THE PITTSBURG & MIDWAY COAL MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
NAVAJO NATION, INTERVENOR

IBLA 97-353 Decided August 21, 1997

Petition for discretionary review by the Pittsburg & Midway Coal Mining Company of a decision by Administrative Law Judge Richard Reeh upholding without a hearing a decision by the Office of Surface Mining Reclamation and Enforcement denying permit revision NM-0001H (Hearings Division Docket No. DV 97-1PR).

Petition granted; Administrative Law Judge's decision reversed and case remanded for hearing.

1. Surface Mining Control and Reclamation Act of 1977: Hearings--Surface Mining Control and Reclamation Act of 1977: Permits

   An applicant for revision of a surface mining permit is entitled to a hearing before an Administrative Law Judge on the reasons for disapproval of the application. To the extent that OSM relies on advice received from BLM in its permit decision, allegations concerning the correctness of the BLM determination which is the predicate for OSM's action in fulfilling its responsibilities are properly subject to review by the Administrative Law Judge.

APPEARANCES: Lawrence G. McBride, Esq., Washington, D.C. for Pittsburg & Midway Coal Mining Company; John Retrum, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement; and William A. Johnson, Esq., Window Rock, Arizona, for the Navajo Nation.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Pittsburg & Midway Coal Mining Company (Pittsburg & Midway) has filed a Petition for Discretionary Review (PDR) of a Decision by Administrative Law Judge Richard Reeh, dated March 21, 1997, on a request for review of a Decision of the Office of Surface Mining Reclamation and Enforcement (OSM) denying in part an application for a permit revision. Judge Reeh granted the motion of OSM for summary decision and upheld the OSM permit Decision.

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We have expedited our consideration of this matter as required by regulation. See 43 C.F.R. § 4.1369.

Pittsburg & Midway is the owner of several Federal, private, and Indian coal leases for certain lands in northwestern New Mexico, operated as the McKinley Mine. On May 22, 1964, Pittsburg & Midway entered into coal lease contract No. 14-20-0603-8669 with the Navajo Nation which embraced about 11,157 acres of Tribal land. After the enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994), the mine was divided into the North Mine (located on Indian lands) and the South Mine. 1/ The North Mine is further subdivided into the East Wing and the West Wing.

On July 18, 1983, Pittsburg & Midway submitted an application package to OSM for a permit to conduct surface coal mining operations. Because of the division of responsibilities between the State of New Mexico and OSM that evolved under SMCRA, the McKinley Mine required two SMCRA permits: a permit issued by OSM for the Indian lands (the North McKinley Mine) and a permit issued by the State regulatory authority for the Federal and private lands (the South McKinley Mine). On March 7, 1986, OSM issued the initial SMCRA permit for a portion of the North McKinley Mine, Permit No. NM-0001B. In 1991, the permit was renewed as Permit No. NM-0001C, and then in 1992, the permit was broadened and designated Permit No. NM-0001G. On April 4, 1994, Pittsburg & Midway applied for renewal of Permit No. NM-0001G and for a revision of the existing permit boundary to include the remainder of the North McKinley Mine, about 4,200 acres (the East Wing) held by Pittsburg & Midway under the same lease No. 14-20-0603-8669 from the Navajo Nation. This Permit Application Package (PAP) was designated as NM-0001H.

In a February 27, 1996, letter to the Environmental Supervisor at the McKinley Mine, the Farmington (New Mexico) District Office, Bureau of Land Management (BLM), stated that it had reviewed and concurred with the portion of PAP NM-0001H that was included in the 1987 Resource Recovery and Protection Plan (R2P2). 2/ However, BLM further stated that

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1/ On Dec. 31, 1980, OSM approved the New Mexico State Program and State-Federal cooperative agreement under which the State became the regulatory authority for the Federal and other lands of the South Mine. See 30 C.F.R. §§ 931.10, 931.30. Because the North Mine is comprised of Indian lands, OSM is charged with regulatory authority of the North Mine. 30 C.F.R. § 750.6(a).

2/ The PAP is required to contain a mining plan required by 25 C.F.R. § 216.7 for Indian lands and 43 C.F.R. Part 3480 for Federal leases. 30 C.F.R. § 750.12(d)(1). The BLM is responsible under the relevant regulations for "[r]eceiving, reviewing, and conditionally approving, approving or disapproving coal exploration plans and mining plans" on Indian lands. See 30 C.F.R. § 750.6(b). Under the regulations governing Federal coal leases, BLM has the responsibility for approving R2P2's which are a prerequisite to coal mining operations. 43 C.F.R. § 3482.1(b). In

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the PAP included both the West Wing and East Wing of the Indian lease N00-C-14-0603-8669, whereas the 1987 R2P2 included Federal leases, private leases, and the West Wing of the Indian lease. The BLM letter stated that, because the "East Wing" of the Indian lease was not addressed in the R2P2, a "mining plan" was needed for those lands. The BLM letter requested specific information for the East Wing pursuant to 30 C.F.R. § 225.4 and 43 C.F.R. § 3480, stating that the information should be provided within 60 days of receipt of the letter.

