

INTERIOR BOARD OF LAND APPEALS

Navajo Nation

163 IBLA 245 (October 26, 2004)

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NAVAJO NATION

IBLA 2002-241

Decided October 26, 2004

Appeal from decision of the Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, terminating OSM's jurisdiction over a surface coal mining and reclamation operation. Permit No. AZ-0001.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Applicability: Initial Regulatory Program–Surface Mining Control and Reclamation Act of 1977: Indian Lands–Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program

OSM properly terminates its jurisdiction, under the Surface Mining Control and Reclamation Act of 1977, as amended, 30 U.S.C. §§ 1201-1328 (2000), over a surface coal mining and reclamation operation or any increment thereof on Indian lands, pursuant to 30 CFR 700.11(d)(1), once the operator has, following the cessation of mining operations, completed reclamation and otherwise fully complied with the applicable requirements of the initial program regulations, 30 CFR Chapter VII, Subchapter B. Termination may occur regardless of whether the affected lands remain thereafter subject to a mining lease, that was issued by the Indian tribe to the surface coal mining operator, pursuant to the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g (2000).

APPEARANCES: John B. Rutherford, Esq., Office of the Attorney General, Navajo Nation Department of Justice, Window Rock, Arizona, for the Navajo Nation; Scot W. Anderson, Esq., Denver, Colorado, for the Peabody Western Coal Company; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

The Navajo Nation ^{1/} has appealed from a February 12, 2002, decision (Decision) of the Director, Albuquerque Field Office (AFO), Office of Surface Mining Reclamation and Enforcement (OSM), granting an August 1, 2000, request by the Peabody Western Coal Company (Peabody or PWCC), to terminate OSM's jurisdiction under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (2000), over two sub-areas known as "N-1" and "N-2" (collectively, N1/2 Sub-areas), at Peabody's Kayenta Mine in Navajo County, Arizona, within the Navajo Indian Reservation. ^{2/} The N1/2 Sub-areas contain 1,145 acres that are part of lands leased by the Navajo Nation to Peabody pursuant to Mining Lease Contract No. 14-20-0603-8580. ^{3/} The surface coal mining and reclamation operations on those lands are subject to the initial regulatory program (Initial Program) provided for by section 502 of SMCRA, 30 U.S.C. § 1252 (2000), and 30 CFR Chapter VII, Subchapter B.

Peabody completed active mining operations on the N1/2 Sub-areas in the early 1980's, and following the completion of reclamation, sought to have OSM release the lands from OSM's jurisdiction under SMCRA. ^{4/} OSM specialists, accompanied by representatives of the Bureau of Indian Affairs (BIA), Navajo Nation, and Peabody, inspected the N1/2 Sub-areas on several occasions from 2000 through 2001, specifically, September 19, and 20, 2000, and June 20, and October 15, and 25, 2001, and conducted technical evaluations for the purpose of assessing Peabody's success in meeting reclamation standards, set forth at 30 CFR Part 715. See Memorandum to AFO Director from OSM Reclamation Specialist, dated Feb. 1, 2002, and attachments thereto (including Termination of Jurisdiction Checklist, dated Feb. 1, 2002). In addition, OSM consulted with BIA and the Navajo Nation concerning the question of whether to terminate jurisdiction.

^{1/} The Navajo Nation is a Federally-recognized Indian tribe.

^{2/} By order dated May 8, 2002, we granted Peabody's motion to intervene in the present appeal, as a full party to the proceedings.

^{3/} The mining lease was issued pursuant to the Indian Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396g (2000), and its implementing regulations (25 CFR Part 211).

^{4/} Peabody has yet to relinquish or surrender the applicable part of its mining lease. Peabody Answer, dated Apr. 22, 2002, at 14; see 25 CFR 211.51.

The Decision granted Peabody's request to terminate OSM's jurisdiction over the N1/2 Sub-areas, because OSM had determined, in the course of its inspections and evaluations, that Peabody had "successfully complied" with all of the requirements of the Initial Program.^{5/} (Decision at 1.) The AFO Director terminated OSM's jurisdiction pursuant to 30 CFR 700.11(d)(1).

The Navajo Nation timely appealed the Decision.

Appellant does not challenge OSM's authority under 30 CFR 700.11(d)(1) to terminate its jurisdiction over all or part of a surface coal mining and reclamation operation. Nor does appellant contest OSM's determination that Peabody has completed reclamation and otherwise fully complied with the applicable requirements of 30 CFR Chapter VII, Subchapter B on the N1/2 Sub-areas of the Kayenta Mine. However, appellant does challenge OSM's authority to terminate its jurisdiction while the N1/2 Sub-areas are still subject to a mining lease, and, it alleges, are still part of a surface coal mining and reclamation operation. It argues that termination can only properly occur after the mining lease is terminated (at least with respect to the N1/2 Sub-areas), permitting appellant to resume its post-mining use on those lands.

[1] SMCRA itself does not specifically provide for the termination of jurisdiction by OSM. However, under 30 CFR 700.11, OSM is authorized to terminate jurisdiction over a surface coal mining and reclamation operation when mining operations have ceased and the affected lands have been reclaimed to regulatory performance standards:

(d)(1) A regulatory authority may terminate its jurisdiction under the regulatory program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when:

(i) The regulatory authority determines in writing that under the initial program, all requirements imposed under subchapter B of * * * [30 CFR] [C]hapter [VII] have been successfully completed[.]

^{5/} The Decision consists of a Feb. 12, 2002, letter addressed to Peabody, that sets forth Peabody's appeal rights. In addition, attached to the Decision was a Feb. 1, 2002, memorandum from an OSM Reclamation Specialist to the AFO Director, that recommended termination of OSM's jurisdiction over the N1/2 Sub-areas. That memorandum was concurred in by the AFO Director on Feb. 12, 2002.

Once OSM is satisfied that the operator has completed reclamation of the mined lands and otherwise satisfied the requirements of 30 CFR Chapter VII, Subchapter B, OSM may terminate its jurisdiction, under 30 CFR 700.11(d)(1). National Wildlife Federation v. Lujan, 950 F.2d 765, 766-67 (D.C. Cir. 1991); Glen Beverly, 142 IBLA 98 (1997) (upholding termination by State regulatory authority).

Appellant does not dispute that OSM properly determined that Peabody had ceased mining operations, reclaimed the N1/2 Sub-areas of the Kayenta Mine, and otherwise complied with the applicable requirements of 30 CFR Chapter VII, Subchapter B.^{6/} See OSM Answer, dated Aug. 30, 2002, at 3 (“[N]o one disputes the accuracy of OSM’s findings that both of the areas in question have been completely reclaimed, that is, restored to approximate original contour with healthy, permanent vegetation for the post-mining land use, which in this case is grazing”). Nonetheless, appellant contends that OSM must retain continuing jurisdiction over the affected lands, even though there was nothing more that Peabody was required to do under the statute and regulations. We find no basis for that contention.

Appellant’s principal argument in favor of OSM’s continuing jurisdiction under SMCRA is that the N1/2 Sub-areas are still subject to the mining lease held by Peabody, which permits Peabody’s continued occupancy of the leased lands, and may preclude post-mining land use by appellant:

[W]here, as here, the operator will continue to occupy the land and prevent the Navajo Nation from beginning its future use, PWCC’s activities have not concluded. Therefore, OSM’s determination that PWCC had met all of the requirements of 30 C.F.R. [Part] 715[] was not a sufficient basis to terminate jurisdiction[.]

(Reply at 5.) Appellant concludes that what it seeks is “to take over full occupancy, use and management of the land upon the termination of jurisdiction,” and that, “[i]f

^{6/} Appellant does contend that OSM failed to require Peabody to provide “adequate financial assurance” for the continued maintenance of the retained roads deemed necessary to support the post-mining land use, as required by 30 CFR 715.17(l)(1). (Reply to Answers of OSM and Peabody (Reply), dated Mar. 7, 2003, at 8.)

We find nothing in 30 CFR 715.17(l)(1) that requires any financial assurance for the continued maintenance of retained roads. The regulation only requires that the “necessary maintenance [of retained roads be] assured.” 30 CFR 715.17(l)(1). Appellant provides no evidence that OSM did not have, in the present case, the assurance required by the regulation, or that Peabody failed to satisfy this condition for the termination of jurisdiction.

PWCC insists on remaining on the land, then the appropriate course for OSM is to view PWCC's coal mining use as continuing, and continue its jurisdiction." Id. at 7.

