

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

IBLA 92-286

Decided June 5, 1992

Petition for discretionary review by the Hopi Tribe of a decision by Administrative Law Judge John R. Rampton, Jr., invalidating Special Condition 12 to Permit AZ-0001C (Hearings Division Docket No. TU 90-2-PR).

Petition granted; Administrative Law Judge decision affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

Under 43 CFR 4.1366(a), when a permit applicant seeks review of a permit condition imposed by OSM, OSM has the burden of going forward to establish a prima facie case as to the failure of the permit applicant to comply with applicable requirements of the Act or regulations or the appropriateness of the permit condition, and the applicant shall have the ultimate burden of persuasion as to its entitlement to the permit or the inappropriateness of the permit condition. To establish a prima facie case, OSM must introduce evidence that will justify but not compel a finding that the condition is an appropriate response to a failure of the permit application to satisfy a specified statutory or regulatory standard or is otherwise appropriate.

2. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

When the evidence demonstrates that OSM's principal reason for imposing a permit condition requiring the permittee to dewater impoundments was its concern for protecting the water rights claims of downstream users, even though such claims are currently being adjudicated in state court, OSM has failed to establish a prima facie case that the permit condition is appropriate, and the Administrative Law Judge properly declares the condition invalid.

3. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Impoundments: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Approval--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Generally

When OSM fails to establish a prima facie case that it acted pursuant to provisions of SMCRA and implementing regulations in imposing a condition requiring the permittee to dewater impoundments, it is proper for the Administrative Law Judge to rule that the permit condition is inappropriate.

APPEARANCES: David S. Neslin, Esq., Denver, Colorado, Gloria Kindig, Esq., Kykotsmovi, Arizona, and Harry R. Sachse, Esq., Washington, D.C., for The Hopi Tribe; James R. Bird, Esq., Washington, D.C., and Michael H. Hyer, Esq., Flagstaff, Arizona, for Peabody Coal Company; Stanley M. Pollack, Esq., Window Rock, Arizona, for the Navajo Nation.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Hopi Tribe has filed a petition for discretionary review (PDR) of a decision by Administrative Law Judge John R. Rampton, Jr., dated October 24, 1991, invalidating Special Condition 12 (Condition 12) to permit AZ-0001C, issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 6, 1990, to Peabody Coal Company (PCC) for the Kayenta Mine in northeastern Arizona.

From 1964 to 1966, PCC's predecessor entered into leases with the Navajo Nation and the Hopi Indian Tribe to mine coal in areas controlled by either the Navajo Nation or by the Navajo Nation and the Hopi Tribe jointly. In 1970 PCC began mining operations at the Black Mesa Mine, which supplies coal via slurry pipelines to the Mohave Generating Station near Bullhead City, Nevada, and in 1972 PCC began mining operations at the Kayenta Mine, from which coal is shipped by rail to the Navajo Generating Station in Page, Arizona. OSM issued permit AZ-0001 in 1982 to cover both mines, known collectively as the Black Mesa/Kayenta complex. On September 28, 1984, OSM issued regulations governing the permitting of mining operations on Indian Lands under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988). See 30 CFR Part 750, 49 FR 38462 (Sept. 28, 1984). The regulations required new permits for all operations, but allowed existing operations to continue under their existing authorizations pending action on timely applications for new permits. In 1984, PCC applied for a permit under the Indian lands program for the Black Mesa/Kayenta complex. 1/

During the period from November 1985 to May 1990, OSM was engaged in considering PCC's permit application and preparing an environmental impact statement (EIS) for the Black Mesa/Kayenta complex. OSM prepared a Cumulative Hydrologic Impact Analysis (CHIA), which was submitted in draft form to the Hopi Tribe and the Navajo Nation on August 1, 1987, redistributed to them as a "first final draft" on January 1, 1988, and finalized in April 1989. The draft EIS (DEIS) was published on June 5, 1989, and was distributed in final form (FEIS) on May 17, 1990. OSM issued a Technical Analysis (TA) in July 1990. 2/

On July 6, 1990, OSM issued permit AZ-0001C covering only the Kayenta Mine. Although PCC's permit application covered both the Black Mesa and the Kayenta Mines, and although the required studies and analyses, (including the CHIA, the EIS, and the TA) did, too, OSM's decision memorandum for permit AZ-0001C noted that OSM was reserving action on the Black Mesa Mine. 3/ Permit AZ-0001C contained the standard conditions listed at

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1/ The various permits issued in connection with the Kayenta and Black Mesa Mines have been the subject of previous administrative and judicial proceedings. See, e.g., 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); The Hopi Tribe v. OSM, 109 IBLA 374 (1989).

2/ This history is set forth in greater detail in PCC's Pretrial Memorandum, filed with Administrative Law Judge John R. Rampton, Jr., on Mar. 4, 1991, at 1-8 and (Exhibit (Exh.) A). See also FEIS, Vol. 1, at Table I-6.

3/ OSM decided to postpone action on the Black Mesa Mine for a further "reasonable time" in order to take into account any additional information that might become available about the impacts of pumping water from the N-aquifer to supply the coal slurry pipeline used to transport coal from the Black Mesa Mine to the Mohave Generating Station. See the July 6, 1990, Memorandum from the Chief, Federal and Indian Permitting

30 CFR 733.17, the terms and condition of PCC's leases with the tribes, and an "Attachment A" listing 18 "Special Conditions."

On August 3, 1990, PCC filed a request for review of 13 of the 18 "Special Conditions" attached to permit AZ-0001C. See 43 CFR 4.1360 through 4.1369. By orders dated September 18, October 12, and November 16, 1990, Judge Rampton granted petitions to intervene filed by the Hopi Tribe, Maxine Kescoli, and the Navajo Nation. By order dated January 31, 1991, he denied Feather Hammond's petition to intervene, but granted her status as amicus curiae.

Prior to the hearing before Judge Rampton, the parties pursued settlement negotiations which were successful as to 9 of the 13 conditions originally challenged. 4/ The hearing began on March 5, 1991, in Denver, Colorado, and continued there through March 8, 1991. It reconvened in Flagstaff, Arizona, on March 12, 1991, and ended there on March 15, 1991. 5/ At the conclusion of the hearing, Judge Rampton asked the parties to explore settling PCC's challenge to conditions 1, 3, and 4 in light of the hearing record. By memorandum dated March 18, 1992, Judge Rampton informed the Board that the parties were still attempting a negotiated settlement of those conditions. Only PCC's request for review of Condition 12 was briefed before Judge Rampton, and his decision dated October 24, 1991, addresses only Condition 12.

Condition 12, as modified by Judge Rampton's order on January 4, 1991, 6/ provides:

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fn. 3 (continued)

Branch, to the Chief, Federal Programs Division, concerning FPD Project No. AZ-0001-C-P-01, at 19-24, 33-34, included in Exh. P-52.

4/ On Mar. 5, 1991, PCC's challenge to Condition 2 was dismissed as moot upon joint motion of the parties at the hearing (Tr. D39). On Mar. 8, 1991, Judge Rampton issued an order approving a settlement of Conditions 5-7, 9-11, and 16-17.

5/ Throughout this decision, citations to the Denver, Colorado, phase of the hearing will be given as "Tr. at D\_" and those to the Flagstaff, Arizona, phase as "Tr. at F\_."

6/ As issued on July 6, 1990, Condition 12 provided as follows:

"Within 120 days of permit issuance, PCC shall submit to OSM, and thereafter shall implement, a plan which provides for the ongoing release of water stored in impoundments. The plan shall: (1) identify each impoundment; (2) specify the volume and schedule for release of water from each identified impoundment, including provision for release during the spring season; (3) provide for monitoring and reporting to OSM of the downstream effects, if any, of releases of impounded water on surface and alluvial ground water quantity and quality; (4) minimize the volume of water and length of time that water is retained in each impoundment; and (5) be consistent with the provisions of PCC's National Pollution [sic] Discharge Elimination System (NPDES) permit and all other applicable laws and regulations."

See Exh. J-1 at 5.

Within 120 days of written notice by OSM, or within 60 days of a decision by the Administrative Law Judge upholding this condition in whole or in part, or within such other time period as ordered by the Administrative Law Judge, PCC shall submit to OSM, and thereafter shall implement, a plan which provides for the ongoing release of water stored in impoundments. The plan shall: (1) identify each impoundment; (2) specify the volume and schedule for release of water from each identified impoundment, including provision for release during the spring season; (3) provide for monitoring and reporting to OSM of the downstream effects, if any, of releases of impounded water on surface and alluvial ground water quantity and quality; (4) minimize the volume of water and length of time that water is retained in each impoundment; and (5) be consistent with the provisions of PCC's National Pollution [sic] Discharge Elimination System (NPDES) permit and all other applicable laws and regulations.

As more fully discussed infra, in his October 24, 1991, decision, Judge Rampton ruled that OSM failed to establish a prima facie case that Condition 12 was appropriate (Decision at 5). See 43 CFR 4.1366(a). To place this ruling in context, we will summarize the various arguments OSM, PCC, the Hopi Tribe, and the Navajo Nation presented to Judge Rampton.