In a memorandum to OSM dated February 28, 1996, the Farmington District Office "clarified" a February 1, 1996, memorandum 3/ to OSM regarding PAP NM-0001H. The February 28 memorandum used language very similar to that used in BLM's February 27, 1996, letter to the Environmental Supervisor at the mine, concluding that the R2P2 did not cover all of the Indian lands addressed in the PAP. 4/ The memorandum informed OSM that the mine would be required to submit a "mining plan" that covered the additional "East Wing" lands of the Indian lease that were not currently addressed by the R2P2. Subsequently, on September 6, 1996, OSM approved the renewal of Pittsburg & Midway's existing permit but refused to revise NM-0001G to include the East Wing lands because BLM had advised OSM that the R2P2 did

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fn. 2 (continued)
view of the somewhat differing regulatory matrix governing Indian land leases and Federal leases, Petitioner notes that

"at least since 1985-86, P&M has submitted, and operated under, one unified document covering the whole mine, for purposes of BLM's supervision and approval both of federal lease operations at the South Mine and of Indian lease operations at the North Mine. This unified document is the 'R2P2' for purposes of BLM's federal coal lease regulation, but it is also the 'mining plan' for purposes of BLM's Indian lease regulation, and for purposes of 30 CFR 750.12(d)(1) * * *."

(PDR at 4.)

3/ Although the date on the earlier memorandum, (Ex. 15 to Petitioner's Request for Review), is "February 1, 1995," it appears that this was a typographical error and the actual date was in 1996.

4/ Comparison of the language of the two memoranda suggests that BLM took a different position in its Feb. 28 memorandum than that expressed in the Feb. 1 memorandum which it purported to "clarif[y]." Thus, the earlier memorandum stated that

"[t]he Bureau of Land Management has reviewed the R2P2 for the McKinley Mine, that includes Federal Leases NM-057348, NM-57349, NM-0554844 and NM-065466. The R2P2 has been reviewed in accordance with 43 CFR 3482.2.

"We have found the plan to be complete and [that it] meets the [maximum economic recovery] criteria. We hereby approve the plan contingent on the ongoing reserve determination of each lease. If we find major discrepancies in these reserves we will contact the company directly to resolve the difference."

(Ex. 15 to Request for Review.)

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not cover all the Indian lands addressed in the PAP. Pittsburg & Midway requested review of OSM's Decision, and on review, Judge Reeh issued the Decision which is the subject of the PDR filed with the Board.

Judge Reeh concluded that the matter was appropriate for summary decision under 43 C.F.R. § 4.1125(c) pursuant to the motion of OSM, because he found that there was no disputed issue of material fact and the moving party was entitled to summary decision as a matter of law. Judge Reeh upheld the decision by OSM denying the permit revision on the ground that: (1) OSM was not authorized to approve the application in the absence of a BLM approved mining plan for the relevant area; (2) BLM had advised OSM that there was no approved plan for the East Wing; (3) BLM's finding that there was no approved plan had not been appealed pursuant to 43 C.F.R. § 4.410; and (4) BLM's determination could not be reviewed in the present proceeding because jurisdiction was not properly invoked by an appeal of the BLM finding. (Decision at 4.)

Pittsburg & Midway contends in its PDR that the Hearings Division, Office of Hearings and Appeals, is the authorized representative of the Secretary of the Interior for the purpose of hearing and deciding as fully as might the Secretary matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary. 43 C.F.R. § 4.1. Thus, Petitioner argues that in reviewing the permit Decision, the Administrative Law Judge has jurisdiction over both the Decision of OSM and the advice of BLM which formed the factual predicate on which OSM relied. Further, Petitioner asserts that precedents involving dismissal of appeals for failure to file a timely notice of appeal are not applicable in the context of a timely appeal from an appealable decision which challenges the basis for that decision. Petitioner requests that the Board reverse the Decision of the Administrative Law Judge and remand the case to the Administrative Law Judge to determine after a hearing whether the mining plan/R2P2 constitutes a whole mine plan which should be considered as an approved mining plan for purposes of the application for permit revision. Petitioner notes that this was the position it took in its Request for Review before the Administrative Law Judge. Further, Petitioner asserts that in their Answers before the Administrative Law Judge, OSM and the Navajo Nation essentially did not dispute the factual basis for this contention. Rather, Petitioner argues, they defended the OSM Decision on the ground that Petitioner had "renounced" the fact that the approved mining plan/R2P2 was the approved mining plan for purposes of Indian lands. 5/

5/ Petitioner points out that this contention was based on a submission rejected as untimely and ignored by BLM and Bureau of Indian Affairs in a proceeding challenging a notice of noncompliance regarding mining operations on the Indian lease that was ultimately resolved in Petitioner's favor by rescission of the notice. (PDR at 6-8.)

