

ARK LAND CO.

IBLA 94-555

Decided June 23, 1997

Appeal from a Decision of the New Mexico State Office, Bureau of Land Management, rejecting preference right coal lease applications. NMNM 3752, etc. 1/

Set aside and remanded.

1. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

The Board of Land Appeals generally does preclude parties from raising issues not discussed in the agency's decision. However, where the agency has not had the opportunity to review issues that are potentially dispositive of the matter on appeal, the case is properly remanded to the agency to do so.

2. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

The regulations at 43 C.F.R. Subpart 3430, governing preference right coal lease applications, require BLM to evaluate and adjudicate the Final Showing made by a lease applicant that lands sought to be leased contain coal in commercial quantities and would justify a prudent person in the expenditure of labor and means to establish a successful mine. Where BLM has rejected coal lease applications without a substantive evaluation of the merits of the applicant's Final Showing, its decision will be set aside and remanded for further adjudication.

APPEARANCES: Lawrence G. McBride, Esq., Washington, D.C., for Appellant; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Paul E. Frye, Esq., Joshua S. Grinspoon, Esq., Albuquerque, New Mexico, for the Navajo Nation.

1/ The serial numbers are: NMNM 3752 through NMNM 3755, NMNM 3835, NMNM 3837, NMNM 3918, NMNM 3919, NMNM 6802, NMNM 7235, and NMNM 8745.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Ark Land Company (Ark) has appealed the May 13, 1994, Decision of the New Mexico State Office, Bureau of Land Management (BLM or the Bureau), rejecting 11 Preference Right Coal Lease Applications (PRLA's). These PRLA's had been linked by Ark into a combined mining venture (CMV).

On July 7, 1994, pursuant to a Petition filed by Ark, the Board issued an Order staying the effect of BLM's Decision pending consideration of its appeal.

At various times from 1967 through 1970, Ark or its predecessors-in-interest were issued Prospecting Permits under section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b) (1970). ^{2/} The regulations governing preference right coal leases appear at 43 C.F.R. Subpart 3430. An applicant for a preference right lease must make an "initial showing" of coal quantity and quality and must indicate the scope and schedule of its operations and mining methods. 43 C.F.R. § 3430.2-1. After environmental review, the applicant must make a "final showing" of entitlement, including information concerning estimated revenues; proposed means of meeting proposed lease terms; costs of developing a mine, removing, processing, and making coal salable; and estimated costs and revenues if coal is to be mined by a CMV. 43 C.F.R. § 3430.4-1.

Ark's initial showings for some PRLA's were filed prior to 1980, and the merits of its PRLA's have been under adjudication continuously since that time. On November 2, 1982, BLM issued a Decision allowing Ark 90 days to make its final showing under 43 C.F.R. § 3430.4-1. The record indicates that Ark timely submitted its Final Showings for some of the PRLA's. ^{3/} The record refers to another request for final showings by BLM in March 1988, but the documentation for this period is not complete. For various reasons, those Final Showings were not finally adjudicated.

On October 8, 1992, BLM issued Decisions requesting amended final showings as to the 11 PRLA's at issue here. The Decisions specified the stipulations that would apply to the PRLA's and the final showing information that had to be submitted to BLM.

^{2/} On Aug. 4, 1976, Congress enacted the Federal Coal Leasing Act Amendments of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. Section 4 of FCLAA repealed 30 U.S.C. § 201(b) (1970), "subject to valid existing rights," thus abolishing coal prospecting permits and preference right leases and requiring all coal leases to be issued on a competitive basis. 90 Stat. 1085. There is no dispute that the PRLA's here are based on valid existing rights.

^{3/} Those PRLA's are NMNM 3752 through NMNM 3755, NMNM 3918 and NMNM 3919, and NMNM 8745.

Ark submitted its Final Showing for these PRLA's on or around March 11, 1993. On May 14, 1993, BLM advised Ark that its review had determined the need for additional information and/or clarification on 16 items in order for it to fully evaluate Ark's Final Showing. The Bureau listed specific items necessary to complete its evaluation. Ark complied on September 14, 1993.

On December 27, 1993, BLM issued a Notice of "Intent to Reject Applications," stating that Ark had failed to provide the information previously requested with respect to the following items:

1. Ark Land has failed to address how all of the recoverable reserves will be mined. This also includes all private, Federal, State, and Indian leases. Section 4 in the proposed leases specifically addresses the requirement to produce coal in commercial quantities. Commercial quantities are defined as 1 percent of the recoverable reserves.
2. Ark Land must address all of the reserves down to a stripping ratio of at least 10:1. [4/]
3. The mine plan, and therefore the economics of the CMV, need to cover all of the recoverable reserves, not just those reserves with overburden less than 100 or 120 feet.
4. Ark Land needs to address coal thickness of at least 2 feet.

In paragraph 5, BLM requested Ark to address the estimated costs of production, removal and processing of coal, and transportation costs as such costs would be evaluated by a prudent operator. The Bureau also asked Ark to indicate applicable rents and royalties.

On March 4, 1994, Ark submitted its response, asserting that its previous Final Showing met all statutory and regulatory criteria and that rejection of the PRLA's would therefore be illegal. Ark argued that BLM's requirements that it consider all reserves down to a stripping ratio of 10:1 and all seams with thicknesses greater than 2 feet amounted to consideration of an "arbitrary and unreal mine operation," and that BLM was requiring Ark to make a showing in excess of the statutory requirement of showing "commercial quantities of coal" under 30 U.S.C. § 201(b) (1994). Ark stressed that an applicant's design of the mine which it actually proposes to open on the property is the only proper basis for determining

4/ The term "stripping ratio" is defined as, "The unit amount of spoil or waste that must be removed to gain access to a similar amount of ore or mineral material." A Dictionary of Mining, Mineral, and Related Terms at 1091.

if a commercial quantity of coal has been discovered. Ark asserted that it was improper for BLM to demand that it design a mine to include "uneconomic coal resources which are not coal 'reserves.'" ^{5/} Ark suggested that the effect of BLM's demand was to turn "a commercial proposal into an uneconomic one."

Ark also responded to each of the topics enumerated in BLM's December 27, 1993, Notice. With respect to BLM's demand to be informed how all of the recoverable reserves would be mined, Ark responded that, although it had discovered 660 million tons of coal "resources," only 130 million tons were "recoverable" under current economic conditions and therefore constituted "reserves." Ark answered further that its Final Showing demonstrated that it could construct and operate a mine to develop the 130 million tons of reserves consistent with lease terms, and that its discovery constituted "commercial quantities," entitling it to a lease. ^{6/}

Ark indicated that an average stripping ratio of 3.8:1 could be expected, and that coal beyond a 5.4:1 ratio would be uneconomic. According to Ark, BLM's requirement that the economic consequences of mining all coal with up to 10:1 ratio was arbitrary and capricious, and not supported by any factual basis. Ark asserted that BLM "does not use a 10:1 ratio in administering Federal and Indian coal leases in the region in which the

^{5/} Ark relied on the following definition of the term "reserves" set out in U.S. Geological Survey Circular No. 891 (USGS Circular 891) entitled "Coal Resource Classification System of the U.S. Geological Survey":

"Reserves--virgin and (or) accessed parts of a coal reserve base which could be economically extracted or produced at the time of determination considering environmental, legal, and technologic constraints."

Ark also pointed to the terms "economic" and "economic feasibility," defined as follows in USGS Circular 891:

"Economic--implies that profitable extraction or production under defined investment assumptions has been established, analytically demonstrated, or assumed with reasonable certainty.

"Economic Feasibility--determined by interrelating 1) the thickness of coal, 2) thickness of overburden, 3) the rank and quality of coal as ascertained from analyses that may be from the same bed or adjacent beds and which may be projected on geologic evidence for several miles, 4) costs of mining, processing, labor, transportation, selling, interest, taxes, and demand and supply, 5) expected selling price, and 6) expected profits."

^{6/} Ark cited two lease terms and conditions governing post-issuance activity: "the obligation to develop the mine within ten years; [and] the obligation to mine the reserve at the rate of 1% per year thereafter." Ark also described the requirement for receiving a lease: "the opportunity to achieve a reasonable return on its investment which meets guidelines currently governing Federal coal lease issuance."

Ark stressed that the "commercial quantities" that must be mined to meet the post-issuance "continued operation" requirement are different from the "commercial quantities" that must be shown to have been discovered under 43 C.F.R. § 3430.1-2(a) in order to receive a preference-right lease.

property is located, or * * * anywhere in the United States." Ark suggested that the only purpose in requiring consideration of the economics of mining such coal was to doom its attempt to establish entitlement to a lease.

As to the need to consider the economics of mining all recoverable reserves, not just those with 100 or 120-feet of overburden, Ark conceded that, if its mine plan were to include coal beyond the 120-foot cover, the project "would no longer appear commercial." It stressed that coal under less than 100 feet of cover "is potentially economic via the feasibility analysis that was conducted, and that a positive return could possibly be realized even if the stripping depth were to be extended to 120 feet of cover."