A review of the relevant portions of the transcript of the hearing before Judge Rampton, as well as OSM's posthearing brief, indicates that Judge Rampton correctly concluded that OSM's "principal" reason for imposing Condition 12 was to protect the water rights of the Hopi Tribe. OSM argues that in imposing Condition 12, it "struck a reasonable balance between interests competing for a very limited and, hence, extremely valuable resource in the arid southwest environment where the Kayenta Mine is located--namely, water" (OSM's Posthearing Brief at 3-4). OSM explained that Stephen Parsons, its expert witness who testified at the hearing, and who largely wrote the hydrologic portions of the TA, recommended that "OSM include in the permit for the Kayenta Mine a special condition that would call for the submission of a plan for dewatering impoundments" (OSM's Post-hearing Brief at 5, citing Tr. D376). OSM stated that it imposed Condition 12 to achieve two primary goals: "First, it was meant to help maintain the hydrologic status quo with respect to the impoundments at the Kayenta Mine; and, second, it was designed to better define the hydrologic impacts of those impoundments" (OSM's Posthearing Brief at 6, citing Tr. D367).

OSM admitted that the CHIA predicted only minor impacts to downstream users from the impoundment of water at the Kayenta Mine (OSM's Posthearing Brief at 6; see CHIA § 3.1.2, at 3-14 (Exh. J-23)), but asserted that the CHIA was "based on limited information" (OSM's Posthearing Brief at 6, citing Tr. D423-24). OSM stated that its technical staff recommended adding Condition 12 in light of "the limited extent of the data upon which the CHIA necessarily relied, the concern expressed by both government agencies and the public over the impoundment of water at the Kayenta Mine, and OSM's

regulatory mandate to protect water users situated downstream from a mining operation" (OSM's Posthearing Brief at 6, citing Tr. D367, D476-77).

OSM was concerned about the fact that "[t]he Hopi Tribe, the Navajo Nation, and PCC all have competing claims to the water impounded by PCC at the Kayenta Mine" (OSM's Posthearing Brief at 8, citing Tr. D604). OSM stated that it "ha[d] studiously avoided taking a position on the merits of these claims." Id., citing Tr. D480-82. In OSM's view,

[b]y requiring PCC to minimize the volume of water and the length of time that water is retained in impoundments at the Kayenta Mine, special condition number 12 serves to maintain the hydrologic status quo so that downstream users are not denied the benefit of surface runoff they otherwise would have in the absence of these impoundments.

(OSM's Posthearing Brief at 9, citing Tr. D367). OSM asserted that "[b]y requiring PCC to allow more surface runoff to flow downstream, special condition number 12 helps maintain the status quo until the parties' competing claims to the water are finally adjudicated" (OSM's Posthearing Brief at 9, citing Tr. D425-26).

OSM argued that it had authority under SMCRA and implementing regulations to impose Condition 12. However, OSM merely enumerated a series of provisions under which it claimed the authority to impose Condition 12 but did not demonstrate how Condition 12 relates to or implements that authority.  
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7/ OSM's Post-Hearing Brief at 13-15. OSM enumerates the following provisions of SMCRA and the regulations in support of this argument: section 508 of SMCRA, 30 U.S.C. § 1258(a)(13) (1988) (requiring an applicant for a permit to submit a reclamation plan including "a detailed description of the measures to be taken during the mining and reclamation process to assure protection of \* \* \* the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured"); 30 CFR 780.21(h) (the operator is required to submit a "hydrologic reclamation plan," which, inter alia, "shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas," and "to protect the rights of present water users"); 30 CFR 816.41(a) (requiring "[a]ll surface mining and reclamation activities [to] be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved post-mining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part," and providing that "[t]he regulatory authority may

OSM contended that Judge Rampton should apply the arbitrary and capricious standard of review in evaluating Condition 12. According to OSM, "[u]nder SMCRA, the Secretary is granted broad authority over the regulation of surface coal mining operations" (OSM's Reply Brief at 6, citing Drummond Coal Co. v. Hodel, 610 F. Supp. 1489, 1496 n.5 (D.D.C. 1985), aff'd, 796 F.2d 503 (D.C. Cir. 1986), cert. denied, 480 U.S. 941 (1987)). OSM maintained that "OSM has broad discretion to impose special permit conditions to ensure that surface coal mining operations are conducted in accordance with the requirements of SMCRA" (OSM's Reply Brief at 6) and, thus, "a deferential standard of review is clearly warranted" in this case. Id.

In its post-trial brief, the Hopi Tribe presented arguments in favor of Condition 12 in agreement with those advanced by OSM. The Hopi Tribe argued that "[n]o less than seven statutory and regulatory provisions individually and collectively authorize OSM to impose water management requirements like special condition no. 12" (Hopi's Post-Trial Brief at 8). 8/

The Hopi Tribe stated that OSM has the authority to impose Condition 12 under 30 CFR 750.6(a)(4). That regulation requires OSM to "[c]onsult with the BIA [Bureau of Indian Affairs] and the affected tribe with respect to special requirements relating to the protection of non-coal resources of the area affected by surface coal mining and reclamation operations, and assure operator compliance with such special requirements" (Hopi's Post-Trial Brief at 10). The Hopi Tribe pointed out that "water is a non-coal resource, the Hopi Tribe is an affected tribe, the Hopi reservation is affected by the mine, and the Assistant Secretary for Indian Affairs and the Hopi Tribe both advised OSM of their concern about the downstream impact of the impoundments." Id.

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fn. 7 (continued)

require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment"); section 515(b)(8)(F) of SMCRA, 30 U.S.C. § 1265(b)(8)(F) (1988) (providing that permanent impoundments "not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial[,] recreational, or domestic uses"); and section 717(b) of SMCRA, 30 U.S.C. § 1307(b) (1988) (providing that "[t]he operator of a surface coal mine shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution, or interruption proximately resulting from such surface coal mine operation").

8/ These provisions are enumerated again in footnote 8 of the Hopi Tribe's PDR, and are set forth in footnote 11 of this decision.

The Hopi Tribe placed emphasis on sections 508(a)(13)(C) and 717(b) of SMCRA, 30 U.S.C. §§ 1258(a)(13)(C) and 1307(b) (1988), and OSM regulations at 30 CFR 780.21(h) and 816.41(a), arguing that those provisions require the water supply and water rights of present water users be protected or replaced. According to the Hopi Tribe, "[t]hese provisions authorize OSM to impose the special condition as a means of protecting the water supply and putative water rights of the Hopi Tribe" (Hopi's Post-Trial Brief at 11-12).

The Hopi Tribe also argued that OSM has the authority to impose Condition 12 under section 515(b)(10) of SMCRA, 30 U.S.C. § 1265(b)(10) (1988), and the regulations at 30 CFR 780.21(h) and 816.41(a), "each of which requires operators to minimize disturbance to the hydrologic balance, both on- and off-site" (Hopi's Post-Trial Brief at 13). Arguing that "the impoundments reduce the flow of water downstream," which "plainly disturbs the hydrologic balance," the Hopi Tribe concluded that "[b]y imposing the special condition, OSM has appropriately sought to minimize this disturbance" (Hopi's Post-Trial Brief at 13-14).

Reasoning that because OSM "has acted within the ambit of its authority," the Hopi Tribe argued that Condition 12 "can be set aside only if it is arbitrary and capricious." *Id.* at 15. Moreover, the Hopi Tribe contended that the burden of showing OSM's action is arbitrary and capricious is on PCC, citing Colorado Health Care Association v. Colorado Department of Social Services, 842 F.2d 1158, 1164 (10th Cir. 1988). The Hopi Tribe argued that PCC's "burden on this issue is a rigorous one," since "[t]he arbitrary and capricious standard is highly deferential, and presumes agency action to be valid" (Hopi's Post-Trial Brief at 15, quoting Virginia Citizens for Better Reclamation, Inc. v. Watt, 19 Env't Rep. Cas. (BNA) 1382, 1384 (E.D. Va. Apr. 1, 1983)). The Hopi Tribe asserted that "[a]n agency action is arbitrary and capricious only if no rational basis exists for it" (Hopi's Post-Trial Brief at 15, citing Tackitt v. Prudential Ins. Co., 758 F.2d 1572, 1575 (11th Cir. 1985), and American Financial Services Association v. FTC, 767 F.2d 957, 985 (D.C. Cir. 1985)). The Hopi Tribe maintained that great deference should be accorded OSM, since its "policy determinations are based upon complex scientific and factual data, or involve speculative projections" (Hopi's Post-Trial Brief at 16, quoting National Grain & Feed Association v. OSHA, 866 F.2d 717, 729 (5th Cir. 1989)).

The Hopi Tribe argued that there were five reasons for imposing Condition 12: (1) "to develop additional information, and refine the existing data, on the effects of the sediment ponds on the Moenkopi water system (Tr. D362, F487)"; (2) "to protect the quantity of downstream surface water and users of that water (Tr. D362, D367)"; (3) "to protect the water rights claims of the Hopi Tribe, the Navajo Tribe, and Peabody by maintaining the hydrologic status quo pending the outcome of the Little Colorado River Adjudication (Tr. D604, D362, D552-53)"; (4) "to minimize disturbance to the hydrologic balance of the Moenkopi water system (Tr. D512, D362, D367)"; and (5) "to respond to the concerns raised by, among others, the Assistant

Secretary for Indian Affairs, the Environmental Policy Act (EPA), the Fish and Wildlife Service, the Hopi Tribe, and the Navajo Tribe (Tr. D414, D362)" (Hopi's Post-Trial Brief at 16-17). The remainder of the Hopi Tribe's Post-Trial Brief basically elaborated on its argument that "[a]ny one of these reasons provides a rational basis for imposing special condition no. 12," and that "[i]n combination, they mandate the special condition." Id. at 17.