Appellant fails to point to anything in SMCRA or its implementing regulations that precludes OSM from terminating its jurisdiction until the operator relinquishes its lease rights to the lands. In addition, 30 CFR 700.11(d)(1) allows the termination of jurisdiction over incremental parts of a surface coal mining and reclamation operation, each of which may be subject to one larger overall mining lease, with no express requirement that the lease be relinquished in whole or in part.

OSM has no jurisdiction over the mining lease itself, or over any activities that take place under the lease other than "surface coal mining and reclamation operations," as they are defined by section 701(27) of SMCRA, as amended, 30 U.S.C. § 1291(27) (2000). Once surface coal mining and reclamation operations have ended, termination of jurisdiction under SMCRA is appropriate, and may be invoked. See 53 FR 44355, 44359 (Nov. 2, 1988) ("[I]t is reasonable to terminate jurisdiction under the regulatory program since a surface coal mining and reclamation operation as defined under the regulatory program no longer exists").

Because Peabody has ceased its mining and reclamation of the N1/2 Sub-areas, we know of nothing, and appellant identifies nothing, over which OSM could, in any event, exercise any jurisdiction under SMCRA. ^{7/}

Appellant argues that OSM should exercise continuing jurisdiction under SMCRA in order to ensure that the N1/2 Sub-areas remain reclaimed until, at the time of termination of the mining lease, appellant once again resumes exclusive use and occupancy of the lands. (Navajo Nation NA/SOR at 16.) We find nothing in SMCRA or its implementing regulations that requires OSM to retain jurisdiction, in order to ensure that the standards for reclamation, met at the time of termination,

^{7/} We are not persuaded that OSM's obligation, adopted as a matter of policy, to "protect and conserve the Navajo Nation's [Indian] trust lands and trust resources" precludes the exercise of its authority to terminate jurisdiction, once the prerequisites of 30 CFR 700.11(d)(1) have been satisfied, or that OSM has otherwise violated its trust responsibility. See OSM Directive REG-18, "Protection of Indian Lands and Indian Trust Resources," dated Mar. 28, 1996 (Ex. C attached to Notice of Appeal and Statement of Reasons (NA/SOR)).

remain satisfied until post-mining use resumes.^{8/} The protection that appellant seeks is not to be found in SMCRA. See 53 FR at 44357 (“It was not the intent of the Surface Mining Act that the regulatory authority maintain perpetual jurisdiction over all lands that were mined. It is recognized that the Surface Mining Act does not impose requirements upon fully reclaimed land.”); National Wildlife Federation v. Lujan, 950 F.2d at 768-69 (Reclaimed mine sites not subject to “perpetual regulation” under SMCRA); LaRosa Fuel Co., Inc. v. OSM, 134 IBLA 334, 349 (1996) (30 CFR 700.11(d)(1) created “established point at which regulatory jurisdiction ended under the Act * * * for OSM”).

To the extent not explicitly or implicitly addressed herein, appellant’s arguments that OSM erred, as a matter of fact or law, are considered and rejected, as contrary to the facts and law, or immaterial.

Accordingly, we find that the AFO Director properly terminated OSM’s jurisdiction over the N1/2 Sub-Areas of Peabody’s Kayenta Mine.^{9/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

H. Barry Holt
Chief Administrative Judge

^{8/} If the termination of jurisdiction has been obtained as a result of fraud, collusion, or misrepresentation of a material fact at the time of termination, OSM has ample authority, under 30 CFR 700.11(d)(2), and indeed is directed, to “reassert” its jurisdiction under SMCRA. See National Wildlife Federation v. Lujan, 950 F.2d at 769-70; Cheyenne Sales Co., Inc. v. OSM, 163 IBLA 30, 52-53 (2004).

^{9/} In filing its appeal, appellant sought an award of attorney’s fees and expenses “to the extent authorized by law.” (NA/SOR at 19.) Since we now conclude that appellant has failed to establish any factual or legal error in OSM’s termination of jurisdiction over the N1/2 Sub-areas of the Kayenta Mine, we hold that appellant has not “prevail[ed] in whole or in part, achieving at least some degree of success on the merits,” and thus is not eligible for an award from OSM of attorney’s fees and expenses, pursuant to section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000). 43 CFR 4.1294(b); see, e.g., LaRosa Fuel Company, Inc. v. OSM, 159 IBLA 203, 216 (2003).

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge