (1987); Coal Energy, Inc. v. OSMRE, 94 IBLA 347 (1986). Such a conclusion would obtain in this case also, if the record were conclusively

30 U.S.C. § 1264(c) (1982), that a hearing be conducted within 30 days of the request. The parties also agreed that direct testimony would be prefiled and that the hearing would be conducted only for the purpose of allowing cross-examination.

In the request, NPRC designated 11 issues for resolution. Prior to commencement of the January 13, 1987, hearing, the parties agreed that only one issue remained for resolution--whether or not Montco complied with applicable law relating to disclosure of related entities engaged in coal mining operations and the compliance history of those entities. The entire basis for NPRC's case on that issue was set forth in the July 21, 1986, prefiled testimony of John D. Smillie, at that time a staff member of NPRC (Administrative Law Judge (ALJ) Exh. 1). ^{3/} Therein, he charged that Montco's permit was issued in violation of SMCRA and the Montana State program because it failed to disclose that Tongue River Resources, Inc., a 50-percent partner in Montco, is a "wholly owned subsidiary of Diamond Shamrock, Inc., which also owns Diamond Shamrock Coal Company, and which also owns or controls the following [nine] coal mining entities." Id. at 3. ^{4/} In addition, Smillie charged that several of those entities had been cited for violations of surface mining requirements. Attached to his statement was a schedule of those violations. Smillie alleged that at the time of his statement "several Diamond Shamrock mines," including two of the listed companies, Hawkeye Elkhorn in Marion County, Tennessee, and Falcon Coal Company in Kentucky, had outstanding violations or unpaid penalties. Id.

In response to the Smillie testimony, OSMRE submitted the December 2, 1986, affidavit of Dr. Mark Boster, then Chief of OSMRE's Division of Permit and Environmental Analysis (ALJ Exh. 3). ^{5/} He described OSMRE's background investigation conducted prior to issuance of Montco's permit and detailed NPRC's involvement in commenting on the application (ALJ Exh. 3 at 7-8). He stated that favorable action on Montco's permit application required findings by OSMRE, in accordance with the Montana State program, that Montco did not own or control any coal mining operation with outstanding violations of SMCRA, State laws required by SMCRA, or any other Federal law, rule, or regulation pertaining to environmental protection, and that Montco did not own or control a coal mining operation with a demonstrated

fn. 2 (continued)

to show untimely filing. Absent such evidence, however, we are unable to dismiss the application as untimely. See The Hopi Tribe v. OSMRE, 109 IBLA 374, 380 (1989).

^{3/} Smillie's unsworn statement, dated July 21, 1986, is styled "Testimony of John D. Smillie."

^{4/} The entities listed by Smillie were: Elkhorn Fuel, Inc.; Falcon Coal Company, Inc.; Hawkeye Elkhorn Coal Company, Inc.; Brown Badget, Inc.; Falcon Seaboard, Inc.; Hawkeye Coal Company; Natomas Minerals of Utah, Inc.; Gateway Coal Company; and Amherst Coal Company.

^{5/} This document is styled "Direct Testimony of Dr. Mark Boster." It is in the form of an affidavit and was filed with the Hearings Division on Dec. 3, 1986. At the hearing, minor deletions and corrections were made to Boster's direct testimony by counsel for OSMRE (Tr. 114-16).

pattern of willful violations of SMCRA or any State law required by SMCRA. Boster stated that OSMRE found that neither Thermal Energy Inc., nor Tongue River Resources, Inc., had ever engaged in coal mining, and therefore had no outstanding violations or pattern of willful violations (ALJ Exh. 3 at 10). He asserted that although it was not necessary to satisfy OSMRE's obligations under the law, he directed that further inquiry be made into Diamond Shamrock's relationship to the companies cited by NPRC as being affiliates or subsidiaries thereof. He stated that OSMRE was unable to substantiate a connection between Diamond Shamrock and Hawkeye Elkhorn in Tennessee; that investigation of the compliance history of Falcon Coal Company revealed that all violations were abated or in the process of being abated; that there were no unpaid penalties in connection with those violations; and that none of the companies affiliated with Diamond Shamrock had a pattern of willful violations resulting in irreparable environmental damage (ALJ Exh. 3 at 11-16).

