

Editor's note: Reconsideration granted; holding set aside (findings of fact and conclusions of law not disturbed) by Order issued June 26, 1996 – See 191-A and B below.

WESTERN FUELS-UTAH, INC.

IBLA 94-25 Decided April 11, 1996

Appeal from decision of the Colorado State Director, Bureau of Land Management, readjusting the royalty rate for coal recovered by underground mining operations on Federal coal lease C-023703.

Affirmed.

1. Coal Leases and Permits: Readjustment–Coal Leases and Permits: Royalties–Mineral Leasing Act: Royalties

The royalty rate set at the time of the readjustment will remain in effect through the next 10-year term. BLM would be unable to raise that rate even though improved economic conditions might clearly justify a higher royalty. To justify a lower royalty rate at the time of readjustment, there must be existing adverse engineering or geologic conditions that can reasonably be expected to render underground coal recovery uneconomic for the full 10-year term if no royalty relief is afforded. This approach adequately protects both the Government's interest in obtaining a fair return and the interest of the lessee who is afforded the opportunity to obtain royalty relief when conditions warrant that relief.

APPEARANCES: Charles F. Holum, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Western Fuels-Utah, Inc. (Western Fuels), has appealed an August 20, 1993, decision issued by the Colorado State Director, Bureau of Land Management (BLM), setting an 8-percent royalty rate for coal removed from lease C-023703 by underground mining.

Preference right coal lease C-023703 was originally issued effective March 1, 1963, to a predecessor in interest of Western Fuels under the authority of the Mineral Leasing Act of February 25, 1920 (MLA), 30 U.S.C. § 207 (1994). Pursuant to the MLA and by the express terms of section 3(d) of the lease, BLM retained the right to readjust the royalty rate and

other lease terms at the end of the 20-year term, which was March 1, 1983. On May 17, 1982, BLM advised Western Fuels that the terms and conditions of its lease would be readjusted pursuant to 43 CFR 3451.1, and on May 3, 1983, BLM tendered the proposed terms and conditions of the readjusted lease.

Western Fuels owns and operates the Deserado Mine, a private railroad, and related coal transportation facilities which were designed for the Bonanza Power project. The Bonanza Power project was designed in the late 1970's and early 1980's to serve an anticipated burgeoning electric load spurred by the new oil shale industry in western Colorado and eastern Utah. The power plant was to consist of two units, and, when the second unit was running, 2.5 million tons of coal would be consumed each year. When the anticipated increase in demand did not materialize, only one generation unit was placed on line. According to Western Fuels, as a result of the drastic downturn in coal needs, the Deserado Mine could not be operated as an efficient and inexpensive component of the power project in 1983.

The reduction to a one unit plant had another significant impact on Western Fuels' operations. When designed for the two-unit plant, the anticipated capital costs were amortized over a significantly larger tonnage of coal. When the increase in demand did not materialize, the mine had to be replanned to serve the one-unit operation at the Bonanza Plant, with a per-ton cost at least 20 percent higher than that projected for a two-unit operation. Western Fuels maintains that a single unit generating plant would not support the engineering and design decisions made at the Deserado Mine when designing for a two-unit operation.

Western Fuels filed objections to the lease readjustment. In a February 7, 1985, decision BLM formally rejected Western Fuels' objections and readjusted the lease. Western Fuels appealed BLM's February 7, 1985, decision to this Board. In Western Fuels-Utah, Inc., 98 IBLA 114 (1987), we affirmed the timeliness of the readjustment, citing Coastal States Energy Corp. v. Hodel, 816 F.2d 502 (1987). However, the Coastal States decision also held that the Department could not automatically set the readjusted royalty for coal removed from underground mining operations at 8 percent, because to do so ignored the provisions of 43 CFR 3473.3-2(a)(3) (1987), that a lower royalty could be set "if conditions warrant." 816 F.2d at 507. The Board remanded Western Fuels-Utah, Inc. and directed BLM to determine whether the conditions warranted a lower royalty rate.

Western Fuels appealed the Board's timeliness decision and it was subsequently affirmed. Western Fuels-Utah Inc. v. Lujan, 895 F.2d 780 (D.C. Cir. 1990), cert. denied, 498 U.S. 811 (1990). However, the question of whether the royalty rate was properly set at 8 percent was not addressed. When the court action became final the matter was remanded to BLM, and it began its reexamination of the royalty rate.

