

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2022-000356-001 DT

04/28/2023

HONORABLE JOSEPH P. MIKITISH

CLERK OF THE COURT
D. Tapia
Deputy

FARMERS INVESTMENT CO
SAVE THE SCENIC SANTA RITAS
ASSOCIATION

G VAN VELSOR WOLF JR.

v.

THE OFFICE OF THE ARIZONA STATE MINE
INSPECTOR (001)
PAUL D MARSH (001)
ROSEMONT COPPER COMPANY (001)

DAVID F JACOBS
NORMAN D JAMES

MICHAEL K FOY
PAUL A KATZ
TYLER D CARLTON
JUDGE MIKITISH
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

UNDER ADVISEMENT RULING – ADMINISTRATIVE REVIEW DISMISSED

Appellant Farmers Investment Co. (“Farmers Investment”) and Appellant Save The Scenic Santa Ritas Association (“SSSR”) (collectively “Appellants”) brought this action for judicial review of an administrative decision and declaratory relief to challenge the Appellee Arizona State Mine Inspector decision to classify an amendment to the Mined Land Reclamation Plan of Appellee Copper World, Inc. (“Copper World”) as “not substantial.” The Court has reviewed the Motion to Dismiss filed by Appellees Office of the Arizona State Mine Inspector and Paul D. Marsh (collectively “the Mine Inspector”), filed on January 6, 2023; Copper World, Inc.’s Motion to Dismiss Appeal for Lack of Jurisdiction, filed January 6, 2023; the Appellants’ Consolidated Response in Opposition to Appellees’ Motion to Dismiss, filed on February 2, 2023; the Mine Inspector’s Reply, filed February 17, 2023; and Copper World’s Reply, filed

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February 17, 2023. The Court heard oral argument on March 1, 2023, and took the Motions under advisement. For the reasons stated below, the Motions to Dismiss are granted.

BACKGROUND

In August 2021, Copper World (then known as Rosemont Copper Company) submitted to the Mine Inspector a Mined Land Reclamation Plan (the Original Plan) for a mining project in the Santa Rita Mountains south of Tucson. *See* A.R.S. §§ 27-901 to 27-1026. The Original Plan proposed to disturb 1,292 acres of land and excavate two open pit mines. Thereafter, the Mine Inspector provided the required statutory notice and opportunity for public comment. *See* A.R.S. § 27-929(A). SSSR filed Objections to the Original Plan on October 15, 2021. Later in October 2021, the Mine Inspector approved the Reclamation Plan. No Appeal was filed regarding the Mine Inspector's approval.

On May 5, 2022, Copper World submitted an Amended Plan ("the Amended Plan") to the Mine Inspector. The Amended Plan proposed to disturb 3,954 acres of land, excavate six open pit mines, and create a new 336-acre heap leach pad containing 104 million tons of oxide ore material. Copper World sent the Mine Inspector a letter identifying four "major changes" between the Original Plan and the Amended Plan.

The Mine Inspector forwarded the Amended Plan to a consultant for technical review. In part, the consultant provided expertise as to whether the Amended Plan was technically complete and whether the proposed changes were considered "substantial" under Arizona Law. Arizona Law provides that the Mine Inspector must determine whether the requested change is substantially different from the Original Plan. A.R.S. § 27-927(C). If the proposed amendment involves a substantial change, the Mine Inspector must provide notice of the proposed amendment. A.R.S. § 27-929(A). Persons adversely affected by the change are permitted to file objections and request a hearing. A.R.S. § 27-929(D). If the Amended Plan does not involve a substantial change, the owner or operator is required to file fully an amendment to the Reclamation Plan and modify the financial assurance as necessary. A.R.S. § 27-929(A)(D).

On May 20, 2022, Mine Inspector informed Copper World that its consultant determined that the changes proposed in the Amended Plan were "not substantial". On July 27, 2022, the Mine Inspector notified Copper World that the Amended Plan was technically complete, met all of the applicable statutory and regulatory requirements, and that the proposed changes were not substantial. The Mine Inspector did not send a copy of the July 27, 2022, letter to the Appellants.

The Appellants each sent letters to the Mine Inspector urging that the Amended Plan represented substantial changes and requesting statutory notice and the opportunity to file objections. The Mine Inspector responded to Farmers Investment on September 13, 2022, and to

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SSSR's Letter on September 15, 2022. In its responses, the Mine Inspector stated that it was not required to follow the notice and objection process because the Amended Plan did not provide substantial changes. The Appellants filed their Notice of Appeal within 35 days of receiving their Letters.

