

AMCA COAL LEASING, INC. (ON RECONSIDERATION)

IBLA 88-104

Decided May 8, 1990

Petition for reconsideration of AMCA Coal Leasing, Inc., 112 IBLA 103 (1989), which affirmed a decision of the Moab District Office, Utah, Bureau of Land Management, requiring the payment of advance royalties in lieu of continued operation on coal lease SL-063058.

Petition granted; prior Board decision affirmed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Diligence

Where a pre-1976 coal lease is modified in 1981 and included in the modified lease is a term designating the lease as a logical mining unit, a subsequent rulemaking announcing that leases would no longer be automatically designated as logical mining units did not change the logical mining unit status of the modified lease.

2. Coal Leases and Permits: Generally--Mineral Leasing Act Generally--Regulations: Force and Effect as Law--Regulations: Validity

The intent of the proviso in a modified Federal coal lease that it is issued pursuant and subject to the terms and provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior then in force or subsequently promulgated and to make them "a part hereof," is to incorporate future regulations, even though inconsistent with those in effect at the time of a modification of the lease under the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 203 (1982), and even though to do so creates additional obligations or burdens for the lessee.

APPEARANCES: John S. Kirkham, Esq., Salt Lake City, Utah, for petitioner; David K. Grayson, Esq, Assistant Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

AMCA Coal Leasing, Inc. (AMCA), has filed a petition for reconsideration of this Board's decision in AMCA Coal Leasing, Inc., 112 IBLA 103 (1989). In that decision we affirmed a decision of the Moab District Office, Utah, Bureau of Land Management (BLM), requiring payment of advance royalty in lieu of continued operation on Federal coal lease SL-063058. AMCA asserts in its petition for reconsideration that our affirmance is based on an erroneous determination that the lease became a logical mining unit (LMU) on the date of lease modification, October 26, 1981, and on an incorrect application of the definitions of "diligent development period" and "continued operation" found in regulations with an effective date of August 30, 1982.

In its appeal, AMCA argued that BLM erred in determining that its lease became subject to the diligence requirements on the date of lease modification (October 26, 1981), rather than on the date of lease readjustment. In AMCA Coal Leasing, Inc., *supra*, at page 106 we held:

In this case section 11 of the modified coal lease provided that "[t]his lease is automatically considered to be an LMU." Thus, the date of its modification and the date of approval of the LMU are the same, October 26, 1981. The LMU contained a lease which was issued prior to August 4, 1976, and which was not readjusted after August 4, 1976, until after LMU approval. Therefore, BLM correctly concluded that the diligence requirements commenced on October 26, 1981. [Footnote omitted.]

Our holding was based on 43 CFR 3480.0-5(a)(13)(ii)(A), which defines diligent development period as a 10-year period which for LMU's begins on "[t]he effective approval date of the LMU, if the LMU contains a Federal lease issued prior to August 4, 1976, but not readjusted after August 4, 1976, prior to LMU approval."

Petitioner contends that the Board's conclusion is erroneous because the lease did not become an LMU on October 26, 1981, and because the regulation defining diligent development period (cited above) could not have applied on October 26, 1981, since it was not published until July 30, 1982, and not effective until August 30, 1982. ^{1/}

Although petitioner concedes that its modified lease contained section 11 concerning LMU's, it argues that in the preamble to the 1982 rulemaking the Department stated:

^{1/} The definitions included in 43 CFR 3480.0-5 were first proposed as amendments to Department of Energy regulations at 10 CFR Part 378. *See* 46 FR 62226 (Dec. 22, 1981). They were adopted, however, as a final rule at 30 CFR 211.2(a). *See* 47 FR 33154 (July 30, 1982). When the responsibilities for administration of coal exploration and development were transferred from the Minerals Management Service to BLM, these provisions were redesignated as Part 3480 of Title 43. 48 FR 41589 (Sept. 16, 1983).

It is not DOI [Department of the Interior] policy to automatic-ally designate any lease as an LMU. * * * The designation of LMU's is discretionary under Section 2(d) of MLA [Mineral Leas-ing Act of 1920]. With these final rules, it is not DOI policy automatically to designate any Federal lease to be an LMU. The former rules designating each lease an LMU are repealed with this rulemaking and BLM's final rulemaking for 43 C.F.R. 3400. [Emphasis in original].