With respect to coal thickness of between 2 and 3 feet, Ark stated that, as a result of its initial economic analysis, a minimum minable seam thickness of 3 feet was established. Ark indicated that "upon more detailed study" it might be possible to extract thinner coal seams without adversely impacting the stripping ratio. In any event, because tonnages from such thin seams would be small, the decision whether to mine such seams would more properly be made by the operator in the field. Thus, Ark considered coal in the 2- to 3-foot thickness range "a marginally economic reserve, similar to that coal lying between 100 and 120 feet of cover depth."

With respect to cost to a prudent person of operating a mine, Ark's September 9, 1993, letter had discussed transportation costs, hourly wages, and items to be contracted out, with references to cost tables and spread sheets where appropriate. Among the items covered were material and supply costs, labor costs, operating costs, depreciation, taxes, insurance, and storage. Ark's March 3, 1994, letter stated that its projected operating and capital costs were estimated using standard mining and industry practices, and that applicable royalties and taxes were included in cash flow analyses.

In its May 13, 1994, Decision, BLM again listed the five topics set out in its December 27, 1993, Notice, stating that "Ark Land's response did not adequately address" these concerns. Of the five topics, BLM's Decision specifically discusses the requirement that Ark consider the economics of mining coal with a stripping ratio up to 10:1, coal deeper than 100 or 120 feet, and coal with a minimum seam thickness of 2 feet, as required:

Ark Land contends that they have addressed all of the recoverable coal reserves and that the coal deeper than 100-120 feet is not recoverable. Therefore, we can only conclude that Ark Land's cost estimates are based on only a small portion of the reserve base, and not what would be considered the entire extent of the mine. Ark Land also contends that it is unfair for the BLM to require a stripping ratio of 10:1 to be applied to their operation.

The Bureau rejected that argument, ruling that the regulations require an applicant to address how the operation will meet the proposed lease terms and conditions, citing 43 C.F.R. § 3430.4-1(d)(2).

The Bureau also cited the terms of Section 4 ("Diligence") in the proposed coal lease, which addresses the requirement to produce coal in commercial quantities, defined for the purpose of this section as 1 percent of the recoverable reserves.

Further, BLM cited Instruction Memorandum (IM) No. 86-323, listing the criteria for determining recoverable reserves and outlining the policy and procedure to be used when doing so. This IM states that (1) recoverability of any given coal seam or seams will be based on current industry practice; and (2) all categories of reserves (measured, indicated, inferred, and hypothetical), will be considered equally in reserve calculations. The IM directed that standard industry practice would be established by current or proposed operations and that the absence of transportation or a market in a particular field did not affect the recoverability of coal in the field. The Bureau's Decision noted that the standard criteria for surface mining in the New Mexico San Juan Region include a 250-foot highwall (mining depth), a minimum seam thickness of 2 feet, and a 15:1 stripping ratio. The Bureau also cited IM No. 822 (Sept. 9, 1983), requiring BLM to determine whether the applicant "reasonably estimated the quality and quantity of coal for all beds which are cumulatively economic to mine consistent with the maximum economic recovery [MER] requirements of the regulations," and whether the applicant showed that "the anticipated mining operation has a reasonable prospect of producing the amount of coal needed to meet minimum production standards under [FCLAA], and in accordance with the [MER] requirements of the regulations."

Finally, BLM cited BLM Manual H-3430-1, Chapter V - Request for Final Showing, D. Combined Mining Venture, which provides that the "reasonable mining boundaries of a combined mining venture include those areas that the applicant has identified and that the authorized officer has verified, that are within a conceptual mine plan that is reasonable and could be expected to be the actual extent of a mine consistent with the current and judicious practices in that area." The Bureau did not explain how Ark's combined mining venture failed to satisfy this test.

In its statement of reasons (SOR), Ark contends generally that BLM failed to properly adjudicate Ark's Final Showing. Ark asserts that BLM failed to evaluate the project as submitted and instead endeavored to impose on Ark a mining operation estranged from the regulatory guidelines which was bound to fail the commercial quantities test.

Ark assigns various specific errors to BLM's Decision. It contends that BLM may not require lease applicants to accept costs of mining "subeconomic resources." Ark questions the relevance of IM No. 86-323, arguing that it "cannot be the basis for any PRLA rejection decision." See SOR at 23. Ark asserts that BLM misapplied the "final showing" standard by effectively requesting it to design an "alternative mine plan," and that BLM's imposition of controlling regional standards, including those in

IM No. 86-323, is inconsistent with the regulations. See SOR at 24. Noting that IM No. 86-323 expired on September 30, 1987, Ark urges that the economies of the proposed operation be evaluated in a contemporary framework and not according to an outdated IM that does not mention PRLA's. See SOR at 27-39.