At the hearing both Smillie and Boster were made available for cross-examination. Boster testified that NPRC's allegations concerning outstanding violations by Montco affiliates were diligently investigated and yielded the results stated in his direct testimony (Tr. 130-32). OSMRE's position continued to be that the compliance histories of the companies named by NPRC were irrelevant to approval of Montco's permit under the Montana State program (Tr. 127-28, 139, 154).

On February 8, 1988, Judge Rampton issued his decision concluding that, in accordance with the cooperative agreement, the requirements of the Montana State program at the time of review of Montco's application controlled OSMRE's determination of whether or not Montco had properly disclosed the relevant compliance history; that Montco complied with those requirements; and that OSMRE properly issued the permit.

Discussion

On appeal, NPRC contends, as it has throughout, that Montco was required, but failed to disclose "all coal mining entities * * * owned or controlled by anyone owning or controlling Montco" (SOR at 3). NPRC apparently now concedes, which it did not previously, that, pursuant to the cooperative agreement, Montco's application was to be reviewed and approved under the Montana State program; however, it shifts its argument to contend that the State program is less stringent than the Federal program and should not have been approved by the Secretary in the first instance (SOR at 5). Nevertheless, it contends that OSMRE's approval of the application without requiring disclosure of all related entities and their respective compliance histories was contrary to sections 507(b)(4) and 510(c) of SMCRA, 30 U.S.C. §§ 1257(b)(4) and 1260(c) (1982), respectively. NPRC asserts that SMCRA requires identification of individuals owning 10 percent or more of any class of stock of the permit applicant. It alleges that Tongue River Resources, Inc., owns or controls more than 10 percent of Montco, and that "Diamond Shamrock Coal Company owns or controls Tongue River Resources, Inc., outright" (SOR at 7). 6/

6/ It is not clear whether NPRC asserts that Tongue River Resources, Inc., is owned or controlled by "Diamond Shamrock, Inc.," as alleged by Smillie

OSMRE and Montco each responded to NPRC's contentions. They both assert that the permit was properly issued and that Judge Rampton's decision should be affirmed.

Section 510(c) of SMCRA, 30 U.S.C. § 1260(c) (1982), provides:

The applicant shall file with his permit application a schedule listing any and all notices of violations of this chapter * * * incurred by the applicant in connection with any surface coal mining operation during the three-year period prior to the date of application. * * * Where the schedule or other information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter * * * the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority * * * and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter of such a nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this chapter. [7/]

Section 507(b) of SMCRA, 30 U.S.C. § 1257(b) (1982), requires the following disclosure in a permit application:

(4) if the applicant is a partnership * * * the names and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of any person owning, of record 10 per centum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation in the United States within the five-year period preceding the date of submission of the application;

fn. 6 (continued)

in his statement or by Diamond Shamrock Coal Company, as stated in its brief. However, the record indicates that Tongue River Resources, Inc., is wholly owned by Diamond Shamrock Corporation, which wholly owns Falcon Seaboard, Inc., who, in turn, wholly owns Falcon Coal Company, Inc., and Hawkeye Coal Company. See Cross-Examination of Lanny Icenogel, Montco's project manager, dated Mar. 23, 1987, Exh. 1 at 2.

7/ The comparable State provisions are found at Mont. Code Ann. § 82-4-227(11) and (12). The regulations implementing the Federal and State requirements are 30 CFR 778.14(c) and Mont. Admin. R. § 26.4.303(13). See Montco's Response Brief, Exh. A.