The Departmental regulation in effect when the Board issued its decision in Western-Fuels Utah, Inc., supra, called for a royalty rate not

less than 8 percent, "except that the authorized officer may determine a lesser amount, but in no case less than 5 percent, if conditions warrant." 43 CFR 3473.3-2(a)(3) (1987). There being no definition of the phrase "conditions warrant," BLM issued Instruction Memorandum (IM) 88-148 on December 18, 1987, instructing BLM authorized officers to look for adverse geologic and engineering conditions projected to exist during the 10-year term of the readjusted lease which would render underground coal economically unrecoverable at an 8-percent royalty rate. Short-term conditions, which could be addressed through a royalty rate reduction request pursuant to section 39 of the MLA, 1/ were not deemed to be an appropriate basis for readjusting the royalty rate lower than 8 percent.

When reexamining the royalty for coal removed during the 10-year period from March 1, 1983, to March 1, 1993, BLM relied on 43 CFR 3473.3-2(a)(3) (1986) 2/ and IM 88-148. Following the Board's decision, BLM notified Western Fuels that it should submit information supporting a royalty rate reduction. However, the information submitted by Western Fuels did not include geologic or engineering data. As a result, BLM's State Office directed the Resource Area office to review Western Fuels' files for engineering and geologic data that might aid in the royalty rate determination. After this review BLM concluded that there was no evidence of adverse geologic and engineering conditions warranting a royalty rate of less than 8 percent. The State Director then issued the August 20, 1993, decision now on appeal.

Western Fuels notes on appeal that BLM has granted interim relief by approving a 2-year section 39 royalty reduction, effective May 1, 1991. In a February 21, 1992, decision BLM found that a lower royalty would "serve the interests of the Government and will encourage the greatest ultimate

1/ Section 39 of the MLA authorizes reduction of the royalty rate "in the interest of conservation of natural resources" if, in the judgment of the Secretary of the Interior it is "necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein." 30 U.S.C. § 209 (1994).

2/ The regulations governing royalty for coal removed from an underground mine have subsequently been amended. All references in this decision are to the regulations as they existed prior to this amendment. BLM has promulgated a new regulation providing for a flat royalty of 8 percent of the value of coal removed from an underground mine, without regard to conditions prevailing in the mining operation. 43 CFR 3473.3-2(a)(2) (55 FR 2664 (Jan. 26, 1990)). Under the new regulations, the 8-percent royalty rate is to be automatically applied at the "next scheduled readjustment of the lease." 43 CFR 3473.3-2(b) (55 FR 2664 (Jan. 26, 1990)). Thus, the question of the appropriate royalty rate for C-023703 set by the decision now on appeal remains at issue. See Kanawha & Hocking Coal & Coke Co., 118 IBLA 364, 370 n.5 (1991).

recovery, in the interest of conservation of natural resources, and will promote development of the leases." Western Fuels asserts that the decision on appeal is arbitrary because BLM has already found that "conditions warrant" a 5-percent royalty.

Western Fuels acknowledges that this Board upheld the standards set out in IM 88-148 in Atlantic Richfield Co., et al., 121 IBLA 373, 98 I.D. 429 (1991), but disagrees with BLM's application of those standards. It argues that it is patently unfair for BLM to apply a stricter standard under the more general "conditions warrant" regulation than that applied under the more specific section 39 standard. Western Fuels interprets the "conditions warrant" language in the regulation to mean "adverse geologic and engineering conditions." It asserts that it is entitled to relief because its financial problems, which led BLM to approve the section 39 reduction, are related to the engineering conditions because drastically lowered coal use rendered the Deserado Mine inefficient and uncompetitive. Lastly it maintains that BLM's decision under section 39 collaterally estops relitigating the "conditions warrant" question.

[1] The regulation and IM 88-148 were intended to guide the authorized officer responsible for setting a royalty rate which would be applicable for the entire 10-year term of a readjusted coal lease. The pertinent conditions to be considered were those likely to exist for the entire term of the readjusted lease. When it made a distinction between short-term economic conditions and longer term geologic and engineering conditions, BLM recognized that economic conditions tend to be more temporary and, therefore, may reasonably be treated in a different manner than physical conditions likely to last the full 10-year readjusted lease term. See Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (1986); Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984); National King Coal, Inc., 76 IBLA 124 (1983).

In Blackhawk Coal Co., 68 IBLA 96 (1982), we noted: "If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment." Id. at 99. On the other hand, a lessee can obtain short-term royalty relief if it can make the showing required under 43 CFR 3473.3-2(d) (1987). Id. In fact, when Western Fuels applied for a section 39 reduction, one was granted by BLM.

In its statement of reasons (SOR) Western Fuels stated that the "mine and power plant operators expect the questionable project viability to continue until the output of Bonanza can be sold at cost, which should occur when the additional planned transmission becomes available to the California market" (SOR at 8). Thus, it could reasonably be expected that the mine could become economic some time in the future. The volatility of economic conditions is the reason for treating market conditions in a different manner than adverse engineering and geologic conditions expected to continue for the entire lease period.