LEGAL STANDARD

Interpreting the statutory requirements governing the Judicial Review of Administrative Decisions is a question of law. *Ariz. Physicians IPA, Inc. v. W. Ariz. Reg'l Med. Ctr.*, 228 Ariz. 112, 114, ¶ 9 (App. 2011). In addition, whether a Court has jurisdiction is a question of law. *Buehler v. Retzer ex rel. Indus. Comm'n*, 227 Ariz. 520, 521, ¶ 4 (App. 2011).

DISCUSSION

1. Does the Court lack jurisdiction over Count One Seeking Judicial Review under the Administrative Review Act?

The Mine Inspector first argues that its determination that the Amended Plan is “not substantial” is not an appealable agency action. It argues that the Legislature granted the right to appeal reclamation plans in only one instance: “the owner operator of an exploration operation or mining unit may request a hearing on the State Mine Inspector’s denial of a plan.” A.R.S. §27-933. The Mine Inspector argues that because Appellants were not parties to the Amended Plan, the Court has no jurisdiction under the Administrative Review Act for their Appeal. The Mine Inspector argues that only “persons appearing before the administrative agency or given legal notice of the proceedings before the administrative agency” are parties for the purposes of the Administrative Review Act. *See Roer v. Superior Ct.*, 4 Ariz. App. 46, 46 (1966).

Copper World argues that “a right to appeal exists only by force of statute and limited by the terms of the statute.” *Pima County v. State Dep. of Revenue, Division of Property and Special Taxes*, 114 Ariz. 275, 277 (1977) (internal citations omitted). It further argues that if the party does not fall within the class of persons that the legislature grants the right to appeal an administrative decision, the Court lacks jurisdiction to hear that party’s case. *Pima County*, 114 Ariz. at 278-79. Copper World argues that a person is not entitled to appeal under the Administrative Procedures Act unless he “appeared before the administrative agency or [was] given legal notice of the proceedings before the administrative agency which reached the decision sought to be reviewed.” *Roer*, 4 Ariz. App. at 49. Copper World goes on to assert that the Appellant did not appear before the Agency or received legal notice of the Amended Plan. Therefore, it concludes that the Appellants are not “parties” that can appeal the Mine Inspector’s decision under the ARA.

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Like the Mine Inspector, Copper World argues that only owners or operators of the mine may request a hearing regarding Mine Plan Reclamation Plans. Copper World argues that allowing a judicial review without an administrative appeal violates principles of exhaustion of administrative remedies. It further asserts that the Mine Inspector did not issue an “administrative decision” subject to judicial review. It argues that judicial review is available under the ARA only when a hearing is required before the agency issues a decision. *Rose v. Ariz. Dep’t of Corr.*, 167 Ariz. 116, 118-120 (App. 1991).

The Appellants argue that the Administrative Review Claim is properly before the Court because the ARA was “enacted to permit Judicial Review of Administrative Decisions when review of an agency’s decision has not been otherwise provided for.” *Pima County*, 114 Ariz. at 279. The Appellants assert that they were given legal notice of the proceedings and appeared before the Agency when they received legal notice of the Original Plan and when SSSR filed Objections to that plan.

The Appellants go on to argue that the Mine Inspector’s decision that the Amended Plan presented no substantial change is separate and distinct from the statute that governs the approval of a plan amendment. Because the substantial change determination under A.R.S. §27-927(B) does not provide a definitive process for review, the ARA provides the means for challenging the decision. *See Pima County*, 114 Ariz. at 279. The Appellants argue that the issuance of the permit, or approval of the plan, and decisions on key procedural issues preceding the Agency’s decision are separate and distinct for purposes of ARA jurisdiction. *See State Board of Technical Registration v. Bauer*, 84 Ariz. 237 (1958).

The Appellants argue that an Agency’s decision that is not preceded by a hearing does not prevent an appeal under the ARA. A.R.S. § 12-902(A); *Arizona Board of Regents ex rel. University of Arizona v. State ex rel. State of Arizona Public Safety Retirement Fund Manager*, 160 Ariz. 150, 154 (App 1989); *Bolser Enterprises, Inc. v. Arizona Registrar of Contractors*, 213 Ariz. 110, 114 ¶ 18. (App. 2006) (no statutory requirement for a hearing “before an ROC decision can be considered a final administrative decision.”)

The Appellants conclude that dismissal of their claims would contravene the Legislature’s intent to give parties “who may be adversely affected” the right to file objections and to request a hearing regarding substantially Amended Plans.

The parties agree that in order to appeal under the ARA, and Appellant must either (1) have received legal notice of the proceedings, or (2) appear before the agency regarding the decision. *See Roer*, 4 Ariz. App. at 46. In this case, the Appellants correctly identify that the decision being appealed is the Mine Inspector’s determination that the changes in the Amended Plan are not “substantial.” The Appellants, however, did not receive, and were not entitled to

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receive, legal notice of the proceedings relating to the determination that the Amended Plan changes are not “substantial.” Rather, they received notice and appeared before the Agency regarding its determination on the Original Plan. Likewise, neither party appeared before the Agency, nor had the right to appear before the Agency regarding that decision. Because the Appellant did not receive legal notice nor appear before the Agency regarding the decision, they do not have the right to appeal under the ARA and this Court lacks jurisdiction to review their Appeal.

2. Can this Court exercised jurisdiction to grant declaratory judgment relief?

The Mine Inspector argues that a declaratory judgment count cannot serve as an end run to obtain review of an agency action where ARA review is not available. It notes that an “action for declaratory relief is not appropriate to review an administrative decision when there exists a procedure to appeal from the administrative ruling.” *Tanner Companies v. Ariz. State Land Dep’t*, 142 Ariz. 183, 187 (App.1984).

Similar to the Mine Inspector, Copper World argues that the Appellants’ declaratory judgment claim requires the Court to review whether the Mine Inspector erred in concluding which the changes were not substantial. Therefore, the Appellants are not simply seeking declaratory relief, but asking the Court to review the Mine Inspector’s decision.

The Appellants argue that under the Arizona Uniform Declaratory Judgments Act (“UDJA”), anyone whose rights “are affected” by a statute “may have determined any question of construction or validity arising under the” statute. A.R.S. § 12-1832. The Appellants argue that declaratory relief is necessary for the Court to provide an interpretation of “substantial change” under A.R.S. § 27-927(B).

While the Appellants argue that the Mine Inspector’s interpretation of “substantial change” and the statutory exemptions is erroneous, they do not explain how or discuss what interpretation is appropriate. Based on the record, the Court concludes that the Appellants are not addressing statutory interpretations but rather the Agency’s decision on how to apply statutes to the facts of this case. Declaratory relief is not appropriate to address those issues.

3. Should the Court grant the Appellants leave to amend to allow them to pursue this Appeal as a Special Action?

In their response, the Appellants argue that even if the first two claims fail, they should be allowed to amend their claims to pursue a special action addressing the Agency’s decision. A Complaint for a Special Action is proper “when a party is raising the question of whether a Defendant is failing to perform a duty required by law.” *Arizona Board of Regents*, 160 Ariz. at

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155. Appellants argue that the Mine Inspector's decision not to give notice of a substantial change and allow adversely affected parties to object to the change and request a public hearing, demonstrates that the Mine Inspector failed to perform such a duty.

The Mine Inspector replies that it complied with all statutory requirements and the determination that the Amended Plan was not a substantial change eliminated any additional statutory duties.

Copper World argues that the Court lacks any authority to give leave to amend the Complaint and can only dismiss the Appeal.

The Court finds no basis to conclude that the Mine Inspector failed to perform a duty required by law at this stage. Rather, the Appellants solely complain that the Mine Inspector failed to apply the law as they would like it to be applied. There is no basis to grant leave to amend the Appeal. This finding, however, is without prejudice to the Appellants to file the appropriate action if otherwise provided by law and supported by the record.

CONCLUSION

Based on the foregoing,

IT IS ORDERED granting the "Motion to Dismiss of Appellees Office of the Arizona State Mine Inspector and Paul D. Marsh", filed January 6, 2023; and "Copper World, Inc.'s Motion to Dismiss Appeal for Lack of Jurisdiction", filed January 6, 2023.

No matters remain pending in connection with this appeal. This is a final order pursuant to J.R.A.D. 13 and Rule 54(c), Ariz. R. Civ. P.

Joseph P. Mikitish

THE HON. JOSEPH P. MIKITISH
Judge of the Superior Court

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