

**Editor's note: Appealed -- aff'd, Civ. No. C76-136 (D.Utah Mar. 5, 1979)**

UTAH POWER & LIGHT COMPANY

IBLA 74-17

Decided February 21, 1974

Appeal from Bureau of Land Management decision refusing to approve the assignment of eight coal prospecting permits to appellant.

Affirmed.

Appeals--Rules of Practice: Appeals: Effect of

When an appeal is filed with the Board of Land Appeals from a decision made by an official of the Bureau of Land Management, that official loses jurisdiction of the case and has no further authority to take any action concerning it until his jurisdiction over the matter is restored by action dispositive of the appeal.

Coal Leases and Permits: Permits--Mineral Lands: Prospecting Permits

Notwithstanding the fact that preference right lease applications are pending, assignment of coal prospecting permits cannot be approved after the permits have expired.

APPEARANCES: Sidney G. Baucom, Esq., and Verl R. Topham, Esq., Attorneys for Utah Power & Light Company.

OPINION BY MR. STUEBING

Utah Power & Light Company appeals the decision of the Utah State Director, dated June 4, 1973, denying its application for approval of assignments of coal prospecting permits Utah 1362 and 1363 from Veola H. Rasmussen, Administratrix of the Estate of

W. L. Rasmussen, and Utah 1375, 5233, 5234, 5235, 5236, and 5237 from Delcoal Inc.

The decision appealed from states that assignments cannot be approved since they were filed after the permits had expired. The decision notes that the permittees have filed timely applications for preference right leases based upon alleged discoveries of valuable coal deposits made by the permittees within the terms of the permits, and states that if and when such applications are approved, assignments of the leases to Utah Power & Light Company could be filed for approval.

Appellant asserts that it has filed this appeal in order to preserve its rights in the event that the preference right coal leases are not issued by the Department, and says that in the event these leases do issue this appeal will be dismissed. Therefore, appellant maintains, the Board of Land Appeals should take no action on this appeal until such time as the leases are either issued or denied.

Appellant argues that under these circumstances, such permits do not expire until the leases are either issued or denied with finality, contending that even assuming that the right to engage in certain activities under the permits may have expired, other rights thereunder continue, and that whatever rights, title or interests do continue to exist may be assigned and are, in fact, rights existing under the valid prospecting permits.

Finally, appellant alleges that the decision appealed from is arbitrary, capricious and an abuse of discretion.

By filing this appeal appellant has removed the adjudication of the permits and all issues relating thereto from the Bureau of Land Management. See Audrey I. Cutting, 66 I.D. 348 (1959), and cases therein cited. Moreover, all records pertaining to these permits have been forwarded by the Utah State Office to this Board for its use in considering this appeal. Therefore, any delay by this Board in deciding the issues raised could only be counterproductive. For those reasons, appellant's request that the appeal be held in abeyance is denied.

We note that the record confirms that the assignments were filed after the expiration dates of the respective prospecting permits. In

fact, the assignments were executed by the parties after the permits' expiration dates. <sup>1/</sup>

We must reject appellant's principal contention, i.e., that prospecting permits do not expire under these circumstances. The statute expressly provides that coal prospecting permits shall have a term of two years, and that this term may be extended for a period of two years. 30 U.S.C. § 201 (1970). There is no provision of law or regulation which would operate to preserve such permits beyond their statutory terms.

The expiration of a prospecting permit has no effect on the right of the permittee to receive a preference right lease for which timely application was made. Therefore, there is no need to indulge in the fiction that the permits survived beyond their expiration dates in order to maintain the right to receive any leases earned by virtue of work done and mineral discoveries made during the viable terms of the permits.

The refusal of the State Director to approve the assignments of the expired permits was proper, as the permits were no longer in esse when his approval was sought. In considering an analogous situation involving assignment of an oil and gas lease, the Solicitor of this Department concluded that the tardy filing of such an assignment could not have the effect of reviving a lease which had already expired, saying:

Applications for approval of such assignments must be rejected if filed after expiration of the lease term even though executed while the lease was subsisting. Solicitor's Opinion M-36443 (June 4, 1957).