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Counsel for OSM has filed a Response to the PDR asserting that "it is not clear that BLM has approved, or that Assistant Secretaries have approved or concurred in, a single mining plan for 'the entire area' of the McKinley Mine." (Response at 9.) Counsel asserts that Petitioner's "inconsistent stance" on the question of whether the R2P2 constituted a mining plan for the East Wing lands prompted the BLM letter of February 27, 1996, requesting a stand-alone mining plan for the East Wing. (Response at 15.) It is contended by OSM that a permit for mining Indian lands may not be approved in the absence of a mining plan approved by BLM, and that OSM has no discretion in the matter. Further, OSM contends the BLM letter was an appealable decision, and that hence, the Administrative Law Judge lacked jurisdiction to review that decision in the absence of a timely appeal.

The Navajo Nation, intervenor in this proceeding, has also filed a Response to the PDR. Intervenor contends that under the regulations BLM has the exclusive authority to approve or disapprove a mining plan for the East Wing. Intervenor asserts that the BLM letter of February 27, 1996, constitutes a decision by BLM which required a separate appeal to this Board, and that, in the absence of a timely appeal of the BLM Decision, the Administrative Law Judge had no jurisdiction to review the BLM Decision. Accordingly, Intervenor argues that the Decision of OSM was mandated by the unappealed BLM Decision.

[1] If an application for a permit is disapproved, "specific reasons therefor must be set forth" and the applicant is entitled to request a hearing before an Administrative Law Judge on the reasons for the final determination. 30 U.S.C. § 1264(c) (1994); 30 C.F.R. § 775.11; 43 C.F.R. § 4.1362. As a threshold matter, we note that it is incumbent upon the administrative adjudicator at OSM to ensure that the decision is supported by a rational basis, and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. See U.S. Oil & Refining Co., 137 IBLA 223, 232 (1996); Larry Brown & Associates, 133 IBLA 202, 205 (1995); Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 Interior Dec. 481, 483 (1983). Thus, we have held that the recipient of a decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 367-68 (1990); Southern Union Exploration Co., 51 IBLA 89, 92 (1980). An administrative decision is properly set aside and remanded if it is not supported by a case record providing the information necessary for an objective, independent review of the basis for the decision. Shell Offshore, Inc., 113 IBLA 226, 233, 97 Interior Dec. 73, 77 (1990); Fred D. Zerfoss, 81 IBLA 14 (1984). Further, this principle has been upheld where the decision on appeal is predicated on a determination made by another Interior Department agency delegated with appropriate authority. Southern Union Exploration Co., supra. To the extent that OSM relies on advice received from BLM to carry out its mandate, allegations concerning the

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correctness of the BLM determination must be subject to review by the Administrative Law Judge, since the BLM determination serves as the predicate for OSM's action in fulfilling its responsibilities. See Colorado Environmental Coalition, 125 IBLA 210, 220 (1993). To hold that the BLM determination relied upon by OSM immunizes the OSM Decision denying the application for permit revision from review by an Administrative Law Judge pursuant to a timely-filed request for review is to deny the applicant the right to a hearing mandated by statute and regulation.

While we find that Petitioner is not precluded from challenging the basis for rejection of the permit revision application by failure to appeal the BLM letter of February 27, 1996, we note that the letter lacked many of the indicia of an appealable decision. The right to appeal hinges in significant part on whether the matter is sufficiently ripe for administrative review. Animal Protection Institute of America, 79 IBLA 94, 100, 91 Interior Dec. 115, 119 (1984). Determination of ripeness turns on the nature of the decision in question. While the BLM letter states that the "East Wing" of the Indian lease is not addressed in the 1987 R2P2 and a "mining plan" is needed for these lands, it goes on to request that certain information be provided within 60 days. The letter does not identify any consequences to Pittsburg & Midway of BLM's conclusion that a mining plan is needed. It simply requests information for the East Wing within 60 days and includes the statement that "this will be a stand alone 'mining plan.'"

It is also noteworthy that before the 60 days were up, BLM sent the Environmental Supervisor at the McKinley Mine another letter, dated April 29, 1996, which extended Pittsburg & Midway's due date for submitting the requested information until 90 days prior to the commencement of mining. The letter stated that it was reaffirming BLM's position with regard to the letter of February 27, 1996, and that if the Supervisor had concerns or objections, to attach them to the information BLM was requesting. Thus, it is clear that BLM continued to deal with Pittsburg & Midway on the mining plan, and the matter was not ripe for review.

Furthermore, for there to be an appealable decision the appellant must be adversely affected. 43 C.F.R. § 4.410(a); Animal Protection Institute of America, supra. The statement by BLM that a mining plan was needed for the East Wing did not adversely affect Pittsburg & Midway beyond having to submit additional information to BLM. Pittsburg & Midway was not adversely affected until 6 months after the BLM letter when OSM denied the permit revision, thus preventing the company from mining the East Wing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we grant the

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petition for discretionary review. We reverse Judge Reeh's Decision and remand the matter to him for a hearing.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

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