

MORGAN COAL CO.

IBLA 97-9

Decided June 17, 1998

Appeal from a decision of the Alaska State Office, Bureau of Land Management, issuing preference right lease applications for coal. F-029746, F-033619.

Reversed and remanded.

1. Coal Leases and Permits: Applications

When the U.S. Geological Survey determines that a coal preference right lease applicant has discovered commercial quantities of coal, and the Bureau of Land Management decides to issue the lease in December 1966 but fails to do so, the applicant is now entitled to a lease with terms that would have been imposed as of January 1967.

APPEARANCES: Jerome C. Muys, Esq., Washington, D.C., for Morgan Coal Co.; James Wickwire, Esq., and Steven T. Seward, Esq., Seattle, Washington, for Arctic Slope Regional Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In Morgan Coal Co., 129 IBLA 386 (1994), we ordered the Bureau of Land Management (BLM) to issue preference right coal leases to Morgan Coal Company (Morgan) before granting the lands involved to the Arctic Slope Regional Corporation (ASRC) under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(e) (1994), subject to Morgan's right to the leases. In doing so, we "express[ed] no opinion on what the terms of the leases BLM must issue Morgan should be." 129 IBLA at 396.

On remand, BLM decided to issue the leases "subject to \* \* \* the provisions of the Federal Coal Leasing Amendments Act of 1976 [FCLAA], as amended," and provided Morgan copies of Coal Lease Form 3400-12 (April 1986) to execute. The BLM's decision record adopting the recommendation to issue the leases stated that the leases "shall be subject to \* \* \* the regulations contained in 43 CFR 3400." We have expedited consideration of Morgan's appeal at BLM's request.

In December 1966, the Director of the Geological Survey determined, in response to applications for preference right coal leases from Miller Spears, Morgan's predecessor, that commercial quantities of coal had been discovered and recommended that BLM issue the leases. See 30 U.S.C. § 201(b) (1970). On December 29, 1966, the Chief, Division of Land Office, Fairbanks District and Land Office, BLM, wrote Spears:

Your June 28, 1966 application for preference-right coal leases now appears to be correct and complete, and leases should be issued to you in due course. \* \* \* Section 1(b) of your permits allows you to mine coal, pending issuance of the preference-right leases, as long as you comply with all applicable Federal and State laws, rules, and regulations and pay royalty of 25 cents per ton. \* \* \* The lease, when issued, will be dated January 1, 1967, and rental will accrue from that date. [1/]

Morgan argues its right to the leases vested as of January 1967 and that this right is protected by section 4 of FCLAA amending section 201(b) "subject to valid existing rights." Pub. L. No. 94-377, 90 Stat. 1083, 1085. This right entitles it to leases with terms that would have been imposed at the time the right vested. Morgan Statement of Reasons (SOR) at 3. Morgan relies on Utah International, Inc. v. Andrus, 488 F. Supp. 976 (D. Colo. 1980), in which the court held Utah International could not be required to comply with commercial quantities showing requirements under 1976 regulations after BLM had decided to issue a lease in 1970 on the basis of a Geological Survey determination that Utah International had established the existence of commercial quantities. 2/ The BLM's

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1/ On Apr. 27, 1967, the Chief, Division of Land Office, wrote Spears informing him that rental payments were due and payable by Jan. 1 of each year but that no further rentals would be due until Dec. 31, 1967, because he had paid his first year's rentals in advance.

2/ "I hold that Utah International obtained a vested right in a preference right coal lease on the April 29, 1970 date of the BLM decision and that regulations promulgated subsequent to that date cannot be applied to preclude that right." Id. at 986-87.

The Apr. 29, 1970, BLM decision referred to by the Colorado U.S. District Court in this Utah International case was explained:

"By a decision of April 29, 1970, the Office of Appeals and Hearings, Bureau of Land Management, reversed the land office decision of May 2, 1969, [rejecting the application] on the basis of the Geological Survey's report of April 27, 1970, and remanded the case to the land office 'for further appropriate action looking toward issuance of the preference right coal lease requested.'"

Id. at 978. Cf. Utah International, Inc. v. Andrus, 488 F. Supp. 962 (D. Utah 1979), in which "the United States Geological Survey had made a determination that plaintiff, regarding another prospecting permit, had discovered coal in commercial quantities, but there had been no decision by the Bureau of Land Management that Utah International was therefore entitled to a lease." 488 F. Supp. at 981.

"inclusion in the leases proffered to Morgan of terms required by FCLAA, particularly those with respect to rentals, royalties and due diligence, would, for all practical purposes, render Morgan's lease[s] worthless given the adverse climatic and transportation obstacles confronting coal development in Alaska," Morgan states. <sup>3/</sup> (SOR at 4.)

What Morgan seeks in its leases are the rental, royalty and diligence provisions which were in effect in 1966 \* \* \*. However, as a compromise on the diligence issue \* \* \* Morgan would be willing to accept leases requiring diligent development within 10 years if it were exempted from the requirement of 43 C.F.R. § 3482.1(b) to submit resource recovery and protection plans for its leases within three years of their effective dates. This essentially produces the result, for diligence purposes, that would have flowed from BLM's timely issuance of Morgan's leases in 1967 and the adjustment of them in 1987.