(5) a statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant, has ever held a Federal or State mining permit which in the five-year period prior to the date of submission of the application has been suspended or revoked * * *. [8/]

[1] Both the Federal and State statutes and regulations require disclosure of certain entities and their history of compliance. As noted above, the cooperative agreement made the Montana State program applicable to OSMRE's permit approval review. Likewise, approval of that program by the Secretary constituted a determination that the Montana program was consistent with the Federal program. ^{9/} And, in fact, Smillie admitted at the hearing that there was no substantive difference between the applicable State and Federal laws (Tr. 71, 86). To the extent that NPRC is challenging approval of the Montana State program, such a challenge must be denied on the basis that it has been raised in the wrong forum and is untimely. ^{10/}

The issue before us is whether, under applicable law, OSMRE properly approved Montco's permit. We must conclude that it did.

On November 15, 1984, and December 20, 1985, respectively, when Montco's State and Federal permits were issued, the controlling law was the Montana State program then in effect. That program required the regulatory authority to make a finding that any surface coal mining and reclamation operation "owned or controlled" by the applicant was not in violation of applicable law. The unrefuted testimony of Dr. Boster demonstrates that, after a thorough review, this finding was made. At that time, there was no requirement, as urged by NPRC, that Montco disclose those entities owned or controlled by anyone owning or controlling Montco or to disclose the compliance history of such entities. ^{11/} NPRC has not shown that the coal

^{8/} The comparable State provisions are included in Mont. Code Ann. § 82-4-222(1)(f)-(h), and the implementing Federal and State regulations are 30 CFR 778.13(a)-(d) and 30 CFR 778.14(a) and (b) and Mont. Admin. R. § 26.4.303(6), (8), and (12). See Montco's Response Brief, Exh. A.

^{9/} 30 CFR 732.15 sets forth the criteria for approval or disapproval of state programs by the Secretary. These criteria provide for full participation by the public, including hearings, and submission of information and commentary for consideration by the Secretary prior to approval or disapproval of a state program. NPRC participated in that process for the Montana program. Authorized by relevant provisions of SMCRA, duly approved and promulgated, the Montana State program has the force and effect of law and is binding on the Department. Alternate Fuels Inc. v. OSMRE, 103 IBLA 187 (1988).

^{10/} Under 30 U.S.C. § 1276(a)(1) (1982), judicial review of the approval of a state program must be filed in the United States District Court for the District which includes the capital of the state whose program is at issue within 60 days of such action. See Montana v. Clark, 749 F.2d 740, 743 (D.C. Cir. 1984).

^{11/} OSMRE notes in its response that the Montana State program was undergoing revision at the time Montco's permit was being reviewed. Specifically, "OSMRE required Montana to change its informational requirements at

mining entities it identified were either owned or controlled by Montco. NPRC has failed to demonstrate error in OSMRE's review and approval of Montco's permit.

Since Montco's Federal permit was issued, new requirements for permits and permit processing have been promulgated. OSMRE has added a definition of "owned or controlled" and "owns or controls" at 30 CFR 773.5. 53 FR 38890 (Oct. 3, 1988). In addition, 30 CFR 773.15 has been amended to proscribe issuance of a permit "if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule, or regulation referred to in this paragraph." *Id.* Finally, more detailed disclosures relating to ownership and control are now required by 30 CFR 778.13. *See* 54 FR 8992 (Mar. 2, 1989). Although these changes reflect requirements urged by NPRC in the present appeal, such requirements were not part of the Montana State program and, therefore, were not in force or effect at the time of review or approval of Montco's permit.

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.

Bruce R. Harris
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 11 (continued)

M.C.A. [sic] § 26-4-303(13), but these changes were not final at the time Montco's application was reviewed, and OSMRE applied the approved State program provisions in its review" (OSMRE Response at 5). Under 30 CFR 732.17(g), changes in a state program take effect only when approved by the Secretary as an amendment to such a program.