47 FR 33159 (July 30, 1982); see 47 FR 33133 (July 30, 1982). Petitioner's position is that "while there was a time period that arguably the Lease was considered to be an LMU [2] such was not the case at any time after July 30, 1982 and the regulations concerning diligent development of LMU's could not have applied after that date" 3/ (Petition at 8-9).

In the decision appealed from, BLM stated that the lease contained 3,668,000 tons of recoverable coal when it became subject to diligence. BLM determined, based on the definitions in 43 CFR 3480.0-5(a)(6) and (12) (1982), that commercial quantities (1 percent of recoverable coal or LMU recoverable coal) had been recovered from the lease by September 1983. Petitioner asserts that the decision is erroneous in this respect because under the regulations in effect in 1981, diligent development was the recovery of commercial quantities, then defined as one-fortieth of the LMU reserves before June 1, 1986. (See 43 CFR 3400.0-5(i)(2) and (m)(2) (1981).) It reasons that because only 1 percent of the reserves were produced between October 26, 1982, and September 1983, "it is impossible that 2.5% of the reserves were produced between October 26, 1981 and August 30, 1982. Therefore, diligent development was not achieved on the LMU prior to August 30, 1982" (Petition at 9).

Petitioner concludes that because its lease never was an LMU its diligence requirements are governed by the definitions of diligent development period and continued operation applicable to individual leases not LMU's. Those definitions, petitioner charges, dictate that the diligent development period did not begin until March 1, 1984, and that the determination of recoverable reserves is properly made from that date.

In its response to the petition, BLM argues that the lease was an LMU from its modification on October 26, 1981, until section 11 of the lease was stricken from the lease upon its readjustment on March 1, 1984. BLM points out that under the regulations in effect in 1981, 43 CFR 3475.5(a),

2/ AMCA denies that the lease has at any time been considered as an LMU, and it argues, based on the preamble to regulations published in 1986 (51 FR 13228 (Apr. 18, 1986)), that compliance with public participation procedures is necessary prior to approval of LMU's, that since those requirements have not been satisfied for its lease, it could never have been an LMU.

3/ AMCA's reference to July 30, 1982, is the date the regulations were published in the Federal Register. Those regulations, however, were not effective until Aug. 30, 1982. Therefore, the policy of not automatically designating a lease as an LMU was not effective until that date.

each lease was to be considered an LMU on its effective date or on June 1, 1976, whichever was later. BLM states that with the promulgation of the 1982 rulemaking cited by AMCA, automatic designation of leases as LMU's was discontinued. The 1982 regulations, BLM states, allowed a lessee to request removal of the LMU provision from its lease, but AMCA did not request such removal until January 8, 1990. ^{4/} BLM asserts that the issue concerning LMU status of the lease is moot. Appended to BLM's response is a copy of an October 31, 1984, memorandum from the Associate Solicitor, Energy and Resources, to the Director, BLM, titled "Effect of a coal lease modification on the development and financial obligations of the lessee," which BLM asserts supports its position that a pre-1976 unadjusted coal lease, which is modified under 30 U.S.C. § 203 (1982), is properly subject "to post-1976 rules and regulations" (Response at 2).

The issue decided in AMCA Coal Leasing, Inc., *supra*, was whether BLM correctly determined that the diligence requirements commenced on October 26, 1981. Finding that the lease was an LMU on that date, and referring to 43 CFR 3480.0-5(a)(13)(ii)(A), which was promulgated in 1982, we concluded that the diligence requirements did, indeed, commence on October 26, 1981. We now affirm that result.

[1] First, there is simply no question that the lease was, by its own terms (section 11), an LMU on the date of its modification, October 26, 1981. Petitioner seeks to convince us that because the Department changed its policy in August 1982 so that leases were no longer to be automatically designated as LMU's, regulations concerning the diligent development of LMU's were not effective as to its lease after that date. We are not persuaded.

BLM does not dispute the change in the regulations. However, nothing in the preamble to those regulations or in the regulations themselves indicates that those regulations were intended to be self-executing to the extent of removing, eo instante, from any lease in existence a provision designating such a lease as an LMU. In fact, the regulations expressly provided otherwise. Thus, 43 CFR 3475.6 (c) states that, under certain circumstances, holders of leases containing the LMU provision may request to have that provision deleted from their leases. Assuming AMCA could have availed itself of that provision between the time of lease modification and the readjustment of the lease, it did not do so. Clearly, if AMCA were correct that the lease ceased to be an LMU when the 1982 regulations were promulgated, there would have been no need for a section providing

^{4/} The regulation referred to by BLM is 43 CFR 3475.6(c), which provides:

"(c) The holder of any lease issued or readjusted between May 7, 1976, and the effective date of this regulation, whose lease provides by its own terms that it is considered to be an LMU, may request removal of this provision from any such lease. Such request shall be submitted to the authorizing officer." The regulation appears to be limited to leases issued or readjusted between May 7, 1976, and Aug. 30, 1982. AMCA's lease was issued prior to May 7, 1976, and was readjusted after Aug. 30, 1982. It was, however, modified on Oct. 26, 1982.

that leaseholders could request the deletion of LMU provisions. Therefore, ACMA's lease continued with the LMU status in effect until section 11 of the lease was stricken by BLM when it readjusted the lease on March 1, 1984.

The relevant inquiry, however, is not how long the lease may have continued in LMU status, but whether 43 CFR 3480.0-5(a)(13)(ii)(A) governs the point in time on which its diligent development obligation commenced.

[2] The modified lease, SL-063058, contains in section 1 the express proviso that it is subject to the terms and provisions of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1982), and to all regulations of the Secretary of the Interior, "which are now in force or * * * hereafter in force and all such regulations are made a part hereof." This Department has long recognized that the intent of the term "now or hereafter in force" is to incorporate future regulations even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. Veola & Aaron Rasmussen, 109 IBLA 106, 111 (1989); Coastal Oil & Gas Corp., 108 IBLA 62, 66 (1989); Gilbert V. Levin, 64 I.D. 1, 3-4 (1957).

The 1982 rulemaking provided definitions for the terms governing operations for the exploration, development, and production of coal from Federal coal leases. Those definitions included a definition for "diligent development period" at 43 CFR 3480.0-5(a)(13), which is still in existence. Although those definitions had not been promulgated at the time of lease modification on October 26, 1981, they became effective on August 30, 1982. At that time, the lease at issue contained the LMU provision. That provision was not removed until the March 1, 1984, readjustment of the lease. Therefore, on August 30, 1982, the definition of "diligent development period," as set forth at 43 CFR 3480.0-5(a)(13)(ii)(A), was applicable as to AMCA's lease. 5/

As a duly promulgated regulation, 43 CFR 3480.0-5(a)(13)(ii)(A) has the force and effect of law, is binding on the Department, and was prop-erly utilized by BLM in determining AMCA's obligations under the lease as modified. See Rasmussen, supra at 110, and cases cited therein. The 1982 regulatory provisions clearly controlled, to the exclusion of regulations which may have been in effect at the time of lease modification. See Coastal States Oil & Gas Corp., 108 IBLA 62, 66 (1989). As we held in our

5/ We recognize that if AMCA's lease and the regulations were exam-ined only as of Mar. 1, 1984, the date of lease readjustment, 43 CFR 3480.0-5(a)(13)(i)(B), the regulation cited by AMCA in its appeal, would have been applicable. However, the purpose of defining "diligent development period" was to establish the commencement date for the running of that 10-year period. Since AMCA's lease was an LMU on the effective date of the regulations defining "diligent development period," its LMU status controlled the application of the definition. The subsequent removal of that status in March 1984 did not result in the assignment of a new commencement date for the running of the 10-year period.

earlier decision, "BLM correctly concluded that the diligence requirement commenced on October 26, 1981." 112 IBLA at 106.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, and AMCA Coal Leasing, Inc., 112 IBLA 103 (1989), is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

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