In its Post-Hearing Memorandum, PCC argued that the rationale behind imposing Condition 12 was political rather than technical. PCC referred to two memoranda authored by Keith Kirk captioned "Pertinent information for response to Comments on Black Mesa/Kayenta Mine EIS and CHIA" (Exhs. N-1, P-51). Kirk, a co-author of the CHIA, was emphatic that "[s]ignificant loss of water is NOT substantiated by the available data" (Exh. P-51 (emphasis in original)). Kirk noted that

for the Hopi this is not a technical issue but a political and emotional/religious issue in that OSM has apparently "given" the Navajo something (water in this case) that we have not given the Hopi and further any impounding of water conflicts with Hopi religious principles; therefore, this issue will not be resolved by scientific realities or technical facts.

(Kirk Memorandum, Exh. P-51). Kirk suggested:

One solution to this issue is for OSM to require that PCC discharge water from the impoundments after it meets NPDES discharge requirements during active mining and after mining modify the permanent structures so that they retain only water sufficient for the postmining land use and pass the remainder down stream.

Id.

PCC contended that the "real purpose behind Condition 12 remains, as when dewatering was first suggested by Mr. Kirk, a symbolic gesture to alleviate Hopi political/emotional/religious concerns" (PCC's Post-Trial Memorandum at 56). PCC quoted Parsons' testimony at the hearing in support of its argument "that OSM places its primary reliance on a purported protection of 'water rights' to justify Condition 12." Id. For example, Parsons testified:

[W]ith respect to the impoundments in this condition[,] [t]he principal thought that drove that, and, again, it's expressed in, I think, the TA, is with the concerns and claims for water rights.

Q Concerns and claims for water rights, that's not a technical factor?

A That's exactly the point. That wasn't a technical analysis. That was a regulatory consideration.

(Tr. D469). Moreover, Parsons testified:

Q So you didn't calculate any benefit that would be available to any downstream user or any impact on any downstream user. When you did this, it was more or less a solution to the problem that you had people that were upset and you wanted to do something that would--

A Well, I think it was more than just upset. I think it was people that were voicing formally claims that were in some sort of a legal arena, and that--

Q Was it in some response to legal claims for water rights?

A Well, I don't know if they're, strictly speaking, legal. They were certainly claims--there were assertions that water rights were being violated or somehow disturbed.

(Tr. D481).

PCC maintained that "[t]he most fundamental flaw in OSM's 'water rights' rationale is that it would require the ALJ in effect to conduct a water rights adjudication, a proceeding clearly beyond this tribunal's jurisdiction" (PCC's Post-Trial Memorandum at 59). PCC stated that the Hopi, the Navajo, and PCC are all parties to a proceeding currently pending in an Arizona state court to adjudicate water rights in the Little Colorado River basin, In re The General Adjudication of All Rights to Use Water in the Little Colorado River System & Source, No. 6417 (Ariz. Super. Ct., Apache City, filed May 1980). PCC observed that OSM was asking Judge Rampton to "approve a permit condition on the ground that it 'protects' water rights that have not yet been adjudicated and are the subject of a pending state proceeding" (PCC's Post-Trial Memorandum at 59).

PCC challenged OSM's claim that "dewatering the impoundments will merely preserve the 'hydrologic status quo' pending the outcome of the Arizona proceeding" (PCC's Post-Trial Memorandum at 60). PCC contended that "[w]hat steps, if any, should be taken to protect the 'status quo' during pending litigation is manifestly an issue to be considered by the court before which the litigation is pending," and that "OSM's attempt to assert jurisdiction for this 'limited' purpose is an obvious effort to evade the prohibition against duplicative water adjudication proceedings." Id. PCC noted that "it is well established that SMCRA requires deference to state water law on issues of water rights and use," citing National Wildlife Federation v. Hodel, 839 F.2d 694, 756 (D.C. Cir. 1988) (PCC's Post-Trial Memorandum at 61). PCC concluded as follows:

Until the adjudication currently pending in Arizona state court is complete, the nature, source, extent, priority and existence of each of the participants' water rights are unknown, and we know merely that certain claims have been made. Protection of such claims is not within the scope of OSM's authority under SMCRA.

Id.

In addition, PCC stated OSM's efforts at the hearing to "show that the impoundments have sufficient adverse downstream impacts to require remedial action" are contrary to "the authoritative scientific studies relied on by OSM in acting on the permit application" (PCC's Post-Trial Memorandum at 64). PCC emphasized that "[i]n response to the large numbers of comments on the CHIA and draft EIS expressing concern about this issue, OSM reexamined its analysis in the CHIA, but found no reason to conduct additional studies and reaffirmed the conclusions of the CHIA." *Id.* at 65. PCC stated that, at the hearing, Parsons "departed somewhat from OSM's previous position with respect to these scientific studies and took the position that it was 'possible' or 'plausible' that the impoundments could have negative impacts on downstream users." *Id.* at 68, *citing* Tr. D372, D376-77, D460, D479. PCC asserted that "[r]eleasing water from impoundments as contemplated by Condition 12 would not cure any of the 'possible' adverse effects on downstream users, even if such impacts existed." *Id.* at 71. PCC maintained that any releases pursuant to Condition 12 would be limited in rate as well as amount, and that such releases would have insignificant impacts, since "the amount of water actually in the impoundments is a mere fraction of their design capacity, only a fraction of this lesser amount would even be subject to release, and the rate of release would make approximation of pre-impoundment conditions impossible." *Id.* at 73. PCC concluded that OSM "ignored the role that impounded water plays in mitigating the impacts of mining at the mine site, apparently ready and willing to sacrifice those benefits for hypothetical benefits to hypothetical downstream users." *Id.* at 74.

In its posthearing memorandum, the Navajo Nation opposed Condition 12 on essentially the same grounds as PCC. The Navajo Nation maintained that "[t]he dewatering condition is not warranted by OSM's own technical analyses," and that it "was imposed to appease the Hopis" (Navajo Nation's Post-Hearing Memorandum at 5). Its basic argument is:

OSM attempts to justify the dewatering condition under the auspices of protecting Hopi water rights. The Hopis do not possess any rights, only claims to water. In order to obtain a water right, the Hopi claims need to be adjudicated in a court of competent jurisdiction, not before OSM. The hydrologic data do not support the Hopi claims. The Hopis do not use the water controlled by the impoundments; moreover, releasing the water will not enable the Hopis to put this water to beneficial use. Dewatering will only serve to deprive Navajos of the beneficial impacts attributable to the impoundments. The dewatering condition implicitly recognizes "plausible" downstream benefits to be worthy of protection, even if known Navajo benefits from the impoundments are diminished. OSM cannot impose a condition which requires water to be released from Navajo land under the auspices of water rights, maintenance of the hydrologic status quo, or for any other reason in the absence of an order from a court of competent jurisdiction to adjudicate water rights.

(Navajo Nation's Post-Hearing Memorandum at 7). The Navajo Nation concluded that "[t]he true justification for Special Condition 12 is to mollify Hopi

political, emotional and religious objectives, and OSM lacks the statutory or regulatory authority for such mollification." Id.

On October 24, 1991, Judge Rampton issued his decision that OSM failed to establish a prima facie case that Condition 12 was appropriate. He noted that OSM "was ostensibly authorized to impose the condition under the provisions of 30 U.S.C. § 1265(b)(10)(G) and its implementing regulation, 30 CFR 816.41(a)," but that the principal "reason for imposition of Condition 12 was to address or protect the Hopi Tribe's water rights claims (Tr. D510-511, D513)" (Decision at 5-6). He states that "OSMRE admittedly does not have authority to consider such claims." Id. at 6.

On November 27, 1991, the Hopi Tribe filed with this Board its PDR of Judge Rampton's decision. PCC filed a response to the Hopi Tribe's petition on December 23, 1992, and the Navajo Nation filed its response to the petition on February 3, 1992. OSM did not file a response. 9/

After review of the record, we agree with Judge Rampton's decision, and adopt it as the decision of this Board. A copy is attached. Nevertheless, we feel it necessary to address the primary argument raised in the Hopi Tribe's PDR, i.e., that "[b]ecause OSM stated valid grounds for imposing special condition 12, the condition must be upheld regardless of whether OSM's consideration of water rights was improper" (PDR at 21). Specifically, the Hopi Tribe contends that "OSM identified three valid reasons for imposing the special condition: protecting downstream surface flows and uses; minimizing disturbance to the hydrologic balance; and developing additional information on the hydrologic effect of the impoundments." Id. at 23. Before we address this argument, we deal with one procedural matter.

