

CANYON FUEL COMPANY, LLC, ET AL.

IBLA 2001-24

Decided July 28, 2004

Appeal from a decision of the Acting Deputy State Director, Natural Resources, Utah State Office, Bureau of Land Management, to allow public access to coal exploration data obtained under coal exploration license UTU-48608. UT-930-07-1320-00.

Decision affirmed; request for a hearing denied.

1. Coal Leases and Permits: Generally--Confidential Information

The provisions of 30 U.S.C. § 201(b)(3) (2000) and 43 CFR 3410.4 direct BLM to maintain the confidentiality of information obtained under a coal exploration license until after the areas involved have been leased or until BLM determines that public access to the data will not damage the competitive position of the licensee, whichever comes first. BLM properly releases information obtained under a coal exploration license issued in 1981 where no bids for the explored area were received when the lands were offered for competitive leasing, no entity has subsequently expressed an interest in leasing the area, and the licensee has not asserted that its competitive position will be damaged by the public release of the information.

APPEARANCES: Blair M. Gardner, Esq., St. Louis, Missouri, for appellants; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Canyon Fuel Company, LLC, and Ark Land Company (appellants) have appealed the September 25, 2000, decision of the Acting Deputy State Director, Natural Resources, Utah State Office, Bureau of Land Management (BLM), published

in the Federal Register at 65 FR 57618, 57618-19 (Sept. 25, 2000), to allow public access to data obtained under coal exploration license UTU-48608. As successors-in-interest to participants in a 1981 exploration program that was the subject of that license, they assert that disclosure of the exploration data should be prohibited because it will damage the appellants' competitive advantage in, inter alia, selling the data to potentially interested parties.

On March 27, 1981, Royal Land Company (Royal) submitted an application for a Federal coal exploration license, pursuant to 30 U.S.C. § 201(b) (2000) and 43 CFR Subpart 3410, proposing to drill 12 exploratory holes on the North Horn Prospect encompassing approximately 14,221.59 acres of Federal land in Ts. 18 and 19 S., Rs. 6 and 7 E., Salt Lake Meridian, Emery County, Utah, within the boundaries of the Manti-LaSal National Forest. (Application at 2-4, 10.)^{1/} As required by 43 CFR 3410.2-1(c)(1), Royal published a notice of invitation to participate in the coal exploration program in local newspapers and in the Federal Register, 46 FR 25705 (May 8, 1981). At least 11 companies accepted the invitation to participate on a cost-sharing basis, including Atlantic Richfield Company and Coastal States Energy Company.^{2/} See May 27, 1981, letter from Atlantic Richfield Company to BLM; June 8, 1981, letter from Coastal States Energy Company to BLM; see also Aug. 24, 1981, Application Amendment at 1.

On August 4, 1981, BLM issued coal exploration license UTU-48608 to Royal for a 2-year period ending on August 3, 1983. Royal was the sole licensee. Section 11 of the license, entitled "USE OF DATA," directed the licensee to provide BLM with "copies of all data (including but not limited to, geological, geophysical, and core drill analyses) obtained during exploration." (Coal Exploration License UTU-48608 at 3.) Section 11 specified that "[t]he Confidentiality of all data so

^{1/} Royal later amended the application to add up to eight additional exploratory drill holes. See Aug. 24, 1981, Amendment to Federal Coal Exploration License Application (Application Amendment) at 1.

^{2/} On Dec. 20, 1996, Arco Coal Company (Arco Coal), a division of Atlantic Richfield Company, and Itochu Corporation acquired all of Coastal States Energy Company's coal interests in Utah, including its interests in the data obtained pursuant to coal exploration license UTU-48608, and formed Canyon Fuel Company, LLC (Canyon Fuel). See Jan. 23, 1997, letter from Arco Coal to BLM; Statement of Reasons (SOR) at 2. On June 1, 1998, Arch Coal, Inc. (Arch Coal), through a wholly owned subsidiary, purchased the coal related assets of Arco Coal, including the exploration data secured under the coal license. (SOR at 2-3.) Ark Land Company (Ark Land), a wholly owned subsidiary of Arch Coal, holds title to all of Arch Coal's real estate assets and performs geological investigations and evaluations on behalf of Arch Coal's operating subsidiaries, including Canyon Fuel. Id. at 3.

obtained shall be maintained until after the areas involved have been leased or until such time as the Mining Supervisor determines that making the data available to the public would not damage the competitive position of the licensee, whichever comes first,” citing the predecessors to regulations currently found at 43 CFR 3481.3 and 43 CFR 2.22. Royal apparently drilled 15 holes in the exploration area. See 65 FR 57618 (Sept. 25, 2000).

BLM offered the lands covered by the exploration license for lease on May 29, 1982. No bids were received, nor have any applications for a lease on those lands been submitted since the May 1982 lease sale. 65 FR 57618 (Sept. 25, 2000).

By letter dated January 12, 1996, Interwest Mining Company asked BLM to release the data collected pursuant to UTU-48608, noting that most if not all of the participants in the license had either dropped out of the coal business or no longer had any interest in the coal reserves in Utah. Interwest posited that the data could provide valuable information that would help in the understanding of regional trends in the coal stratigraphy and coal quality, and that, therefore, release of the data would be in the best interest of both the coal industry as a whole and the general public. (Jan. 12, 1996, letter at 1-2.)

On December 19, 1996, BLM published a notice in the Federal Register announcing its preliminary determination to allow public access to the data collected from coal exploration license UTU-48608. 61 FR 67061 (Dec. 19, 1996). The notice stated that BLM had determined that it was in the public interest to release the data and had made a preliminary finding that the competitive interest of the licensee and the participants would not be harmed by the release of the information. The notice granted the licensee and participants or their successors until January 24, 1997, to submit any objections they had to the release of the data and to document any assertion that public release would damage their present competitive position by providing:

1. A statement describing the data to whose disclosure you object.
2. A copy of any participation agreement or other evidence verifying your participation in UTU-48608 and any interest you may have in the data.
3. A demonstration of the specific competitive harm that disclosure of the data would cause to your competitive position.^[2/]

^{3/} The record contains an undated letter from a senior attorney in the Solicitor's Office to Arco Coal, apparently transmitted "By Facsimile." In that letter the attorney
(continued * * *)

Of the 12 companies that participated in the exploration program, only Arco Coal responded with an assertion that its competitive position would be harmed by allowing public access to the data. In a letter dated January 23, 1997, Arco Coal requested that the exploration data remain proprietary and not be disclosed to the public because release of the data would damage its competitive position. Arco Coal explained that Canyon Fuel was in the process of formulating long term strategies within the Uinta Basin including the expansion of current properties and the need for additional reserves. Arco Coal averred that the release of the exploration data could damage its competitive position because, although generated in 1981, the data was still relevant and sufficiently current for its needs, would be reassessed in the near future, and had significant value to its overall plans in Utah. The company also indicated it “might be amenable to a fair market sale” of the information to interested nonparticipating companies. (Jan. 23, 1997, Arco Coal letter to BLM at 1.) Arco Coal further advised BLM that it would forward a copy of an executed exploration agreement once that agreement had been located. *Id.* at 2; *see* generally 43 CFR 3410.2-1 (discussing participants in coal exploration license).

After learning of Ark Land’s acquisition of Arco Coal, BLM contacted Ark Land Company by letter dated August 18, 1999, to advise it that, although Arco Coal’s assertion of competitive damage had been negated by that company’s divestiture of its coal interests, BLM wished to afford Ark Land the opportunity to respond as to whether its competitive position would be damaged by the release of the data. BLM stated that documentation supporting any assertion that Ark Land’s present competitive position would be damaged by releasing the data should include: “1. [a] statement describing the data to whose disclosure you object; 2. [a] copy of any participation agreement or other evidence verifying any interest in the data; [and] 3. [a] demonstration of the specific competitive harm that disclosure of the data would cause your company.” (Aug. 18, 1999, letter at 1.)

Ark Land responded by letter dated August 27, 1999. The letter stated in its entirety:

Ark Land Company, the land management subsidiary of Arch Coal, Inc. (“Arch”), has considered the BLM’s request to release

^{3/} (* * * continued)

explained that the Department viewed the competitive harm standard set forth in 43 CFR 2.22 and 3410.4(b) as equivalent to the competitive harm standard in Exemption 4 of the Freedom of Information Act, as amended (FOIA), 5 U.S.C. § 552(b)(4) (2000), and therefore employed the procedural provisions associated with FOIA requests for information subject to Exemption 4. These protections included consultation with the submitter of the information about the possibility that disclosure might cause competitive harm.

information obtained under Exploration License UTU-48608. Please be advised, at this time, Arch considers the information to be proprietary and valuable and wants to maintain the data's confidentiality.

If others are desirous of the data such as Arch possesses, we recommend the interested parties contact the participants under the license to acquire the data or obtain it as others have done, i.e., through an exploration license. In fact, Arch might be interested in participating in additional exploration of the North Horn Mountain Area.

On September 25, 2000, BLM published the notice in the Federal Register, 65 FR 57618, notifying the public of its determination to allow public access to the data from coal exploration license UTU-48608. The notice indicated that the United States had transferred its interest in a portion of the unleased lands to the State of Utah pursuant to the Utah Schools and Lands Exchange Act of 1998, Publ. L. No. 105-335, 112 Stat. 3139 (1998). See 65 FR 57618 (Sept. 25, 2000). BLM advised the public that one company had responded to the preliminary determination to release the data published on December 19, 1996, and that this company had subsequently divested itself of its coal interests. The notice related that the successor-in-interest to the responding company had availed itself of the offered additional opportunity to object to the disclosure as harmful to its competitive position but that, although the response expressed a desire to maintain the confidentiality of the data, it had provided no information supporting any assertion that public release of the data would harm its competitive position. BLM therefore determined that the data could be made public without any damage to the competitive position of the licensee or any participants. Id. at 57619.

BLM informed Ark Land of its decision in a letter dated September 27, 2000. BLM rejected Ark Land's request that the data remain confidential, pointing out that the company had failed to provide any of the information specifically identified as necessary to support such a request. BLM explained that it had based its original determination that the competitive position of the licensee or any participant would not be harmed by making the data public on the long time period that had elapsed since the data were acquired in 1981, on the fact that the lands were offered for lease on May 29, 1982, and yet no bids were received, and on the lack of any applications to obtain a lease for the area in the 18 years since the lease offering. BLM noted that the United States had recently transferred its coal interests in some of the lands to the State of Utah and that the State was interested in actively promoting the property. BLM advised Ark Land that, given these circumstances, it had determined that it would be in the public interest to provide the State of Utah and any interested parties access to all coal data from the area. (Sept. 27, 2000, letter at 2.)

Appellants timely appealed. In their SOR, appellants argue that they achieved a “competitive position” within the meaning of 43 CFR 3410.4(b) through their predecessors’ participation in the 1981 coal exploration license, and that BLM may not destroy that advantage by releasing information derived from that exploration to the public. (SOR at 5.) Appellants further contend that the exploration data falls within two of the nine exemptions of the Freedom of Information Act (FOIA): Exemption 4, 5 U.S.C. § 552(b)(4) (2000), which relates to “trade secrets and commercial or financial information obtained from a person and privileged or confidential,” and Exemption 9, 5 U.S.C. § 552(b)(9) (2000), which addresses “geological and geophysical information and data, including maps, concerning wells.” (SOR at 13-14.) Finally, they argue that the information gleaned from their predecessors’ participation in the exploration license falls within the definition of a trade secret set forth in the Uniform Trade Secrets Act adopted by the State of Utah, Utah Code Ann. § 13-24-2(4) (2000), and constitutes a protected property right, subject to misappropriation under Utah Code Ann. § 13-24-2(2) (2000).

[1] Coal exploration licenses issued under the coal leasing provisions of the Mineral Leasing Act (MLA), 30 U.S.C. § 201(b)(1) (2000), grant the licensee the right to explore for coal but confer no right to a lease. The Act requires a licensee to provide the Secretary with

copies of all data (including geological, geophysical, and core drilling analyses) obtained during such exploration. The Secretary shall maintain the confidentiality of all data so obtained until after the areas involved have been leased or until such time as he determines that making the data available to the public would not damage the competitive position of the licensee, whichever comes first.

30 U.S.C. § 201(b)(3) (2000) (emphasis added). There is no question that the lands explored in this case have not been leased. The statutory admonition to release the data at such time that the Secretary’s delegate has reasonably determined that disclosure would not damage the competitive position of the licensee, or at the time of leasing, “whichever comes first,” makes clear that the statute intended that the Secretary could release the data at first opportunity.

BLM’s implementing regulation, 43 CFR 3410.4(b), tracks the statutory language and states:

The licensee shall furnish the authorized officer copies of all data (including, but not limited to, geological, geophysical and core drilling analyses) obtained during exploration in a form requested by the authorized officer. All data shall be considered confidential and not made public until the areas involved have been leased or until the

authorized officer determines that public access to the data would not damage the competitive position of the licensee, whichever comes first. (43 CFR 2.20 [(1987)] and 3481.3)[.]

The referenced regulations similarly conform to the statutory directive. Departmental regulation 43 CFR 2.20 (1987) is now found at 43 CFR 2.22 (see 52 FR 45586 (Nov. 30, 1987)) and provides special rules governing requests for information concerning coal obtained under the MLA. The regulation categorizes information provided to or obtained by a bureau pursuant to a coal exploration license as Category A information (43 CFR 2.22(b)(1)) which may only be disclosed under the terms required by statute. 43 CFR 2.22(c)(1). The rule specifies that its protection extends to “the holder of the exploration license.” Departmental regulation 43 CFR 3481.3(a) addresses confidentiality and provides that “(1) Information such as geological and geophysical data and maps pertaining to Federal recoverable coal reserves obtained from exploration licensees under the rules of this part or part 3410 of this title shall not be disclosed except as provided in 43 CFR [2.22(c)].” 43 CFR 3481.3(a)(1).^{4/}

This case presents a matter of first impression to the Board. It is clear from the statute and the regulatory provisions that, in order to disclose data obtained under a an MLA exploration license, BLM must determine that public access to the exploration data “would not damage the competitive position of the licensee.” Accordingly, BLM’s finding as to this point must be reasonable.

We conclude that BLM’s finding was reasonable, based on the facts of record. The licensee, the only entity to receive statutory protection under the MLA, was Royal. Royal has not complained as to the release of the exploration data. Moreover, the purpose of the statutory and regulatory confidentiality provisions was to afford a competitive advantage in a competitive lease sale of an explored area to the explorers as a reward for their willingness to commit resources to explore that area, not to provide licensees with an independent source of potential income. This interpretation finds support in the preamble to the proposed 43 CFR Part 3400 regulations, which stated that “the Department recognizes the principal benefit of exploration to the explorer is his right to keep this data confidential and use it in, or sell it for use in, a competitive lease sale. The regulations will be administered

^{4/} Appellants rely on the succeeding provision of that same regulation, 43 CFR 3481.3(a)(2), which precludes the disclosure of trade secrets and privileged or confidential commercial or financial information exempt from disclosure under FOIA “without the consent of the operator/lessee.” An “operator/lessee” is defined to include a coal exploration “licensee.” 43 CFR 3480.0-5(27). Since appellants do not suggest they were lessees or operators, as defined to include a licensee in that definition, 43 CFR 3481.3(a)(2) does not apply here.

consistent with this principle.” 44 FR 42584, 42588 (July 19, 1979) (emphasis added).^{5/} The explored lands were offered for competitive bidding in 1982, after the completion of exploration activities, and no bids were received. Since that time, no entity has ever requested that the lands be offered for leasing, nor do appellants indicate that they are aware of such an interest. In light of the statutory and regulatory focus on the need for confidential treatment as an incentive for coal exploration, and the lack of any interest in the 1982 lease sale or the subsequent conduct of one, we agree with BLM’s determination that the competitive position of any data holder in this appeal is not implicated within the meaning of the MLA.

Next, we find that appellants have done nothing to meet their burden of undermining that conclusion. As noted above, Royal was the licensee. Neither appellant was a licensee within the meaning of 30 U.S.C. § 201(b), or an operator within the meaning of 43 CFR 3480.0-5(27) (operator includes exploration licensee within meaning of Subpart 3480). Further, despite BLM’s request for a “participation agreement or other evidence verifying any interest in the data,” neither appellant took the opportunity to do so by providing such information.

Appellants argue, instead, that the value of their competitive positions is reflected in their ability to sell the exploration data to anyone who might need it. The MLA does not protect the current owner of exploration data at a given point in time. Yet this is all that appellants can be. They stand in the shoes not of the licensee or participants in the exploration permit but in the shoes of the initial or even subsequent recipients of the data through purchase or other form of acquisition. Appellants make no case for such an entity to be protected by the terms of the MLA, which does not, even on its face protect even the participant in the license. We find that neither the MLA nor its implementing regulations protect the interests of entities which subsequently purchase or acquire exploration data from participants in an exploration license, and thus appellants do not meet their burden of showing BLM’s conclusion was unreasonable.

Even if we could find that the appellants somehow constitute the licensee within the meaning of the MLA, we reject Appellants’ contention that possession of the data, in and of itself, suffices to establish that public dissemination of the data would harm the competitive position even of the licensee. The best case to be made for appellants’ competitive interests is that appellants, as owners of the data, could sell it to entities that might have an interest in using it for an unstated purpose, but

^{5/} The preamble also indicated that the Department would study the appropriateness of establishing by rule the duration of the confidential treatment given to exploration data. 44 FR 42588 (July 19, 1979). Although no such rule has been promulgated, that language indicates that the Department did not envision that exploration data would remain confidential indefinitely.

which might include a decision to develop the mineral property. Indeed, according to BLM, these lands were transferred in part to the State of Utah which has an interest in developing that property. (Sept. 27, 2000, letter at 2.) This best case simply does not establish the coal leasing purpose for which the data was obtained and for which the MLA protects the rights of the licensee. That time passed in 1982 when, after acquisition of the exploration data, none of the participants chose to seek a lease. BLM was permitted to disclose the data after a lease was issued or when the competitive advantage of the licensee would no longer be affected, whichever came first. The statute thus evinces a clear intent to allow the Secretary to release the data at this juncture, not to retain it so that a data owner can maintain it to preserve any opportunity that might come up to profit from the information.

Finally, BLM provided appellants the opportunity to demonstrate that release of the data would harm their competitive position by describing the data they wanted to remain confidential, submitting a copy of the participation agreement or other evidence verifying their interest in the data, and showing the specific harm disclosure of the data would cause. See Aug. 18, 1999, BLM letter to Ark Land at 1. One entity responded, stating only that “at this time, Arch considers the information to be proprietary and valuable and wants to maintain the data’s confidentiality.” (Aug. 27, 1999, Ark Land letter at 1.) Not only did this response fail to address the items listed in BLM’s letter, but, on its face, did not allege, much less establish, that appellants’ competitive position would be damaged by release of the data.^{6/} They have not alleged that they intend to bid on any coal lease offered for the explored lands or that anyone else has requested to purchase the data in conjunction with such a lease sale.

Appellants’ assertion that BLM’s decision to release the data over their objection was arbitrary and capricious under FOIA is similarly unpersuasive. This case is not a FOIA case and does not involve a FOIA request. The MLA, 30 U.S.C. § 201(b) (2000), establishes the Secretary’s duty and obligation here. We recognize that FOIA was raised in this case by the Office of the Solicitor. Nonetheless, it is not a FOIA matter and we will not analyze it as if it were. For the same reasons, we reject appellant’s contention that the information falls within the definition of a trade secret under Utah’s Trade Secrets Act. The data in question was acquired by the Secretary of the Interior as a result of the statutory duty of the licensee under the MLA. The Secretary’s obligations with respect to that data are controlled by the MLA, and not state law.^{7/}

^{6/} Appellants have requested a hearing. We will not order a hearing for the purpose of allowing an appellant to submit data which BLM has requested but which appellant has not provided.

^{7/} Although Appellants speculate that release of the data would encourage licensees
(continued * * *)

Therefore, 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 and Appellants' request for a hearing is denied.

Lisa Hemmer
Administrative Judge

I concur:

H. Barry Holt
Chief Administrative Judge

Z/ (***) continued)

to provide less than complete and accurate information, we will not assume that licensees will violate their statutory responsibilities simply because the data might be released if the statutory requirements for release have been met.