Absent a section 39 reduction, the royalty rate set at the time of the readjustment will remain in effect through the 10-year term. BLM would be unable to raise that rate even though improved economic conditions might clearly justify a higher royalty. To justify a royalty rate of less than 8 percent at the time of readjustment, there must be existing adverse engineering or geologic conditions that can reasonably be expected to render underground coal recovery uneconomic for the full 10-year term if no royalty relief is afforded. This approach adequately protects both the Government's interest in obtaining a fair return and the interest of the lessee who is afforded the opportunity to obtain royalty relief when conditions warrant that relief. Atlantic Richfield Co., et al., supra; Ark Land Co. (On Reconsideration), 96 IBLA 140 (1987).

Western Fuels' assertion that the changes in engineering brought about by economic conditions met the standards set forth in IM 88-148 must be rejected. The increased costs were not the result of some long term physical condition requiring additional physical facilities. Appellant has failed to establish that BLM erred when it set the royalty at 8 percent at the time of readjustment.

The royalty rate relief under 30 U.S.C. § 209 (1994) is separate and apart from establishing a royalty rate at lease issuance or readjustment. Therefore, a BLM decision to grant temporary relief under 30 U.S.C. § 209 (1994) does not preclude establishing an 8-percent rate for the 10-year readjustment period.

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.

R. W. Mullen
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

June 26, 1996

IBLA 94-25 : C-023703

WESTERN FUELS-UTAH, INC.

:
: Coal Lease Readjustment
:
: Reconsideration Granted;
: Holding Set Aside

ORDER

Western Fuels-Utah, Inc. (Western-Utah) has petitioned for reconsideration of Western Fuels-Utah, Inc., 135 IBLA 187 (1996). See 43 CFR 4.403. By its decision the Board affirmed the decision by the Colorado State Director, Bureau of Land Management (BLM), setting an 8-percent royalty rate for coal removed from lease C-023703 by underground mining.

Counsel for Western Fuels-Utah has filed a motion for reconsideration of our Western Fuels-Utah decision. Counsel states surprise at receiving our decision because he had expected the Western Fuels-Utah appeal to be dismissed. He explains that the reason for his belief was that Western Fuels-Utah, BLM, and the Minerals Management Service had "reached a comprehensive settlement of several longstanding disputes related to the royalties paid for coal mined at the Deserado Mine," including the matter at issue in the appeal, and that "[a]s consideration for the settlement, Western-Utah agreed to dismiss this appeal * * *."

Counsel believed that a motion to dismiss the appeal had been filed, and submits a copy of the motion to dismiss with the motion for reconsideration. The motion to dismiss is date-stamped as having been received April 14, 1995, by the "Division of Appeals." However, the date-stamp appearing on the motion does not identify the agency where the document was filed, and is not the date-stamp used by the Interior Board of Land Appeals.

Based upon the representations by counsel, we find that Western Fuels has presented extraordinary circumstances sufficient to grant reconsideration, and the petition for reconsideration is granted.

Counsel for Western Fuels does not identify error in and has not objected to our holding in Western Fuels-Utah, Inc., supra. The sole reason for seeking reconsideration is to allow the Board to rule on a motion to dismiss filed with the Board subsequent to the date of its decision. The extraordinary circumstances causing us to grant the motion for reconsideration is that the appeal decided in Western Fuels-Utah, Inc.,

supra, was to be dismissed to effectuate a comprehensive settlement agreement between Western Fuels and the Department of the Interior. That agreement settled issues presented in the Western Fuels-Utah appeal and several other longstanding disputes related to the royalties paid for coal mined at the Deserado Mine. Recognizing the benefit of entering into an agreement settling several longstanding disputes, we hereby set aside our holding in Western Fuels-Utah, Inc., supra, to assure that the settlement agreement can be carried out. 1/ However, our action does not disturb the findings of fact or conclusions of law set out in that decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, reconsideration is granted and the Board's April 11, 1996, the holding in Western Fuels-Utah, Inc., 135 IBLA 187 (1996), is set aside to facilitate the settlement agreement identified in the Motion for Reconsideration, and the Motion to Dismiss attached thereto.

R. W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

APPEARANCE:

Charles F. Holum, Esq.
Doherty, Rumble & Butler, P.C.
2370 Tabor Center One
1200 17th Street
Denver, Colorado 80202-5823

Office of the Field Solicitor
U.S. Department of the Interior
P.O. Box 25007, D-105
Denver Federal Center
Denver, Colorado 80225

1/ We deem Western Fuel's filing a motion for reconsideration to be sufficient to satisfy the contractual requirement that Western Fuels seek dismissal of the appeal, and accept its failure to do so in a timely manner as an inadvertent error which is not prejudicial to the settlement agreement.