[1] Judge Rampton correctly rejected the argument advanced by OSM and the Hopi Tribe that the burden was upon PCC to demonstrate that OSM's imposition of Condition 12 was arbitrary and capricious, i.e., that no

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9/ Judge Rampton forwarded the transcript and the portions of the record the parties agreed were necessary for the Board's review on Mar. 18, 1992, the record was received by the Board on Mar. 23, 1992, and the case was assigned to a panel of Administrative Judges on Apr. 7, 1992. Under 43 CFR 4.1369(d), the Board is required to deny the petition or grant it and decide the merits within 60 days of the deadline for filing responses. By order dated Apr. 9, 1992, the Board noted that the parties had consented to an extension of the deadline for filing a response as to the Navajo Nation and cooperated with Judge Rampton in designating the appropriate portions of the record for Board review. The Board requested the parties to confer and, no later than Apr. 27, 1992, to propose a reasonable date for the Board's decision. On Apr. 27, 1992, the parties responded to the Board's order, agreeing that a reasonable date for the Board's decision would be 60 days from the date the Board's docket attorney assigned the case to a panel of Administrative Judges.

rational basis exists for it. Review of OSM's decision imposing Condition 12 is governed by 43 CFR 4.1366(a), which provides:

If the permit applicant is seeking review, OSM shall have the burden of going forward to establish a prima facie case as to failure to comply with the applicable requirements of the Act or the regulations or as to the appropriateness of the permit terms and conditions, and the permit applicant shall have the ultimate burden of persuasion as to entitlement to the permit or as to the inappropriateness of the permit terms and conditions.

As noted by Judge Rampton, "[t]he essential fact OSMRE must establish to make its prima facie case is that the imposition of special condition number 12 was appropriate in the context of the Kayenta Permit" (Decision at 5). To establish its prima facie case, OSM must present "sufficient evidence \* \* \* to establish the essential facts and which will justify, but not compel, a finding in favor of [OSM]." Rith Energy, Inc. v. OSM, 119 IBLA 83, 86 n.6 (1991), citing S & M Coal Co. v. OSM, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984). Thus, OSM must introduce evidence that Condition 12 was an appropriate response to a failure of the permit application to satisfy a requirement of SMCRA or its implementing regulations or that it is otherwise appropriate. Under the regulation, were OSM to establish a prima facie case, the ultimate burden of persuasion would rest upon PCC to demonstrate that it is entitled to the permit or that the condition is inappropriate.

[2] As noted, Judge Rampton recognized that OSM "was ostensibly authorized to impose the condition under the provisions of 30 U.S.C. § 1265(b)(10)(G) and its implementing regulation, 30 CFR 816.41(a)," but declared Condition 12 "inappropriate" because the principal reason for imposing Condition 12 was to "address or protect the Hopi Tribe's water rights claims (Tr. D510-511, D513)" (Decision at 5-6). In Judge Rampton's view, "water rights' must mean finally adjudicated water rights or, at least, water rights which are uncontested." Id. at 6. He states that "[t]o hold otherwise would be to require OSMRE to become the adjudicator of water rights claims, a role which it is neither authorized nor qualified to assume." Id. at 7. We agree with his analysis of this issue, and set it forth below:

Each party concedes that the Hopi Tribe, the Navajo Nation, and PCC are all parties in a proceeding currently pending in Arizona State Court to adjudicate their water rights claims, including claims to the water being collected in the Kayenta Mine impoundments, in the Little Colorado River basin. In re The General Adjudication of All Rights to Use water in the Little Colorado River System and Source, No. 6417 (Ariz. Super. Ct., Apache City, filed May 1980). The Supreme Court of the United States has held in a case involving that very same state proceeding that a United States District Court in Arizona properly refused to take jurisdiction over a case in which the Navajo nation sought to "protect" alleged water rights that were under consideration in the Arizona

adjudication. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567 (1983) ("concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property'") (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 819 (1976)).

\* \* \* Moreover, throughout the SMCRA, Congress expressed a concern for preserving existing property rights, and for not interfering with state determination of those rights.

National Wildlife Federation v. Hodel, 839 F.2d 694, 757 (D.C. Cir. 1988). [10/] Thus, OSMRE's assumption of the role of adjudicator of water rights claims is inconsistent with both relevant case law and the purposes of SMCRA, which dictate that such matters should be left to resolution by state courts.

(Decision at 7).

We agree that claims to water rights were OSM's chief concern in imposing Condition 12 at the Kayenta Mine. OSM's expert at the hearing testified that the "driving force" and the "principal reason" for imposition of Condition 12 were to address or to protect the Hopi Tribe's water rights claims (Tr. D510-11, 513). Our review of the record confirms that Judge Rampton was correct in finding that water rights concerns were the principal motivation for imposing Condition 12. Such considerations are beyond OSM's authority under SMCRA and implementing regulations. Thus, Judge Rampton properly ruled that OSM failed to establish a prima facie case that its imposition of Condition 12 was appropriate.

[3] The central question posed in the Hopi Tribe's PDR is whether Condition 12 is sustainable on "appropriate" bases. The Hopi Tribe contends that Condition 12 was imposed in response to the requirement in SMCRA that "mining operations protect water resources and minimize hydrologic disturbance" (PDR at 2). The Hopi Tribe relies upon section 515(b)(10) of SMCRA, 43 U.S.C. § 1265(b)(10) (1988), which requires permittees to "minimize the disturbance to the prevailing hydrologic

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10/ In National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C. Cir. 1988), the U.S. Court of Appeals for the District of Columbia Circuit interpreted section 717(a) of SMCRA, 30 U.S.C. § 1307(a) (1988), which provides that "[n]othing in this Act shall be construed as affecting in any way the right of any person to enforce or protect, under applicable law, his interest in water resources affected by a surface coal mining operation." The court stated that its interpretation was required by a challenge to 30 CFR 816.41(h), which was promulgated to implement section 717 of SMCRA. The Court of Appeals stated "[i]t is clear from the legislative history that the 'applicable' laws referred to are state laws." 839 F.2d at 756; see H.R. Rep. No. 218, 95th Cong., 1st Sess. 181 (1977).

balance at the mine-site and associated offsite areas and to the quality and quantity of water in surface and ground water systems." The Hopi Tribe emphasizes that Congress enacted section 515(b)(10) of SMCRA "to assure the maintenance of [the hydrologic] balance on and off the mining site during and after the mining operation" (PDR at 2, quoting H.R. Rep. No. 218, 95th Cong., 1st Sess. 113 (1977)). It states that Congress was specifically concerned with "mining operations in semi-arid settings that alter drainage patterns and thereby decrease storm runoff and reduce downstream alluvial recharge" (PDR at 2-3, citing H.R. Rep. No. 218 at 111). According to the Hopi Tribe, "[t]his legislative mandate forms the backdrop for the regulatory action at issue in this case" (PDR at 3).

In support of its argument that "OSM has a mandatory obligation under SMCRA to protect water resources and minimize hydrologic disturbance downstream from the Kayenta Mine," the Hopi Tribe cites "[n]o less than seven statutory and regulatory provisions" (PDR at 12). 11/ The Hopi Tribe explains its interest in seeing that the mandate of SMCRA and the regulations cited is effectuated:

OSM must exercise its authority to impose water management requirements where, as here, such requirements protect downstream surface flows, rights of downstream users, and the hydrologic balance. As Mr. Parsons testified, OSM "is required to minimize the impacts to the hydrologic balance downstream . . . . That sense runs throughout our program." Tr. at D513-14 (emphasis added).

Thus, when OSM discusses the need to protect Hopi "water rights," or return to a "hydrologic baseline," it is essentially saying that under SMCRA it must assure that PCC minimizes the impact of the impoundments on the water that runs down the Washes.

11/ The Hopi Tribe's enumeration of these provisions is set forth in footnote 8 of its PDR:

"30 U.S.C. § 1258(a)(13) (requiring operators to protect water users like the Hopi Tribe and the amount of water in surface systems like the washes); id. at § 1265(b)(10) (requiring operators to minimize disturbances to the prevailing hydrologic balance and to the amount of water in surface systems like the washes); id. at § 1307(b) (requiring operators to replace the water supply of landowners, like the Hopi Tribe, whose supply is impacted by mining); 30 C.F.R. § 750.6(a) (authorizing OSM to impose special conditions to protect non-coal resources like water where, as here, the conditions are requested by BIA and an Indian Tribe); id. at § 780.21(h) (requiring operators to minimize disturbance to the hydrologic balance and protect the rights of water users like the Hopi Tribe); id. at § 816.41(a) (requiring operators to minimize disturbance to the hydrologic balance and protect or replace water rights); and id. at § 816.41(h) (requiring operators to replace the water supply of landowners, like the Hopi Tribe, whose supply of water is adversely impacted by mining)."

The Hopis, as downstream users of the water, have an interest in seeing this mandate fulfilled. An environmental organization without any water rights would have the same interest. The fact that the Hopi Tribe has water rights, whether adjudicated or not, cannot reduce the protection that any downstream user receives under the statute. [Emphasis in original.]

(PDR at 13-14).

The Hopi Tribe states that "[b]ecause of the limited nature of the existing data and analysis, the magnitude and geographic scope of these impacts [of dewatering the impoundments] remain unclear. Nevertheless, absent dewatering, the impoundments plainly diminish the 'quantity of water' flowing into and down the Wash in a manner proscribed by SMCRA" (PDR at 17). According to the Hopi Tribe, "the impoundments are disturbing the hydrologic balance" by "decreasing the quantity of surface water in Moenkopi Wash and its tributaries" (PDR at 19). Although the Hopi Tribe acknowledges that the magnitude of this disturbance is uncertain, it insists that "the process for minimizing it is obvious: by minimizing the volume of water and length of time that water is retained in the impoundments, as condition 12 requires" (PDR at 19).

In the Hopi Tribe's view, "[b]ecause OSM stated valid grounds for imposing special condition 12, the condition must be upheld regardless of whether OSM's consideration of water rights was improper" (PDR at 21), citing Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, 419 U.S. 281, 286 (1974); Communications Workers of America v. NLRB, 784 F.2d 847, 851-52 (7th Cir. 1986); and Lynn L. Moedl, 10 IBLA 106, 107 (1973). The Hopi Tribe asserts that OSM identified three valid reasons for imposing Condition 12: "[P]rotecting downstream surface flows and uses; minimizing disturbance to the hydrologic balance; and developing additional information on the hydrologic effect of the impoundments" (PDR at 23).

The Hopi Tribe states that "[s]ome federal courts have stated that an agency decision based in part on an erroneous factor will be remanded 'if [sic] there is a significant chance that but for the errors the agency would [sic] have reached a different result'" (PDR at 23, quoting Salt River Project Agricultural Improvement & Power District v. United States, 762 F.2d 1053, 1060-61 n.8 (D.C. Cir. 1985)). Thus, maintains the Hopi Tribe, "special condition 12 must be sustained as there is no 'significant chance' that OSM would have reached a different result absent the water rights issue" (PDR at 23). According to the Hopi Tribe, "the special condition was not based solely on Hopi water rights or any other single factor" (PDR at 24). The Hopi Tribe contends that "the protection of downstream water rights is simply one means of protecting water resources," and that "OSM's consideration of water rights should not be distinguished from its ultimate concern for minimizing downstream impacts" (PDR at 25).

The Hopi Tribe restates the argument that OSM's concern for the Hopi Tribe's water rights was appropriate under SMCRA:

The Hopi Tribe has reserved water rights in the Washes. These rights are "presently perfected" under the reserved water rights doctrine, see Arizona v. California, 373 U.S. 546, 600 (1963), but have not yet been quantified. By allowing the Kayenta impoundments to be constructed without a release program, OSM potentially impaired these rights. In effect, it effectively adjudicated the water to PCC and the Navajo Nation to the detriment of the downstream Hopi. [Footnote omitted.]

(PDR at 29). The Hopi Tribe asserts that Judge Rampton erred in ruling that OSM's consideration of the Hopi Tribe's water rights was improper because section 717 of SMCRA, 30 U.S.C. § 1307 (1988), protects only "finally adjudicated water rights or, at least, water rights that are uncontested" (PDR at 30, quoting Decision at 6).

Finally, the Hopi Tribe asserts that "[e]ven if the Board agrees with Judge Rampton's conclusion that special condition 12 should be set aside, the appropriate relief is to remand the condition to OSM, not to invalidate the condition" (PDR at 32). In the opinion of the Hopi Tribe, "once the ALJ concluded that special condition 12 had to be set aside, and determined that no other grounds supported the decision, the only appropriate action for the ALJ was to remand the condition to OSM for reconsideration" (PDR at 34). The Hopi Tribe states that "[r]emand is particularly appropriate in this case, given that the ALJ indicated that OSM had relied upon 'valid reasons based upon valid authority to impose' condition 12," and that "upon remand, OSM could readopt condition 12 based solely on those factors that the ALJ identified as valid and proper" (PDR at 34-35).

Our review of the record indicates that in the hearing before Judge Rampton OSM failed to establish a prima facie case that it imposed Condition 12 on any of the three "appropriate" bases argued in the Hopi Tribe's PDR. We have noted that Judge Rampton recognized that OSM was "ostensibly authorized" to impose Condition 12 under section 515(b)(10) of SMCRA, 30 U.S.C. § 1265(b)(10) (1988), and 30 CFR 816.41(a). However, as PCC notes in its Reply to the Hopi Tribe's PDR, Judge Rampton's "finding that OSM had failed to establish its prima facie case despite these alternative rationales and his condemnation of relying on 'valid' authorities to advance unauthorized purposes \* \* \* indicate that he believed OSM had not demonstrated adequate support for these alternatives, and was using them only as vehicles to address an illegitimate consideration" (PCC's Reply at 6). 12/

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12/ As Judge Rampton wrote:

"While the analysis, heretofore, has been directed at the provisions of 30 CFR 816.41(a), the analysis is equally applicable to the other regulations upon which OSMRE bases its claim of authority to impose Condition 12. While one or more of these provisions may establish grounds for imposing Condition 12, they do not authorize OSMRE to impose such a condition on the grounds of protecting or otherwise addressing water rights claims.

A review of the scientific studies relating to the Kayenta Mine substantiates PCC's observation. The Probable Hydrologic Consequences chapter of PCC's permit application package concluded that implementation of the life-of-mine plan for the Kayenta Mine and the adjoining Black Mesa Mine would have no significant long- or short-term impacts on ground or surface water systems (Exh. P-71 at 33, 45-52, 68, and Table 20 (pages 69-76)). The CHIA reached the same conclusions (CHIA at 6-2, 6-6, 6-8, 7-2; Tr. D471-73). It concluded that PCC's mining operation would not cause material damage to the hydrologic balance outside the permit area (Tr. D513-14, D550). Moreover, it concluded that the impoundments would not have a negative impact on downstream users (Tr. D474), and that the impacts of mining activity, if any, would be both minor and, in some instances, beneficial (Tr. D514). The CHIA concluded specifically that the impoundments would increase alluvial water levels (CHIA at 6-2); have a positive net impact on lease area surface water quantity (CHIA at 6-2); result in no measurable impact to surface water discharge or water quality downstream in Dinnebito Wash (CHIA at 6-6); result in no detrimental impacts to Moenkopi Wash discharge at Moenkopi (CHIA at 6-8), and result in no potential material damage to surface water quantities (CHIA at 7-2). OSM conducted no further technical studies after the CHIA (Tr. D467-69, D489).

In response to its DEIS, which contained conclusions on hydrology that were based on those in the CHIA (Tr. D577), OSM received comments that raised questions about water rights, the effects of the impoundments on downstream users, and the lack of refinement as to OSM's hydrologic conclusions (Tr. D362-63). These comments and OSM's responses appear in the FEIS. See generally II FEIS (Exh. J-2). In response to these comments, OSM thoroughly reevaluated the conclusions contained in the CHIA. This review left OSM convinced that those conclusions were reliable, a conviction it expressed in its published responses to the comments received. For example, in response to a letter from BIA that posed the question, "Are the conclusions of the CHIA concerning hydrology reliable?", OSM responded, "In OSM's opinion the CHIA contains valid data and reliable conclusions" (II FEIS at R-80 (Exh. J-2)).

As previously mentioned, Keith Kirk prepared two memoranda dated October 24, 1989, captioned "Pertinent information for response to Comments on Black Mesa/Kayenta Mine EIS and CHIA" (Exhs. N-1, P-51). Kirk,

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fn. 12 (continued)

The distinction must be drawn between addressing water rights claims and addressing other concerns which may indirectly benefit persons asserting water rights claims, such as the 'protection of \* \* \* the quantity of surface and ground water systems' (30 U.S.C. § 1258(a)(13)(C)) and the minimization of 'disturbances to the prevailing hydrologic balance \* \* \* and to the quality and quantity of water in surface and ground water systems' (30 U.S.C. § 1265(b)(10)). OSMRE may not rely upon regulations which authorize OSMRE to consider the latter concerns to sanction its unauthorized consideration of water rights claims in imposing Condition 12."

(Decision at 7-8, footnote omitted).

a co-author of the CHIA, stated in one memorandum that more information had been available to OSM for this action than for any other in OSM's history (Exh. N-1). In the second memorandum, addressing comments that impoundments were "causing significant water loss in surface flow," Kirk explained:

Significant loss of water is NOT substantiated by the available data, however, for the Hopi this is not a technical issue but a political and emotional/religious issue in that OSM has apparently "given" the Navajo something (water in this case) that we have not given the Hopi and further any impounding of water conflicts with Hopi religious principles; therefore, this issue will not be resolved by scientific realities or technical facts.

(Exh. P-51). Kirk then went on to suggest dewatering the impoundments as "[o]ne solution to this issue."

In its final technical documents, OSM continued to adhere to the conclusions stated in the CHIA, and to take positions regarding the reliability of the scientific studies consistent with those stated in the Kirk memoranda. In its TA (Exh. J-15), which was issued in July 1990, OSM stood by its conclusions that the impoundments would have only minor effects (TA at 113-14). In its Decision Memorandum, the last technical document issued either concurrently with or prior to the permit on July 6, 1990, OSM stated that it had "thoroughly reassessed" the conclusions of the CHIA as a result of comments it had received, and that it "found no reason to change its previous CHIA conclusions" (Decision Memorandum, included in Exh. P-52, at 20). Moreover, OSM stated that it was "not aware of \* \* \* any technical basis for OSM to doubt the validity of the conclusions reached in the CHIA." *Id.* at 21 (emphasis added); see PCC's Reply to PDR at 19.

