

EDITOR'S NOTE: Reconsideration denied by order dated September 3, 1996.

WEST VIRGINIA HIGHLANDS CONSERVANCY ET AL.
v.
OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT and THE PITTSTON COMPANY

IBLA 93-152, 95-338

Decided June 26, 1996

Appeals from informal review decisions of the Assistant Director, Field Operations, and the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, affirming determinations not to act on citizen complaints seeking enforcement of applicant/violator system regulations. 92-6-WVHC/WVWF (Pittston); 94-32-VAPITTS.

Appeals dismissed.

1. Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Generally

The Board will not reverse a decision determining how OSM resources are to be allocated absent a showing of arbitrary, capricious, or unreasonable action. In response to citizen complaints, OSM properly refuses to enforce applicant/violator system regulations 30 CFR 773.5 and 30 CFR 773.15(b)(1) at 17 minesites while an injunction prohibiting enforcement of the regulations remains in effect.

APPEARANCES: L. Thomas Galloway, Esq., Washington, D.C., and Walton D. Morris, Esq., Charlottesville, Virginia, for appellants West Virginia Highlands Conservancy, National Wildlife Federation, West Virginia Wildlife Federation, and Citizens Coal Council; Wade W. Massie, Esq., Abingdon, Virginia, for The Pittston Company; John Austin, Esq., Office of the Solicitor, Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The National Wildlife Federation (NWF), Citizens Coal Council (CCC), West Virginia Wildlife Federation (WVWF), and West Virginia Highlands Conservancy (Conservancy) have appealed from decisions issued November 17, 1992, by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM), and on August 11, 1994, by the

Assistant Deputy Director, OSM. Because both decisions raise an identical single issue, these appeals are consolidated, on motion by appellants, who contend that "[t]he only relation between the minesites involved in these appeals is Pittston's ownership or control of each of them within the meaning of 30 C.F.R. § 733.5" (Response filed Aug. 25, 1995, at 2).

The appeals arise from citizen complaints seeking to require OSM to proceed with enforcement action against The Pittston Company (Pittston) for operations conducted by affiliated contractors and companies. Appellants allege that State and Federal regulators should prohibit Pittston from applying for new mining permits until surface mining violations are corrected and unpaid civil penalties assessed on 17 coal mining sites in two states where operations were conducted by contractors affiliated with Pittston. Both appeals follow informal review pursuant to 30 CFR 842.15. In IBLA 93-152, Conservancy, NWF, and WVWF appealed a decision affirming a determination of OSM's Charleston Field Office not to proceed with enforcement action against Pittston for operations conducted by the Glory Coal Company on four surface coal mining permit sites in West Virginia. Docket No. IBLA 95-338 is a joint appeal by NWF and CCC from a decision affirming a refusal by the Big Stone Gap Field Office to take action on a citizen complaint involving 13 permit sites mined by 13 different companies in Virginia.

In each case, OSM upheld a determination by an OSM field office that a citizen complaint against Pittston cannot presently be investigated because of an injunction issued by the United States District Court for the Western District of Virginia in Pittston v. Lujan, Civil Action No. 91-0006-A (W.D. Va. Feb. 24, 1992). OSM has interpreted the injunction to prohibit initiation of enforcement action against Pittston under OSM's applicant/violator system (AVS) rules at 30 CFR 773.5 and 30 CFR 773.15(b)(1).

In an Answer filed in IBLA 95-338, OSM interprets the injunction so as to prohibit enforcement of regulations concerning ownership and control that would block Pittston from obtaining coal mining permits until it has reclaimed the 17 mining sites at issue in these appeals and paid outstanding penalties. While the district court dismissed Pittston's complaint for lack of jurisdiction, nonetheless a preliminary injunction issued against OSM was left in effect pending Pittston's appeal to the United States Court of Appeals for the Fourth Circuit. That court ordered the appeal held in abeyance pending final disposition of a challenge to 30 CFR 773.5, now pending before the United States Court of Appeals for the District of Columbia. See National Wildlife Federation v. Babbitt, 41 Environment Reporter Cases 1515 (BNA) (D.D.C. 1995), appeal docketed, No. 95-5434 (D.C. Cir. Oct. 24, 1995) sub nom. National Mining Association v. Babbitt. In support of the argument that the Fourth Circuit's order left the injunction in effect, OSM has furnished an order dated May 2, 1994, continuing the order holding the Pittston v. Lujan appeal in abeyance.

Appellants do not dispute that the district court injunction remains in effect; they argue, however, that OSM reads it too broadly. They contend the injunction does not prohibit all enforcement activities against Pittston under the ownership and control rules, but that it instead requires OSM to afford Pittston due process protection when administering enforcement procedures. They argue the Pittston v. Lujan injunction does not act as an absolute bar to OSM enforcement of ownership and control regulations in citizen complaint cases arising under section 521 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C § 1271 (1994). Rather, quoting the injunction, appellants maintain that it "bars OSM from imposing permit blocks only 'until such time as [OSM has] given [Pittston] a due process hearing with adequate notice of the offense and an independent determination as to whether [Pittston has] violated any statute or laws and whether any penalty or fine is owed'" (Statement of Reasons (SOR), IBLA 95-338, at 6-7; emphasis in original). Appellants argue that "particular facts concerning Pittston's ownership or control of each minesite" are not at issue, and that the sole "remaining substantive issue in each appeal is the continued reliance of * * * OSM * * * on the preliminary injunction" issued in Pittston v. Lujan (Response filed Aug. 25, 1995, at 2).

Appellants contend that OSM's reading of the injunction to prohibit enforcement action is not supportable, because "[i]ssuance of ten-day notices would not directly or indirectly block Pittston's access to new or revised permits, nor would such action suspend or revoke existing ones" (SOR at 7). Appellants argue that procedures are ready or could easily be developed to protect Pittston's rights under the injunction without abrogating notice procedures available to redress citizen complaints against improvidently issued permits under 30 CFR 843.21(d). Appellants define their appeals as being legal, rather than based upon fact. They maintain that "each appeal frames an issue of law that does not depend upon the particular facts set out in any of * * * [the] citizens' complaints" (Appellants' Response dated Aug. 25, 1995, at 2). OSM's decision not to investigate was based upon a matter of law rather than one of fact, they allege, and consequently the Board's review of these appeals is limited to deciding if the Pittston v. Lujan injunction forbids all relief requested by appellants. Id. at 2-3.

Pittston answers these arguments with an allegation that the injunctive relief granted Pittston by the district court prevents any unconstitutional enforcement of ownership and control rules against Pittston, including commencement of 10-day notice procedures by citizens that would result in retroactive enforcement of those rules in an unconstitutional manner (Pittston Answer at 6). Arguing that appellants have failed to show that they are adversely affected by OSM's decisions here under review, Pittston has moved that a hearing be ordered to inquire into appellants' standing to maintain these appeals. Id. at 3.

The district court injunction, effective February 6, 1991, states, pertinently, that OSM is:

hereby enjoined until further order of the Court in this suit from directly or indirectly requiring Pittston * * * to abate unabated cessation orders, unpaid civil penalties, unpaid abandoned mine land fees or forfeited state bonds heretofore assessed against Golden Chip Coal Company, Delight Coal Company, Fadco, Inc., and Elkins Energy Corporation until such time as [OSM has] given [Pittston] a due process hearing with adequate notice of the offense and an independent determination as to whether [Pittston has] violated any statutes or laws, and whether any penalty or fine is owed * * *.

This preliminary injunction shall remain in effect until further order of the Court.

On February 24, 1992, the district court issued a Memorandum Opinion expanding the preliminary injunction "to include an order that OSM shall not block [Pittston] from obtaining permits during the pendency of this order unless and until [OSM] has given Pittston notice and an opportunity to be heard on the underlying violations" (Pittston v. Lujan, Civil Action No. 91-0006-A, Memorandum Opinion dated Feb. 24, 1992, at 5-6). The Memorandum Opinion states that OSM is enjoined from taking action under AVS in Virginia, West Virginia, and other states, without first providing notice and opportunity for hearing on the underlying violations at issue. Id. at 5.

Appellants now seek a finding that OSM has authority under the expanded injunction to proceed with enforcement against Pittston so long as Pittston is afforded due process protection. They request that we order OSM to proceed with enforcement after notice and an impartial hearing, or at a minimum, order OSM to "request that its counsel in the Lujan case seek clarification from the court" about the effect of the injunction on OSM enforcement action while Pittston v. Lujan is on appeal in the Fourth Circuit (SOR, IBLA 95-338, at 9).

To this argument, OSM responds that a due process hearing consistent with the process in place under AVS will not satisfy the district court's due process expectations. According to OSM, the

injunction provides that OSM can act against Pittston only if it conducts a due process proceeding which has as its goal "an independent determination as to whether [Pittston has] violated any statute or laws and whether any penalty or fine is owed by [Pittston]." * * * Accordingly, under the injunction, OSM must find that Pittston itself has violated the law before enforcement action of the type sought by these Appellants in their citizens' complaints can be taken. The injunction thwarts OSM's ability to enforce its ownership and control rules against Pittston or to engage in oversight of Virginia's implementation of the ownership and control rules with respect to Pittston.

(OSM Answer in IBLA 95-338 at 4-5). OSM defines its options under the injunction as being either to "create some mechanism especially for Pittston and its alleged affiliates beyond those specified by * * * [AVS procedures]," or to wait for a decision from the Fourth Circuit on Pittston's appeal. OSM has chosen the latter course of action. OSM avers that it has not "sat idly" while the injunction has been in place, but has been engaged in "comprehensive settlement negotiations with Pittston over the past three years" (OSM Answer at 5).

[1] We deny Pittston's motion for hearing as moot, and dismiss the appeals. We find OSM's interpretation of the scope of the injunction in Pittston v. Lujan, *supra*, is supported by the record. Appellants allege, in their citizen's complaint, that OSM has not enforced regulatory provisions of the AVS. The district court, however, has enjoined OSM from enforcement of AVS against Pittston until "further order of the Court." Under these circumstances, OSM's course of action is reasonable; it is required by the injunction to avoid enforcement of AVS against Pittston, unless it chooses to fashion an individual inspection system outside the ownership and control regulations for each of the 17 minesites that are the subject of these appeals.

While appellants urge this latter course of action, OSM must, nonetheless, be allowed to exercise rational choice in deciding how to use agency resources. See David Haggerty, 134 IBLA 371, 374 (1996). The Board will not reverse a decision determining how OSM resources are to be allocated, absent a showing of arbitrary, capricious, or unreasonable action. See generally, Donald B. Peterson, 97 IBLA 314, 320 (1987), wherein OSM properly exercised such discretionary authority by deferring consideration of an unsuitability petition. No showing requiring a different result has been made in these cases. On the record before us, we must conclude that the OSM decisions are a reasonable exercise of the agency's discretionary authority.

We find, therefore, that appellants have failed to show error in these decisions wherein OSM refused to enforce 30 CFR 773.5 and 30 CFR 773.15(b)(1), against the Pittston Company, while the injunction issued in Pittston v. Lujan remains in effect.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, these appeals are dismissed.

Franklin D. Amess
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