(Morgan Response at 5.)

"The BLM's position is that the coal leases must contain terms required by \* \* \* FCLAA and implementing regulations in 43 C.F.R. Part 3400." (Answer at 2.) The BLM argues that Morgan has applications for leases pending and the regulations require that leases be issued with provisions required by FCLAA, citing 43 C.F.R. § 3430.6-1. "The two applications at issue, F-029746 and F-033619, are also specifically referenced by serial number as applications that do not necessarily require the preparation of an environmental impact statement. 43 C.F.R. § 3430.3-2(c)." Id. at 3. The regulations in 43 C.F.R. Subpart 3430 apply to issuance as well as processing of leases, BLM argues. The preamble to the regulations stated that

preference right lease applicants have "valid existing rights" to have their lease applications adjudicated in reasonable time periods and to obtain leases if, under the Department's regulations, they have discovered coal in commercial quantities within the terms of the prospecting permit and if all other requirements are met. Preference right lease applicants have no rights to any particular set of lease terms or conditions \* \* \*.

Id. at 4-5, citing 47 Fed. Reg. 33114, 33126 (1982). The Utah International decision "recognizes that the Secretary of the Interior has the

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<sup>3/</sup> Part II, section 1(a) of the proposed lease requires rental at \$3/acre per year. Section 2(a) requires production royalties at 12-1/2 percent for surface-mined coal and 8 percent for underground coal. Section 4 applies to diligence and provides: "Lessee's failure to produce coal in commercial quantities at the end of 10 years shall terminate the lease. Lessee shall submit an operation and reclamation plan pursuant to Section 7 of the [Mineral Leasing] Act not later than 3 years after lease issuance."

authority to establish lease terms that protect various, important interests," BLM argues. *Id.* at 8, citing 488 F. Supp. at 987. Other court decisions, e.g., Western Energy Co. v. Department of Interior, 932 F.2d 807 (9th Cir. 1991), apply FCLAA terms to leases issued before enactment of FCLAA when they are readjusted. Finally, BLM argues, Board decisions "find that subsequently promulgated regulations can be applied," citing Thermal Energy Co., 135 IBLA 291, 323 (1996), and cases cited. *Id.* at 9-10. ASRC joins in BLM's Answer and elaborates on some of the matters it addresses.

[1] In our view, BLM's position cannot be sustained. Morgan is not in the position of an applicant with a right to have its application adjudicated in a reasonable time period and to have a lease issued if it has discovered coal in commercial quantities and if all other requirements are met, as stated in the regulations and discussed in the preamble to the regulations. Rather, Morgan demonstrated it had discovered coal in commercial quantities and received a BLM decision in 1966 that it had met the requirements for a lease. Indeed, BLM treated Morgan as a lessee and accepted rentals for many years before realizing it had overlooked actually issuing Morgan its leases. The "lease terms that protect various, important interests" that BLM says the court in Utah International referred to related to environmental protection requirements, not to coal leasing requirements such as rental, royalties and diligence. <sup>4/</sup> Court decisions applying FCLAA terms at the time leases issued before 1976 are readjusted do not govern the terms that are appropriate to leases to which Morgan was entitled in 1967. And Thermal Energy Co., *supra*, in which we stated that a coal preference right lease applicant must comply with regulations adopted in 1976, involved an applicant "that completed its exploration and submitted an application," 135 IBLA at 323, not one, like Morgan, to whom BLM had decided to issue a lease based on a Geological Survey determination that commercial quantities of coal had been discovered. <sup>5/</sup> Thus, we regard BLM's December 29, 1966, letter to Spears as "a decision by the responsible agency" comparable to the BLM decision involved in Utah International, Inc. v. Andrus, 488 F. Supp. 976, 981 (D. Colo. 1980).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's August 23, 1996, decision is reversed and the case is remanded with

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<sup>4/</sup> Morgan has stated it does not object to the environmental stipulations BLM included in the proposed leases, e.g., all ground level activity is prohibited from May 1 - Aug. 1 within 200 meters of active spectacled eider nest sites, "even though they stem from current statutes and regulations." (Morgan Response at 3.)

<sup>5/</sup> This distinction is consistent with Kin-Ark Corp., 45 IBLA 159, 164, 87 I.D. 14, 17 (1980), and with Eugene Stevens, 126 IBLA 357 (1993), in which BLM suspended action on the adjudication of the lease application before the Geological Survey made a commercial quantities determination. See 45 IBLA at 160, 87 I.D. at 15-16; 126 IBLA at 358.

instructions that BLM issue Morgan leases as they would have been issued in January 1967, as modified by Morgan's willingness to accept the proposed environmental protection conditions, see note 4 supra, and to accept leases requiring diligent development within 10 years if it is exempted from the requirement of 43 C.F.R. § 3482.1(b) to submit resource recovery and protection plans for its leases within 3 years of their effective dates.

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Will A. Irwin  
Administrative Judge

I concur.

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James L. Bymes  
Chief Administrative Judge