As PCC notes, "[d]espite these reiterated statements that there was no reason to think that the proposed impoundments would cause any significant adverse effects to downstream users, OSM issued Permit AZ-0001C with the special condition at issue in this proceeding" (PCC's Reply to PDR at 19). PCC asserts that, being "[p]erplexed as to the reasoning behind the condition," it "asked employees of OSM in December, 1989, why its extensive existing monitoring program was insufficient and what OSM thought would be gained by additional monitoring," and "met with the response 'that [Peabody's senior hydrologist, who posed the question] was naive, that these were not scientific issues, these were political issues, and that in order for [OSM] to receive a passing grade from EPA for their EIS effort that they felt obligated to generate [this condition]" (PCC's Reply to PDR at 20-21, quoting Tr. F247-48, F505).

Even though all of OSM's scientific studies indicate that the impoundments will have little or no impact on the hydrologic balance, and in certain instances will benefit the environment, the Hopi Tribe attempts to justify the three "non-water rights" bases for upholding Condition 12 (PDR at 14-21). The first of these, *i.e.*, that OSM imposed Condition 12 "to protect the quantity of downstream surface water and users of that

water" (PDR at 14), actually only restates the basis upon which Judge Rampton declared Condition 12 "inappropriate and invalid." The Hopi Tribe relies upon section 707 of SMCRA, 30 U.S.C. § 1307 (1988), as protecting its "presently perfected," even though unquantified, water rights. We reject this argument for the reasons set forth in Judge Rampton's opinion, and as discussed supra.

The second asserted legitimate basis for Condition 12 argued by the Hopi Tribe invokes section 515(b)(10) of SMCRA, 30 U.S.C. § 1265(b)(10) (1988), which requires that mining operations "minimize the disturbances to \* \* \* the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations." As we have noted, OSM's scientific studies do not support either the argument that the impoundments have a significant impact on the hydrologic balance at the Kayenta Mine, or that the impoundments have a significant downstream impact. As PCC noted in its reply memorandum filed with Judge Rampton, "[t]o establish that the impoundments do have a significant downstream impact, then, OSM must turn its studies on their heads and interpret them as showing exactly the opposite of the conclusions they plainly state" (PCC's June 21, 1991, Reply Memorandum at 18).

The record amply supports PCC's contentions that the adverse impacts of the impoundments are "hypothetical," and that the dewatering contemplated by Condition 12 would have no beneficial downstream impacts. OSM's conclusions in the CHIA suggested that even if the impoundments were 100-percent full simultaneously, there would be no significant impacts on downstream users. PCC concludes from this that "releasing the largest hypothetically conceivable volume of impounded water would have no significant impact" (PCC's Post-Trial Memorandum at 72). Moreover, considering the fact that "the impoundments contain only a small fraction of the water they are designed to hold \* \* \* [r]eleasing all the water they actually do contain would therefore have an impact substantially less significant than the CHIA found." Id. PCC argues:

Even beginning with this much smaller amount of water actually present in the impoundments, Mr. Parsons conceded that many factors would decrease the amount of water that Peabody would have to discharge under Condition 12. See also OSM's Closing Statement at 19 (Condition 12 establishes a framework whereby "all current permitted activities may continue and whereby these activities will be unaffected"). For instance, Peabody will apparently not be required to release impounded water it uses (in place of the better quality N-aquifer water) for dust suppression and other operational purposes. Tr. at D546-47 (Parsons). This will diminish the total available by between 100 and 200 acre-feet per year, plus any additional water needed to make pumping feasible. Dewatering from the special purpose impoundments (highwall ponds, waste ponds, etc.) would also be impractical.

Tr. at F180-81, F197-98 (Fest). Mr. Parsons implicitly acknowledged that leaving enough water in the impoundments to benefit wildlife and foster the growth of vegetation is a legitimate concern, arguing only that some water might be taken away without destroying all benefit to wildlife. See, e.g., Tr. at D96-101 (Kelly), D605-06 (Parsons). Finally, the condition itself requires Peabody to continue to comply with its NPDES permit, which will limit both the amount and timing of releases. Cf. Tr. at D495, D547-48 (Parsons).

(PCC's Post-Trial Memorandum at 72-73).

While the Hopi Tribe argues that dewatering the impoundments will minimize impacts to the hydrologic balance at the Kayenta Mine and to downstream users, PCC introduced evidence demonstrating that impounded water plays an important role in "mitigating the impacts of mining at the mine site" (PCC's Post-Trial Memorandum at 74). PCC asserts that "the impoundments have a known beneficial impact at the mine site." Id. at 75. The impoundments "contribute to the recharge of the Wepo aquifer, which is disturbed both at points where it is intercepted by mining pits and in wider areas through drawdowns of up to 60 feet" (id. at 75; see Tr. F237-41), and they "support and encourage the development of wildlife habitat and revegetation, subjects of intense interest to the Navajo Nation." Id. at 75; see Tr. F96-101, F365, F389-90, D605-06.

The third valid basis asserted by the Hopi Tribe was that OSM imposed Condition 12 in order "to develop additional information, and refine the existing data, of the effects of the sediment ponds on the Moenkopi water system" (PDR at 14). The Hopi Tribe asserts that "hydrologic impacts have not been further quantified or field verified" (PDR at 20), and cites to Parsons' testimony where he stated that "there was a general concern that the degree of refinement of the hydrologic conclusions that were drawn were not totally or as well refined as they should be" (PDR at 20, citing Tr. D367). However, as observed by PCC, "more data had been available for the Black Mesa-Kayenta CHIA than for any other CHIA in OSM's history" (PCC's Post-Trial Memorandum at 22, citing Tr. D566 and Exh. N-1). Further, as demonstrated supra, that data was sufficient to "let [OSM] not only reach the conclusions expressed in the CHIA, but reaffirm those conclusions after they were challenged by members of the public" (PCC's Reply to PDR at 52). Upon review of the record, we agree with PCC's assertion that

OSM has repeatedly failed to indicate what sort of monitoring would be useful at any of its many opportunities, from the December 1989 meeting, through the hearing, the subsequent briefing, and the ultimate decision not to appeal Judge Rampton's decision, thus clearly indicating its inability to identify problems that the monitoring requirement was imposed to address.

(PCC's Reply to PDR at 52-53). The Hopi Tribe has "failed to show how a monitoring rationale can justify the imposition of the condition." Id. at 55.

We therefore reject the Hopi Tribe's contention that "[b]ecause OSM stated valid grounds for imposing special condition 12, the condition must be upheld regardless of whether OSM's consideration of water rights was improper" (PDR at 21). The record is clear that while OSM was ostensibly authorized to impose Condition 12 under section 515(b)(10) of SMCRA, 30 U.S.C. § 1265(b)(10) (1988), and implementing regulations, OSM's imposition of Condition 12 was not motivated by those provisions. Instead, as Judge Rampton found, OSM's "[principal] reason for imposition of Condition 12 was to address or protect the Hopi Tribe's water rights claims" (Decision at 6). We are in agreement with PCC's conclusions as to the soundness of Judge Rampton's decision, and set forth its analysis below:

The soundness of Judge Rampton's decision on the water rights issue is confirmed by the weakness of the arguments raised against it. OSM did not appeal the decision, and the Hopi petition, when it eventually gets around to addressing the actual ground of the decision (at pp. 29-32), does not even address the basic points Judge Rampton makes (*i.e.*, that OSM cannot base a condition on protecting contested water rights claims without adjudicating those claims and that such an adjudication under the circumstances here would be both unauthorized and ill-advised).

Rather, the Hopi attempt to make the water rights issue irrelevant by merging it with the technical issue of whether the impoundments have downstream impacts. They assert that "no logical distinction may be drawn between water rights and downstream impacts." *Id.* at 31-32. This tactic is not a defense of the agency's water rights rationale, it is a concession of defeat, effectively abandoning the principal justification advanced by OSM for the condition. It is flatly inconsistent with Mr. Parsons's testimony, which explicitly distinguished between the "regulatory concern" of water rights and the "technical" concerns dealt with in the CHIA, and, when pressed on the lack of technical support, indicated unambiguously that Condition 12 was based principally on the former. Tr. at D469, D-513-14. Judge Rampton took great care three times in his decision to point out and

"reiterate[] . . . the distinction between water rights claims, which OSMRE may not consider nor balance, and mining effects on quantities of surface and ground water or other components of the hydrologic balance, which OSMRE may consider and balance, in the permitting process. Because the principal consideration in imposing Condition 12 was the water rights claims of the parties, OSMRE's decision was inappropriate and, in a sense, 'political' as PCC and the Navajo Nation contend." ALJ Dec. at 9; see also *id.* at 7-8.

In attempting to "legitimize" the unauthorized "political/ water rights" rationale by merging it with the unsupported technical rationales, the Hopi engage in a tactic specifically condemned by Judge Rampton: "OSMRE may not rely upon regulations which authorize OSMRE to consider the latter [technical] concerns to sanction its unauthorized consideration of water rights claims in imposing Condition 12." ALJ Dec. at 8.

(PCC's Reply at 33-35).

We are convinced Judge Rampton was correct in his finding that OSM's principal reason for imposing Condition 12 was its concern for protecting the water rights of downstream users, namely the Hopi Tribe. For that reason, nothing in the Hopi Tribe's PDR persuades us to disturb Judge Rampton's ruling that OSM failed to establish a prima facie case as to the appropriateness of Condition 12. The principal reason for imposing Condition 12 was simply inappropriate.

Further, we cannot accept the Hopi Tribe's contention that Condition 12 should be remanded to OSM for readoption "based solely on those factors that the ALJ identified as valid and proper" (PDR at 35). As discussed, the record does not support imposing Condition 12 on any of those bases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we grant the Hopi Tribe's PDR. However, we affirm Judge Rampton's decision that Condition 12 is inappropriate and invalid.

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Will A. Irwin  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

October 24, 1991

|                              |   |                        |
|------------------------------|---|------------------------|
| PEABODY COAL COMPANY,        | : | Docket No. TU 90-2-PR  |
|                              | : |                        |
| Petitioner                   | : | Application for Permit |
|                              | : | Review                 |
| v.                           | : |                        |
|                              | : | Permit AZ 0001C        |
| OFFICE OF SURFACE MINING     | : |                        |
| RECLAMATION AND ENFORCEMENT, | : | Mine: Kayenta Mine     |
|                              | : |                        |
| Respondent                   | : |                        |
| .....:                       | : |                        |
| THE HOPI TRIBE, MAXINE       | : |                        |
| KESCOLI, and THE NAVAJO      | : |                        |
| NATION,                      | : |                        |
| Intervenors                  | : |                        |

DECISION

Appearances: James R. Bird, Esq., and Diane V. White, Esq., Washington, D.C., and Michael H. Hyer, Esq., Flagstaff, Arizona, for petitioner;

Jon K. Johnson, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for respondent;

David S. Neslin, Esq., and Richard Barkley, Esq., Denver, Colorado, for intervenor Hopi Tribe;

Tim Heydinger, Esq., Chinle, Arizona, for intervenor Maxine Kescoli;

Stanley M. Pollack, Esq., Window Rock, Arizona, for intervenor Navajo Nation.

Before: District Chief  
Administrative Law Judge Rampton.

Factual Background

Pursuant to certain leases between the petitioner, Peabody Coal Company (PCC), the Hopi Tribe, and the Navajo Nation,

PCC has mined coal at the Black Mesa and Kayenta Mines in Arizona since 1972. Following the August 3, 1977, enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, OSMRE assumed jurisdiction over surface coal mining operations on Indian lands, including those lands on which the Black Mesa and Kayenta Mines are situated. In exercise of this jurisdiction, in 1982 and 1984, OSMRE issued to PCC a number of initial and permanent program permits covering PCC's mining operations at the Black Mesa and Kayenta Mines.

On October 31, 1984, pursuant to the Federal program for Indian lands (Indian lands program) at 30 CFR Chapter VII, Subchapter E, PCC submitted to OSMRE an application for a permit to conduct surface coal mining operations at the Black Mesa and Kayenta Mines. As part of the permitting process, OSMRE published in May of 1990 a final environmental impact statement (OSM-EIS-25) (EIS) covering said mining operations and their effects on, among other things, the Moenkopi Wash water system. The EIS contains several comments expressing concern over PCC's creation of numerous water impoundments at the Kayenta Mine on land leased from the Navajo Nation and the resulting downstream impacts of the impoundments on the Hopi lands and people located in the Moenkopi Wash, including the potential infringement upon the water rights claimed by the Hopis (Tr. at D406-417, Ex. J-2, Vol. 2, Pt. 2 at 223, 244, 270, 282, 285). On July 6, 1990, pursuant to the Indian land program, OSMRE issued to PCC Permit No. AZ-0001C, which was limited to operations at the Kayenta Mine.

Permit No. AZ-0001C contained 18 special conditions. In its Request for Review, PCC originally challenged OSMRE's imposition of 13 of these 18 special conditions. The Hopi Tribe, the Navajo Nation, and Maxine Kescoli, an individual Native American, were granted leave to intervene in the proceeding. Prior to the hearing of this matter, the parties settled their disputes with regard to all of the challenged special conditions except numbers 1, 3, 4, and 12.

Hearings regarding the remaining conditions under dispute were held in Denver, Colorado, on March 5-8, 1991, and in Flagstaff, Arizona, on March 12-15, 1991. The parties are currently attempting to negotiate a settlement with regard to special condition numbers 1, 3, and 4, and did agree to postpone briefing the issues presented by these three special conditions during the pendency of settlement negotiations. Consequently, the parties agreed to brief and have briefed only the issues presented by Condition 12.

The parties have, as of this date, not reached a settlement on Conditions 1, 3, and 4. In telephone conference call on October 22, 1991, the parties stated that they were near a settlement of Conditions 1 and 3, but there appears no possibility of full agreement between all parties on Condition 4. The parties agreed to submit, on or before November 20, 1991, a partial settlement and requests for an order setting a briefing schedule on all remaining issues, including OSMRE's Motion for Partial Summary Judgment, a ruling on which has been held in abeyance pending completion of the record.

Special Condition 12, involving a requirement that Peabody dewater its impoundment ponds, is separate and apart from the requirements imposed upon Peabody in Conditions 1, 3, and 4. It has been fully briefed. Additionally, by notice dated July 9, 1991, OSMRE officially notified all parties that within 120 days from the filing of the notice Peabody shall submit to OSMRE its dewatering plan. It is therefore expedient and necessary that a decision be issued only as to Condition 12. The decision on any issues remaining on Conditions 1, 3, and 4 will be issued when submissions or briefing is completed.

Special condition number 12, as modified by order on January 4, 1991, provides as follows:

Within 120 days of written notice by OSMRE, or within 60 days of a decision by the Administrative Law Judge upholding this condition in whole or part, or within such other time period as ordered by the Administrative Law Judge, PCC shall submit to OSMRE, and thereafter shall implement, a plan which provides for the ongoing release of water stored in impoundments. The plan shall: (1) identify each impoundment; (2) specify the volume and schedule for release of water from each identified impoundment, including provision for release during the spring season; (3) provide for monitoring and reporting to OSMRE of the downstream effects, if any, of releases of impounded water on surface and alluvial ground water quantity and quality; (4) minimize the volume of water and length of time that water is retained in each impoundment; and (5) be consistent with the provisions of PCC's National Pollution Discharge Elimination System (NPDES) permit and all other applicable laws and regulations.

The Hopi Tribe and OSMRE support the imposition of this condition and the Navajo Nation, PCC, and Maxine Kescoli oppose its imposition.

Discussion

This proceeding is governed by 43 CFR 4.1366(a)(1) which places upon OSMRE the burden of going forward to establish a prima facie case as to the appropriateness of Condition 12 and imposes upon PCC the ultimate burden of persuasion as to the inappropriateness of Condition 12.

However, OSMRE argues that the proper determination to be made in this case is whether Condition 12 was "arbitrary and capricious," rather than "inappropriate," because PCC allegedly limited its challenge of Condition 12 in its Request for Review to whether the condition was arbitrary and capricious. To the contrary, the Request for Review explicitly challenges all of the conditions listed therein on the basis that they are "inappropriate, unreasonable, unlawful, arbitrary and capricious, and/or an abuse of discretion \* \* \* ." (Request for Review at 4) (Emphasis added). Also, PCC specifically alleges that "Condition 12 is \* \* \* unlawful" (Request for Review at 18), which reasonably may be interpreted as an assertion that the condition does not comply with the regulations, including the requirement that the condition be "appropriate."

The determination of whether a mining permit condition is "appropriate" necessarily depends upon the resolution of two issues:

- (1) Did OSMRE have authority to impose the condition;
- (2) If so, did OSMRE act reasonably in the exercise of that authority?

As an initial matter, the Hopi Tribe claims that PCC waived any claim that OSMRE did not have authority to impose Condition 12 by allegedly failing to raise the issue in its Request for Review. The aforementioned language of PCC's Request for Review may also be reasonably interpreted as an assertion that OSMRE did not have authority to impose Condition 12. Furthermore, PCC requested "that Condition 12 be modified \* \* \* in accordance with OSM regulations" and alleged that the "condition may be interpreted to require ongoing releases to dewater the impoundments beyond the requirements of 30 CFR 816.46(c)." (Request for Review at 18). These statements clearly imply that OSMRE did not have the authority to impose the condition.

To establish its prima facie case, OSMRE must produce

sufficient evidence \* \* \* to establish the essential facts. Prima facie evidence is that evidence that will justify a finding in favor of

the one presenting the evidence. It is not necessary to present evidence that is compelling, and the determination as to whether a prima facie case has been made must be made on a case-by-case basis. An important factor in making a determination regarding the amount of evidence required for a prima facie case is the availability of the evidence.

S & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350, 354 (1984) (citations omitted). Accord Rhonda Coal Co., 4 IBSMA 124 (1982). The essential fact OSMRE must establish to make its prima facie case is that the imposition of special condition number 12 was appropriate in the context of the Kayenta Permit.

OSMRE failed to meet its burden to establish a prima facie case. OSMRE was ostensibly authorized to impose the condition under the provisions of 30 U.S.C. § 1265(b)(10)(G) and its implementing regulation, 30 CFR 816.41(a). 1/

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1/ 30 U.S.C. § 1265(b)(10)(G) provides:

General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--

(10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--

(G) such other actions as the regulatory authority may prescribe;

30 CFR 816.41(a) provides in pertinent part:

(a) General. All surface mining and reclamation activities shall be conducted to (1) minimize disturbance of the hydrologic balance within the permit and adjacent areas, (2) to prevent material damage to the hydrologic balance outside the permit areas, (3) to assure the protection or replacement of water rights, and (4) to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of this part. The regulatory authority may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

30 U.S.C. § 1265(b)(10)(G) gives the OSMRE broad authority to prescribe actions to be taken by permittees to minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems. 30 CFR 816.41(a) reiterates that permittees are required, "in accordance with the terms and conditions of the approved permit," to minimize the disturbance to the hydrologic balance and, also, to assure the protection or replacement of water rights. OSMRE's hydrologist, Stephen Parsons, testified that Condition 12 was imposed for the following reasons which are consistent with the authority granted to OSMRE under 30 CFR 816.41(a):

- (1) to develop additional information, and refine the existing data, on the effects of the impoundments on the Moenkopi Wash water system (Tr. at D362, F487);
- (2) to protect the quantity of downstream surface water and users of that water (Tr. at D362, D367);
- (3) to minimize disturbance to the hydrologic balance of the Moenkopi Wash water system (Tr. at D512, D362, D367).

However, Mr. Parsons also testified that the "principle" reason for imposition of Condition 12 was to address or protect the Hopi Tribe's water rights claims (D-Tr. 510-511, 513). OSMRE admittedly does not have authority to consider such claims. (D-TR. 480-482)

Yet, OSMRE now contends in its briefs that it has authority to protect or otherwise address such claims. This contention is contrary to the language of 30 CFR 816.41(a) which speaks of protecting water "rights" not "claims." If "rights" means "claims," then a party asserting an obviously insupportable "claim" would still be entitled to the protection contemplated under 30 CFR 816.41(a). Therefore, "water rights" must mean finally adjudicated water rights or, at least, water rights which are uncontested. 2/

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2/ An uncontested water right would presumably be one that is not easily subject to challenge. If OSMRE were to rely upon a questionable water rights claim to support imposition of a burden upon a permit applicant, the applicant or others would presumably contest the validity of the right.

To hold otherwise would be to require OSMRE to become the adjudicator of water rights claims, a role which it is neither authorized nor qualified to assume. Each party concedes that the Hopi Tribe, the Navajo Nation, and PCC are all parties in a proceeding currently pending in Arizona State Court to adjudicate their water rights claims, including claims to the water being collected in the Kayenta Mine impoundments, in the Little Colorado River basin. In re The General Adjudication of All Rights to Use water in the Little Colorado River System and Source, No 6417 (Ariz. Super. Ct., Apache City, filed May 1980). The Supreme Court of the United States has held in a case involving that very same state proceeding that a United States District Court in Arizona properly refused to take jurisdiction over a case in which the Navajo Nation sought to "protect" alleged water rights that were under consideration in the Arizona adjudication. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567 (1983) ("concurrent federal proceedings are likely to be duplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property'") (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 819 (1976)).

\* \* \* Moreover, throughout the SMCRA, Congress expressed a concern for preserving existing property rights, and for not interfering with state determination of those rights.

National Wildlife Federation v. Hodel, 839 F.2d 694, 757 (D.C. Cir. 1988). Thus, OSMRE's assumption of the role of adjudicator of water rights claims is inconsistent with both relevant case law and the purposes of SMCRA, which dictate that such matters should be left to resolution by state courts.

While the analysis, heretofore, has been directed at the provisions of 30 CFR 816.41(a), the analysis is equally applicable to the other regulations upon which OSMRE bases its claim of authority to impose Condition 12. <sup>3/</sup> While one or more of these provisions may establish grounds for imposing Condition 12, they do not authorize OSMRE to impose such a condition on the grounds of protecting or otherwise addressing water rights claims. The distinction must be

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<sup>3/</sup> OSMRE cites as authority for imposing Condition 12 the following laws: 30 CFR 816.41(h), 30 U.S.C. § 1307, 30 CFR 816.49(b)(5), 30 U.S.C. § 1265(b)(8)(F), 30 CFR 780.21(h), 30 U.S.C. § 1258(a)(13)(B) and (C), 30 U.S.C. § 1265(b)(10), 30 CFR 750.6(a) and 30 CFR, Chapter VII, Subchapter E, Part 750.

made between addressing water rights claims and addressing other concerns which may indirectly benefit persons asserting water rights claims, such as the "protection of \* \* \* the quantity of surface and ground water systems" (30 U.S.C. § 1258(a)(13)(C)) and the minimization of "disturbances to the prevailing hydrologic balance \* \* \* and to the quality and quantity of water in surface and ground water systems" (30 U.S.C. § 1265(b)(10)). OSMRE may not rely upon regulations which authorize OSMRE to consider the later concerns to sanction its unauthorized consideration of water rights claims in imposing Condition 12.

The other regulations that do authorize consideration of proprietary interests in water focus upon established rights and not claims. 30 U.S.C. § 1258(a)(13)(B) and 30 CFR 780.21(h) both refer to protection of "the rights of present users of such water." (Emphasis added). 30 U.S.C. § 1307 and 30 CFR 816.41(h) require replacement of an affected water supply of an owner of an interest in real property who has "legitimate" uses for the water. A "legitimate use" is one that is not in violation of State water rights. See 48 FR 43980.

Additionally, many of these other regulations are not applicable to the case at hand. 30 U.S.C. § 1258(a)(13)(B) and 30 CFR 780.21(h) do not impose substantive performance requirements, but merely require that certain information be included in a permittee's reclamation plan in furtherance of the OSMRE's duty to insure that substantive requirements are met. See National Wildlife Federation v. Hodel, 839 F.2d at 754-755. 30 U.S.C. § 1265(b)(8)(F) and 30 CFR 816.49(b)(5) apply to the approval process for permanent impoundments, requiring a showing that there will be no diminution in water utilized by adjacent landowners before approval may be granted. None of these laws provide OSMRE with authority to impose Condition 12 to protect or otherwise address water rights claims.

Another regulation, 30 CFR 750.6(a), gives OSMRE general regulatory authority on Indian lands and the specific authority to impose special requirements to protect non-coal "resources." But, the term "resources" cannot be read to include "water rights claims." The definition of "resources" would naturally include the water which may be the subject of such claims, but not the actual claims. Again, the distinction must be made between protecting quantities of water, a component of the hydrologic balance, and protecting water rights claims. Moreover, there is absolutely no evidence that OSMRE considered 30 CFR 750.6(a) in imposing Condition 12.

Nor does the whole of Part 750 of 30 CFR Chapter VII, Subchapter E, authorize OSMRE to protect or otherwise address water rights claims. To the extent that Part 750 gives OSMRE broad discretion to impose terms and conditions upon permits as necessary to ensure compliance with the intent and purposes of SMCRA and the regulatory program, as OSMRE contends, the imposition of Condition 12 is contrary to such intent and purposes, as previously discussed.

In light of the foregoing, OSMRE's decision to impose Condition 12 may be characterized either as unauthorized or as an unreasonable exercise of its authority. First, it had no authority to impose the condition for the purposes of protecting or otherwise addressing water rights claims. On the other hand, to the extent that OSMRE has presented valid reasons based upon valid authority to impose the condition, the exercise of that authority was unreasonable and arbitrary because OSMRE gave prime consideration to a factor which it should have not considered: the existence of the water rights claims made by the Hopi Tribe.

Unavailing is OSMRE's attempt to characterize its decision as striking a reasonable balance between competing interests until the state courts reach a final adjudication of the water rights claims. OSMRE had no authority to consider such competing water rights claims, let alone balance them. The fact that its decisions regarding the use of impoundments may permit PCC and the Navajo Nation to exercise their claims to the detriment of the Hopi Tribe's exercise of their claims should be of no concern to OSMRE.

To fully understand this conclusion, it is worth reiterating the distinction between water rights claims, which OSMRE may not consider nor balance, and mining effects on quantities of surface and ground water or other components of the hydrologic balance, which OSMRE may consider and balance, in the permitting process. Because the principal consideration in imposing Condition 12 was the water rights claims of the parties, OSMRE's decision was inappropriate and, in a sense, "political" as PCC and the Navajo Nation contend.

Finally, OSMRE cannot rely upon the trust responsibilities owed by the Federal Government to Indian tribes and the special nature of Indian water rights to justify its decision to impose Condition 12. (See Respondent's Post-hearing Brief at 16-17, Reply Brief of Respondent at 10-11) First, there is no evidence that OSMRE actually relied upon these considerations in making its decision. Second, any trust responsibilities would be owed equally to both the Hopi Tribe and the Navajo Nation which oppose each other's water rights claims. Until the claims are finally adjudicated, it is impossible for OSMRE to determine which tribe

holds rights that require protection. Third, the fact that Indian water rights are generally prior and paramount to rights derived under state law does not mean that such is the situation in this particular case. Furthermore, said general rule does not address the competing claims among the two tribes. At bottom, OSMRE's arguments pertaining to these considerations may carry weight only if one of two false assumptions is made: (1) that finally adjudicated rights exist in this case, or (2) that OSMRE is authorized and capable of adjudicating water rights claims.

Based upon the foregoing, Condition 12 is hereby declared inappropriate and invalid.

The proposed findings of fact and conclusions of law submitted by the parties have either been incorporated into the body of this decision or been rejected as not supported by the law and evidence.

John R. Rampton, Jr.  
District Chief  
Administrative Law Judge

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