Ark attacks the factual foundation of BLM's Decision, asserting that there is little uniformity in the application of "standard industry practice" concerning overburden ratio and seam thickness in the San Juan Basin area. Ark alleges that the overburden and seam thickness ratios BLM seeks to impose on it are not enforced elsewhere in the basin, and that review of other operations in the area demonstrates "wide variation" in recovery requirements. See SOR at 33-37.

Ark contends that BLM improperly relied on 43 C.F.R. § 3430.5-1, termed the "summary rejection" rule, in rejecting its lease applications, pointing out that the reason for the rule was to allow rejection of a PRLA where the applicant had failed in its initial showing to meet the commercial quantities test, or where any showing of coal was so limited in quality or quantity that no mining could be expected to take place. See SOR at 40 (citing the Preamble to the 1979 amendments to the coal leasing regulations, (44 Fed. Reg. 42599 (July 19, 1979))). In doing so, Ark maintains, BLM failed to follow its own procedural guidelines, which specify what adjudicative steps must be taken where commercial viability (as alleged in an applicant's Final Showing) is at issue.

Ark contends that BLM must evaluate Ark's Final Showing in order to achieve a basis for rejecting the PRLA's, but that BLM has made no attempt here to analyze or dispute the showings submitted. Accordingly, Ark asks that we remand the case to BLM to adjudicate Ark's Final Showing. Ark states that it is premature to refer the case for an evidentiary hearing because BLM "has not determined that it disputes Ark's entitlement to leases based on the Final Showing Ark submitted." See SOR at 46.

The Bureau responds that there "was no marketable coal in the San Juan Region for a dozen or more other PRLA applicants whose PRLAs in the area have gradually been processed to a final decision." It asserts that, even if there "is marketable coal on the area," Ark's PRLA's were properly rejected for failure to provide information necessary for further processing. See BLM Answer at 3.

The Bureau notes that its mining engineers find the PRLA regulations confusing, but asserts that it adequately identified the basis for rejecting Ark's PRLA's. The Bureau asserts that "summary rejection was appropriate" and that there is no requirement to go through an extended procedure "when a company has failed to provide sufficient information for an adequate analysis." See BLM Answer at 8.

On February 9, 1995, the Navajo Nation (the Nation) filed a motion to intervene, and, in the alternative, for leave to file a brief as amicus curiae. On March 14, 1995, the Nation filed an Answer and Exhibits, and on May 16, 1995, it filed supplemental materials supporting its proposed

intervention. 7/ Ark has opposed the Nation's intervention or participation as amicus curiae, asserting that its filings are unrelated to the Decision on appeal, are matters on which the State Office has never ruled, and are matters currently in litigation between the Nation, BLM, and Ark. See Ark's Reply Brief at 2.

The Nation argues that its proprietary and Tribal interests in the lands are sufficient to justify intervention and asserts that "it likely would have standing to participate in future court challenges to the issuance of the PRLAs Ark seeks in this appeal," and that it has "a substantial interest in the outcome." We agree. The Nation is properly recognized as a Respondent. See Thermal Energy Co., 135 IBLA 325, 326 n.1 (1996).

[1] It is well settled that the Board is not limited to considering issues raised by the parties to an appeal. United States v. Galbraith, 134 IBLA 75, 82 n.3, 102 Interior Dec. ____ (1995). We have plenary authority to review de novo all official actions appealed to us unless the scope of appellate review by or on behalf of the Secretary has been diminished or constrained by the Secretary himself in a duly promulgated regulation or by the Congress through enacted law. United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983). Although we have on occasion chosen to limit the scope of our decision to the issues raised by an appellant when an intervenor has sought to introduce other issues, we do not think it either necessary or wise to follow a rule of precluding intervenors from raising issues not discussed in the agency's decision or raised by an appellant, as Ark suggests. As a matter of practice, we do not discourage intervenors or limit their arguments. Thermal Energy Co., 135 IBLA at 304-05; Bear River Land & Grazing v. BLM, 132 IBLA 110, 113-14 (1995).

However, the Board endeavors not to replace BLM as the initial decision maker. Accordingly, in these circumstances, it is appropriate to set aside BLM's Decision and remand the matter so that it can consider the Nation's arguments in the first instance.

[2] Even apart from the foregoing, the Decision must be set aside, as we agree with Ark that BLM failed to properly adjudicate its Final Showing.