See also Florence Lyman Taub, A-28040 (August 19, 1959); Sheridan L. McGarry, A-28759 (January 26, 1962).

The dissenting opinion is strongly influenced by the dissenter's assumption that the parties probably intended the instruments in question to constitute not merely an assignment of the permits, but of the assignees' applications for preference right leases as well. However, the language of the assignments speaks only of the permits. It does not allude in any way to the applications or to any interest in any leases. While it would not be surprising if the

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<sup>1/</sup> Applications for extension of the two Rasmussen permits were filed timely, but were never adjudicated by the State Office. The initial term of the permits has long since expired. This opinion does not reach the question of the effect of the assignments on the Rasmussen permits in the event that they are extended by favorable action on the applications for extension.

assignors and the assignee actually did intend that the assignments cover the applications and the leases if issued, they did not articulate such intention. If such was in fact their purpose, it was their responsibility to prepare, execute and file proper documents which clearly evinced such a transfer.

The dissent finds that "the problem appears `only' to be one of interpreting the agreement between the parties to ascertain the extent of the rights conveyed thereby," and states that it is "certainly plausible" that the instrument would convey all rights under the applications for coal prospecting leases. It is not the function of this office to try to analyze contractual agreements between private parties in an effort to discover whether they meant more than they actually said, or to construe and interpret an assignment to try to adjudicate what rights flowed between the parties and what rights were withheld.

It is all very well for us to speculate as to what the parties probably intended, but we should not award to Utah Power & Light the permittees' interest in their lease applications merely on the basis of our supposition, since it is quite possible that nothing of the sort was intended.

If the assignee and the assignors are in agreement that the assignments were intended to cover more than just the permits, as Member Thompson supposes, it will be a simple matter for them to rectify. On the other hand, if they intended only an assignment of the permits, as expressed by the limited language of the documents, the assignments cannot be approved for the reasons indicated. The third possibility is that Utah Power & Light intended to receive something more by way of the assignments than the permittees intended to give, in which case they will either have to resolve the matter between themselves or have it resolved in a court of competent jurisdiction.

As we view the matter, the assignments expressly refer only to the expired permits. The applicants for the preference right leases must have their applications adjudicated in their names. If the appellant wishes to assert and establish its own right to be substituted for the applicants and to receive the leases, if issued, it must do so by providing clear and unequivocal evidence of such right.

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.

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Edward W. Stuebing, Member

I concur:

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Newton Frishberg, Chairman

14 IBLA 376

MRS. THOMPSON DISSENTING:

The decision by the Utah State Office of the Bureau of Land Management (BLM) held that no consideration could be given to assignments to Utah Power & Light Company until and unless leases issue pursuant to the applications for a coal preference right lease filed by the permittees. Appellant would be required to file new assignments of the leases and a new request for approval. The rationale for this conclusion is that the assignments of the permits must be rejected as they were filed after the expiration of the permit term.

The majority treats the issue simply as an assignment of the tenure of the permit. It holds that the prospecting permits in this case cannot be assigned to appellant after their "expiration" date because "the permits were no longer in esse \* \* \*." Although the rationale that a lease cannot be assigned after it has "expired" is correct in the cases the majority relies on, Solicitor's Opinion, M-36443 (June 4, 1957); Florence Lyman Taub, A-28040 (August 19, 1959); Sheridan L. McGarry, A-28759 (January 26, 1962), where the question was whether the term of an expired oil and gas lease could be revived by an assignment filed subsequent to the lease's expiration, it has no application here. Here, the appellant is not asserting that the assignment extended the term of the prospecting permits, but only that the assignment conveyed the permittees' rights, if any, to preference right leases.

The first issue raised by this case is: may the right to a coal preference right lease emanating from compliance with the terms of a coal prospecting permit and the Mineral Leasing Act, 30 U.S.C. § 201 (1970), be assigned prior to issuance of such a lease? If the answer to that question is yes, the next issues are: has that right been assigned, and has the assignee met all the requirements for approval of an assignment? A further matter ancillary to both of these issues concerns the adjudication process itself.

The answer to the first issue is not clearly set forth in the law or in the regulations. Regulation 43 CFR 3506.1-1 provides that "[p]ermits and leases may be transferred in whole or in part \* \* \*." There is no specific form which must be used for assignments, transfers or requests for approval, but the application "must contain evidence of qualifications of the assignee or transferee consisting of the same showing required of a lease or permit applicant as set forth in qualifications subpart 3502." 43 CFR 3506.2-2(a)(1). There is no prohibition against the assignment of such a right prior to issuance of a lease. Upon making a satisfactory showing that land within a coal prospecting permit contains coal in commercial quantities discovered prior to the expiration of his permit, the holder

of a coal prospecting permit is entitled to a lease. Peter I. Wold, II, 13 IBLA 73, 80 I.D. 623 (1973).

As the right to a coal preference lease is contractual and there are no regulatory or statutory prohibitions against assignment of that right, I must conclude that the right is assignable prior to issuance of a lease, and any inference to the contrary in the BLM's decision is erroneous.

The majority apparently bases its affirmance of the BLM's decision upon an interpretation of the assignment instruments as not including the permittees' rights under the applications for the preference leases. These instruments stated that the permittee in each case,

hereby assigns, transfers and sells to UTAH POWER & LIGHT COMPANY, a corporation, all its right, title and interest in and to those certain prospecting permits issued by the United States Department of the Interior and identified by Serial Numbers \* \* \*.

The majority apparently is persuaded by the fact the statutory term for prospecting under the permits had expired in that it concludes in effect that no rights, including those under the lease applications, emanating from the permits, were assigned. Suppose the request for approval and assignments had been filed prior to the expiration of the permit life, but after the permittees filed their applications for the preference leases. Would there be any difference in interpreting the assignment? If not, and I do not think it should, the rights under the assignment should be the same. 1/

In Peter I Wold, II, supra, this Board recognized as a party in the appeal an assignee of the permittee's rights under coal prospecting permits and coal preference right lease applications. The lease applications had been timely filed, but the term of the permit had expired prior to a decision by the BLM denying the applications on a finding there had not been coal discovered in commercial quantities. A hearing was ordered on the factual issue of the coal discovery. The assignee as a party would be entitled to participate in such a hearing. The result of the majority opinion would preclude such a right in this case, if a similar factual issue arises.

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1/ Applications for the two-year extension of the permits assigned by the Estate of W. L. Rasmussen were timely filed but never acted upon. The permits would not automatically expire at the end of the first two years without rejection of the application and cancellation of the permit. Carl Wyman, 59 I.D. 238 (1946). Cf. 5 U.S.C. § 558(c) (1970). It would certainly appear that the assignment would include whatever rights the permittee had under its application for the extension, even though the granting of the extension is discretionary.

As the problem appears only to be one of interpreting the agreement between the parties to ascertain the extent of the rights conveyed thereby, a final rejection of the assignments is premature and arbitrary. It is certainly plausible, if not compelling, that the language of the instrument would convey all rights under the application for the coal lease filed pursuant to the permit.

This leads to the matter of proper adjudication. If further clarification of the assignment and agreement between the parties is desired before this Department would accept the assignee as a substitute for the applicant for the lease in these circumstances, it may request such a clarification. Before approval of any assignment, it must, of course, determine if the assignee is qualified under the law to hold a lease if one is to issue and must determine if all other requirements such as furnishing any bonds have been met. Instead of rejecting the assignments for the reasons given by the BLM and the majority, I would vacate the BLM's decision and remand it for further consideration. This would include a direct determination of Utah Power & Light Company's request, made when the assignments were filed, that the applications for the coal leases submitted by its assignors be granted and that the leases be issued to it. The result of the majority's decision seems to be, however, that Utah Power & Light Company would not be a party in a future decision regarding the lease applications. This is unfair adjudication, and unnecessary.

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Joan B. Thompson, Member