The regulations at 43 C.F.R. Subpart 3430 set out specific showings that a lease applicant must make and that the authorized officer must evaluate. If an applicant demonstrates that there is a discovery of "commercial quantities of coal" on the lands to be leased, he "shall be entitled to a noncompetitive coal lease." 43 C.F.R. § 3430.1-1. "Commercial quantities" are such quantities as would justify a prudent person "in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." 43 C.F.R. § 3430.1-2. The Bureau must reject an application where the applicant has failed to show that coal exists in "commercial quantities" on the applied-for lands; it must issue a lease

7/ On June 10, 1997, the Nation withdrew its Answer in part.

where the applicant has demonstrated, based on reasonable economic assumptions, that coal has been found on the property in commercial quantities. 43 C.F.R. § 3430.5-1 and 3430.5-3.

Ark has alleged that it has discovered commercial quantities and has supported that allegation with analyses and figures. Ark's showing admittedly relies on mining less than all of the coal found within the lands covered by the PRLA's. Its proposed mining is limited to coal seams with no more than 100 feet of overburden (or possibly 120 feet), at least 3 feet of thickness and stripping ratios of between 3:1 and 4:1.

On the strength of IM No. 86-323 and its assertions as to industry practice in the San Juan Basin, BLM rejected the PRLA's on account of Ark's failure to present evidence concerning the economics of mining (1) coal located at depths greater than 120 feet; (2) coal with a stripping ratio up to 10:1, and (3) coal found at thicknesses from 2 to 3 feet. We find nothing in the record supporting BLM's findings concerning industry practice in the area. Ark specifically challenges BLM's failure to "refer to any mine in the San Juan Basin that is actually engaging in mining to those criteria on a commercial basis." (Notice of Appeal/Request for Stay at 10.) The Bureau's case record falls short of establishing that it is industry practice in the San Juan area to mine under the terms discussed above.

The Bureau has not analyzed Ark's showing that the coal resources it has found, admittedly limited to Ark's criteria, constitute "commercial quantities" under the regulations. That is, BLM has not analyzed Ark's showing that those coal resources are "such quantities as would justify a prudent person in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine." 43 C.F.R. § 3430.1-2. The Bureau's Decision is properly set aside and remanded for this reason alone.

The Bureau's failure to address the question whether Ark has made a discovery of a commercial quantity evidently stems from its holding that Ark is not entitled to a lease because Ark has not complied with 43 C.F.R. § 3430.4-1(d)(2), generally requiring an applicant to address how the operation will meet the proposed lease terms and conditions. The Bureau seems to conclude that, by considering only whether mining part of the coal on the PRLA's is economic, Ark has failed to provide requisite proof that due diligence and MER will be met. 8/

8/ A lessee is required to mine at least 1 percent of "recoverable reserves" within 10 years of issuance of the lease. The regulations state that MER "means that, based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined." 43 C.F.R. § 3480.0-5(a)(21).

The Bureau's Decision and case record are inadequate to conclude that due diligence requirements would not be met under Ark's proposed mining plan. As Ark suggests, what is missing in BLM's treatment of its Final Showing is any determination of the "recoverable reserves" for the lands that would be included in the lease, that is, "a reserves number subject to case-specific verification and adjustment." See Notice of Appeal/Request for Stay at 10. In the absence of such, no meaningful assessment can be made of whether the due diligence and MER requirements can be met. We reject as unsupported BLM's conclusion that "Ark Land's cost estimates are based on only a small portion of the reserve base, and not what would be considered the entire extent of the mine." See Decision at 2.

The recoverable reserves determination is governed by whether coal is "commercially minable," (43 C.F.R. § 3480.0-5(a)(32)), and thus would appear to be governed by factors such as whether thin coal seams with high stripping ratio or thick overburden layers can be profitably mined. The Bureau appears to have presumed that all coal on the lease (or at least much more coal than Ark has considered) is "recoverable reserves." Although that interpretation may ultimately prevail, we presently find no support for the assumption that coal within the parameters set by BLM is properly considered "recoverable reserves."

The same problem attaches to BLM's apparent assumption that Ark's mining proposal would not achieve MER, which depends on the economics of mining the deposits covered by a particular lease. The Bureau's presumption that failure to mine all coal on the lease would not achieve MER is simply unsupported by the present record. As pointed out by Ark, BLM should consider this question in light of other factors besides the amount of coal and its situation in the ground, including its Btu content and quality for various purposes.

Finally, although BLM's Decision cites 43 C.F.R. § 3430.4-1(d)(2), which requires an applicant to submit cost projections for operating a mine, the Decision fails entirely to review the cost analyses that were submitted by Ark. Accordingly, there has been no determination that the costs and related data submitted by Ark are based on either reasonable or unreasonable economic assumptions, and hence, no determination whether a prudent person would undertake a mining operation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is set aside, and the case file is remanded to the State Office for readjudication.

David L. Hughes
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge