

Editor's note: Appealed – reversed, sub nom. California Portland Cement v. Andrus, Civ. No. C79-0477 (D.Utah Dec. 30, 1980) aff'd, No. 81-1249 (10th Cir. Jan. 8, 1982) 667 F.2d 953; Appealed – rev'd, sub nom. Rosebud Coal Sales Co. v. Andrus, Civ.No. 79-160 (D.Wyo. June 10, 1980), aff'd No. 80-1842 (10th Cir. Jan. 8, 1982), 667 F.2d 949; Appealed – rev'd, sub nom. Western Slope Carbon, Inc. v. Andrus, Civ.No. C 79-M-1438 (D.Colo. July 14, 1981); Rosebud controlled on appeal; Overruled – See Kaiser Steel Corp. Et.AL, 63 IBLA 363 (April 29, 1982)

CALIFORNIA PORTLAND CEMENT CO.
ROSEBUD COAL SALES CO.

IBLA 78-337
78-303

Decided May 10, 1979

Appeal from decisions of the Utah and Wyoming State Offices, Bureau of Land Management, overruling objections to proposed readjustment of coal leases. Salt Lake 051279-063188, Cheyenne 057086.

Affirmed.

1. Administrative Procedure: Generally--Appeals--Rules of Practice: Appeals:
Answers--Rules of Practice: Appeals: Timely Filing

The applicable regulation, 43 CFR 4.414 (1977), allows the Board some discretion in deciding whether to disregard the answer of an appellee who fails to file an answer within 30 days after service on him of the notice of appeal or statement of reasons and whose delay in filing is not waived under the provisions of 43 CFR 4.401(a) (1977).

2. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally

BLM may properly readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), within a reasonable time after expiration of its 20-year period with or without notice by BLM to the lessee prior to expiration of the 20-year period.

3. Coal Leases and Permits: Leases--Mineral Leasing Act: Generally--Waiver

The failure of BLM to readjust a coal lease issued pursuant to the terms of sec. 7,

Mineral Leasing Act, 30 U.S.C. § 207 (1970), prior to or immediately after expiration of its 20-year period does not constitute a waiver of BLM's right to readjust said lease.

4. Coal Leases and Permits: Leases–Estoppel–Mineral Leasing Act: Generally

BLM is not estopped to readjust a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), by its failure to readjust said lease prior to or immediately after expiration of its 20-year period.

5. Coal Leases and Permits: Leases–Constitutional Law: Generally–Constitutional Law: Due Process–Mineral Leasing Act: Generally

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year lease term does not violate a lessee's rights under the Fifth Amendment of the United States Constitution.

6. Coal Leases and Permits: Leases–Mineral Leasing Act: Generally

BLM's readjustment of a coal lease issued pursuant to the terms of sec. 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), after expiration of the 20-year term does not violate the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21(a) (1976), national policy in favor of coal development, and a certain cooperative agreement between the State of Wyoming and the Department of the Interior.

APPEARANCES: M. William Tilden, Esq., Lonergan, Jordan, Gresham, Varner & Savage, San Bernardino, California, for appellant, California Portland Cement Co.; Michael W. Coriden, Esq., Omaha, Nebraska, for appellant, Rosebud Coal Sales Co.; Ann Vance, Esq., Office of the Solicitor, Division of Energy and Resources, United States Department of the Interior, Washington, D.C., for appellee.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

California Portland Cement Co. appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated February 15, 1978, overruling its objections to the proposed readjustment of coal lease Salt Lake 051279-063188. Rosebud Coal Sales Co. appeals from a decision of the Wyoming State Office, BLM, dated February 9, 1978, similarly overruling its objections to the proposed readjustment of coal lease Cheyenne 057086.

At the request of the Office of the Solicitor, Department of the Interior, the above two cases were consolidated because of the similarity of the material facts and issues of law.

California Portland Cement Co. (CPC) is the successor in interest to coal lease Salt Lake 051279-063188 originally entered into by and between the United States and William Shield Price on January 4, 1935. This lease was issued in accordance with section 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), which provides:

Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

On January 4, 1975, this lease completed its second 20-year period. However, it was not until June 21, 1977, that CPC received notice from BLM that a readjustment was proposed, and only thereafter on August 1, 1977, did CPC receive a copy of the proposed readjusted lease from BLM.

Rosebud Coal Sales Co. (Rosebud) is the successor in interest to coal lease Cheyenne 057086 originally entered into by and between the United States and Nils Swenson and Frank Yates, Jr., on April 5, 1935. This lease was similarly made in accordance with section 7, Mineral Leasing Act, 30 U.S.C. § 207 (1970), quoted above.

On April 5, 1975, the Rosebud lease completed its second 20-year period. On October 4, 1977, and thereafter on November 28, 1977, Rosebud received notice that a readjustment of its coal lease was proposed.

All objections by both CPC and Rosebud were overruled by BLM. These appeals followed.

[1] Before considering the merits of the case, appellant CPC asks this Board to disregard the answer submitted by BLM in response to appellants' statement of reasons. CPC correctly asserts that BLM's answer is untimely as provided by 43 CFR 4.414 (1977):

If any party served with a notice of appeal wishes to participate in the proceedings on appeal, he must file an answer within 30 days after service on him of the notice of appeal or statement of reasons * *
*. Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal, unless the delay in filing is waived as provided in § 4.401(a). [1/]

BLM's answer was transmitted some 28 days after it should have been filed. Hence the provisions of section 4.401(a) providing for a grace period are not applicable. Despite the inapplicability of section 4.401(a), we note that the above-quoted regulation is nevertheless stated permissively and hence allows this Board some discretion in deciding whether to disregard BLM's answer.

Our decision to consider BLM's answer in deciding the appeals before us is motivated by the oft-quoted language set forth in 43 CFR 1810.3 (1977):

(a) The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

Moreover, appellant CPC has not shown how it was adversely affected by the delay in the filing of BLM's answer.

1/ "§ 4.401 Documents.

(a) Grace period for filing. Whenever a document is required under this subpart to be filed within a certain time and it is not received in the proper office during that time, the delay in filing will be waived if the document is filed not later than 10 days after it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. Determinations under this paragraph shall be made by the officer before whom is pending the appeal in connection with which the document is required to be filed."

So, notwithstanding the tardiness of the Solicitor in this case, we will consider BLM's answer in the exercise of the discretion provided by 43 CFR 4.414 (1977). 2/

CPC and Rosebud appeal the decisions of the Utah and Wyoming State Offices on the following grounds:

1. In the absence of notice of readjustment prior to the expiration of each 20-year term, the relevant statute, regulation, and lease provision permit readjustment of the subject coal leases only at the end of each 20-year period.
2. The United States has waived its right to readjust the subject coal leases.
3. The United States is estopped from readjusting the subject coal leases.
4. Readjustment of the subject coal leases as urged by BLM violates appellants' rights under the Fifth Amendment of the United States Constitution.
5. Readjustment of the subject coal leases violates the Mining and Minerals Policy Act of 1970 (30 U.S.C. § 21a (1976)), public policy, and a cooperative agreement between the Department of the Interior and the State of Wyoming.

We shall address each argument in order.

[2] Appellants maintain that the natural and ordinary interpretation of 30 U.S.C. § 207 (1970), supra, authorizing readjustment at the end of each 20-year period prohibits BLM from readjusting a lease at anytime other than the twentieth year anniversary, at least in the absence of notice of readjustment prior to the anniversary date.

A similar interpretation is urged upon us by appellants of the relevant lease provision and regulations in effect at the anniversary date.

The lease provision reads:

It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties

2/ The Solicitor's brief adverts to the appeal of Gulf Oil Corp., IBLA 78-218 (Buffalo 031719). This appeal was dismissed by order of the Board dated December 7, 1978.

payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period * * *.

The regulation in effect at the anniversary dates of the subject leases, 43 CFR 3522.2-1 (1974), is set forth in part below:

Coal * * * leases are issued subject to readjustment of the terms and conditions of the lease at the end of each 20-year period succeeding the date of the lease unless otherwise provided by law at the time of the expiration of such periods. The lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made * * *. Notice of the proposed readjustments will be given, whenever feasible, before the expiration of each such 20-year period. [3/]

We cannot agree with appellants' interpretation of those provisions in the statute and lease authorizing readjustment only "at the end" of each 20-year period. A more plausible interpretation of these provisions, we feel, is to allow BLM to readjust a coal lease within a reasonable time after the anniversary date, with or without notice by BLM prior to the anniversary date.

3/ This regulation was amended effective June 1, 1976, and again on December 22, 1976, to read as follows:

"(b) Coal. All coal leases will be subject to readjustment, at the end of the first 20-year period following the issuance of the lease and at the end of each 10-year period thereafter. Before the expiration of the initial 20-year period or any succeeding 10-year period thereafter, the authorized officer shall if it is feasible, notify the lessee of any proposed readjustment of terms and conditions or that no readjustment will be made [sic]. Unless the lessee within 30 days after receipt of notice of any proposed readjustment from the authorized officer files either an objection to the proposed readjustment or a relinquishment of his lease, he will be deemed to have agreed to the readjusted terms. If the date on which a coal lease became liable for readjustment of terms and conditions occurred before August 4, 1976, but the authorized officer prior to that date neither readjusted the terms and conditions nor informed the lessee that no readjustment would be made, the terms and conditions of that lease shall be readjusted to conform to the requirements of the Federal Coal Leasing Amendments Act of 1975."

Appellants' argument that readjustment may not be made after the 20-year anniversary date ignores the difficulties attendant upon readjustment and the realities of the coal industry during the period prior to the lease anniversary dates in 1975. In 1970, a general moratorium on coal leasing and prospecting permits was imposed by the Department of the Interior in response to a finding by BLM of a sharp increase in Federal acreage under lease and a consistent decline in coal production. ^{4/} On February 13, 1973, Secretary of the Interior Morton announced a new coal leasing policy, one of whose goals was to assure a fair market value return for resources sold. Readjustments were also delayed by the preparation of a Coal Programmatic Environmental Statement, regulations regarding diligent development of leases, and new rental and royalty provisions. We find that BLM's delay in readjusting the subject leases is not unreasonable in light of these numerous policy decisions affecting readjustment.

Our interpretation is further guided by the language appearing at the end of 43 CFR 3522.2-1 quoted above: "Notice of the proposed adjustment will be given, whenever feasible, before the expiration of each such 20-year period." This regulation by itself implies that adequate notice of readjustment may occur after expiration of the 20-year period. Surely if notice of readjustment may be given after expiration of the 20-year period, readjustment itself may occur after expiration of the 20-year period. Based upon our interpretation of the applicable statute and lease provisions, we find that 43 CFR 3522.2-1 (1974) does not exceed the scope of 30 U.S.C. § 207 (1970), contrary to appellants' contentions.

[3] Appellants' second basis for appeal is the contention that the United States waived its right to readjust the leases at issue. Appellants assert that the failure of BLM to notify appellants of a proposed readjustment prior to the anniversary date of the leases demonstrates an intent to waive its right to readjust.

Waiver is the voluntary and intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). Its constituent elements are an existing right, knowledge of such right, and an intention to relinquish or surrender it. One in possession of such a right may effectively waive it by acts, conduct, declarations, acquiescence, or silence where duty requires that he speak. Yates v. American Republics Corporation, 163 F.2d 178 (10th Cir. 1947).

Waiver is of two kinds, express and implied. To constitute implied waiver, there must be unequivocal and decisive acts or conduct

^{4/} Natural Resources Defense Council v. Hughes, 437 F. Supp. 981, 984 (D. D.C. 1977), modified, 454 F.Supp. 148 (D. D.C. 1978), appeal docketed, No. 78-1780 (D.C. Cir. Aug. 10, 1978).

of the party clearly evincing an intent to waive, or acts or conduct amounting to an estoppel on his part. Yates v. American Republics Corporation, *supra*, at 180.

43 CFR 3522.2-1, as set forth above, states: "The lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made * * *. Notice of the proposed readjustments will be given, whenever feasible, before the expiration of each such 20-year term."

Inasmuch as notice of a proposed readjustment is not required prior to the anniversary date of a lease, BLM did not have a duty, prior to the anniversary dates of the leases, to announce its intention to readjust the leases in question. Its silence, therefore, in the absence of a duty to speak, is not the unequivocal and decisive act necessary to evince an intent to waive.

In addition, given the specific language in the regulation to the effect that the lessee would be notified of the proposed readjustment or notified that no readjustment is to be made, the lessee cannot conclude that silence implies a waiver of the right to readjust. Silence is at best equivocal, and no waiver will be found in equivocal action.

[4] Appellants' third basis for appeal is the allegation that BLM's failure to readjust the leases in question on their anniversary dates estops it from readjusting at a later date. This argument does not persuade us and suffers from the same defect as appellants' waiver argument.

Assuming arguendo, that estoppel could be invoked against the United States in this type of case, it is apparent that the requirements for estoppel have not been met here. The elements of estoppel are set forth in United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970) as follows:

1) the party to be estopped must know the facts; 2) he must intend that his conduct be acted on or he must act in such fashion that the party asserting the estoppel has a right to believe it is intended; 3) the party asserting the estoppel must be ignorant of the true facts; 4) he must rely on the former's conduct to his injury.

Appellants are unable to prove estoppel, because BLM did not intend that its failure to readjust on the anniversary date would be acted upon nor did appellants have a right to believe that it could be so intended. As stated above, BLM's failure to readjust was at best equivocal. Appellants cannot rely upon this conduct to establish estoppel. The fact that Rosebud continued to receive quarterly

reports from the Government setting forth royalties paid in a past quarter does not evidence an intention to forgo readjustment.

In addition, appellants' assertion that they were ignorant of the true facts, i.e., of BLM's intention to readjust, while perhaps technically correct, takes on a hollow ring when considering that the rents and royalties which it paid to the Government under its existing lease were far less than those paid in connection with new State and fee leases in 1975.

[5] As a fourth basis for appeal, appellants argue that the proposed readjustment of their coal leases violates their rights under the Fifth Amendment of the United States Constitution. This amendment provides in part: "[N]or shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Consistent with our opinion above, we find that appellants' rights to substantive due process are not violated by the readjustment of a lease which specifically provides for readjustment. We have examined BLM's conduct and do not find it to be arbitrary or inconsistent with the lease provision, regulation, or statute authorizing readjustment at the end of each 20-year period.

With respect to appellants' rights to procedural due process, we hold that due process does not require that appellants be given a hearing prior to readjustment to determine whether BLM has a right to readjust the subject coal leases. Nor have appellants cited to us any case in support of this position. "[D]ue process is flexible and calls for procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976), quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Due process is satisfied by existing procedures which allow appellants to file objections with BLM to the proposed lease terms 5/ and thereafter appeal to this Board from an adverse decision. None of the considerations set forth in Goldberg v. Kelly, 397 U.S. 254 (1970), are present in the instant case to require a hearing prior to readjustment to determine whether BLM has a right to readjust. BLM's proposed lease terms (readjustment) are not in effect "during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal * * * suspend[s] the effect of

5/ 43 CFR 3522.2-1 (1974) provides in relevant part: "The lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice, he will be deemed to have agreed to such terms."

the decision appealed from pending the decision on appeal." 43 CFR 4.21(a) (1977).

Inasmuch as the issue which appellants pose is purely legal, *i.e.*, the right to readjust a lease consistent with the applicable statute, regulation, and lease, it is hard to see how anything beyond the written submissions which appellants have filed would have advanced their cause. Accordingly, CPC's request for a hearing before this Board is denied.

Appellants' argument that readjustment of the subject leases so diminishes their value as to amount to a taking violative of the Fifth Amendment is answered by the Supreme Court in Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962). The fact that readjustment might deprive appellants' property of its most beneficial use does not render such action unconstitutional. See also United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958). Assuming, *arguendo*, that appellants correctly perceive the law, they have made no factual allegations to support their argument that a taking has occurred.

[6] Appellants' final argument on appeal is the claim that BLM's proposed readjustment violates the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21(a) (1976), our national energy policy favoring development of coal, and a cooperative agreement between the State of Wyoming and the Department of the Interior. Appellants are unable, however, to refer us to any language specifically on point to support their contentions. Broad policy statements which can be arguably construed in conflict with BLM's readjustment will not upset the clear, precise language authorizing readjustment set forth in the relevant lease, regulation, and statute.

Thus, for the reasons set forth above, we hold that BLM could properly readjust the coal leases in question after the 20-year term ending with the anniversary date in 1975 of said leases. We further hold, however, that the terms of the proposed readjusted lease may not be applied retroactively to an anniversary date of the leases prior to the notice from BLM.

We agree with the expression by the Associate Solicitor, in a memorandum dated November 4, 1976, addressed to the Director, BLM, relative to the retroactive imposition of higher royalty rates;

It is our view that the new terms cannot be applied retroactively. To a large extent retroactive application of new terms is, of course, physically impossible. Obviously, new terms requiring specific procedures in mining cannot be applied to mining operations already performed. As far as terms requiring the rehabilitation of land are concerned, they can be applied to any land still included

in the lease, even to a portion on which mining has ceased. The most serious question concerns the retroactive application of new royalty provisions; in other words, could the Department now inform a lessee that for the last few years the royalty rate should have been higher and that he must make up the difference? Clearly, this would be extremely unfair. Lease terms in general and royalty provisions in particular are a major factor in determining whether a lessee can operate effectively. The difference in royalty might render a mining operation uneconomic and a lessee could well assert that, if he had known that the royalty would have been set at such a high rate, he would have surrendered the lease. The regulation 43 CFR § 3522.2-1 * * * clearly states that the lessee is to be given the choice between agreeing to the new terms and surrendering his lease. He would not be given the opportunity to make that choice if the Department could make new royalty provisions retroactive. Consequently, based on the applicable regulation which is fully consistent with the statute, we conclude that the Department has no authority to make new lease terms applicable to any period prior to the date on which the lessee receives notice of the new terms.

In reply briefs, appellants call to our attention the fact that Congress specifically deleted certain provisions from S. 3189 6/ which would have authorized BLM to readjust coal leases under facts

6/ S. 3189, 95th Cong., passed the Senate on September 20, 1978, with the following provision:

"SEC. 9. Section 7 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 207) is further amended by adding the following three subsections at the end thereof:

"(d) All Federal Coal leases issued prior to August 4, 1976 shall be subject to a royalty of 12.5 per centum of the value of the coal as determined by regulation on all coal produced by surface mining after the date of enactment of this amendment if:

"(1) the lease was subject to readjustment prior to the enactment of this amendment;

"(2) the Secretary has not-

"(A) readjusted the lease; or

"(B) informed the lessee that the lease will not be readjusted; and "(3) the Secretary has approved a mining plan for all or part of the lease.

"(e) Before approving a mines plan, for the lease, the Secretary shall readjust the royalty rate of all other Federal coal leases issued prior to August 4, 1976, which are or become subject to readjustment in accordance with this Act.

similar to those at hand. S. 3189 was a bill to further amend the Mineral Leasing Act of 1920, 30 U.S.C. § 201 (1976). Appellants contend that deletion of these provisions evidences Congressional intent to prevent BLM from readjusting the subject leases. ^{7/}

The provisions referred to were amendments to S. 3189 offered by Senator Melcher of Montana. In introducing the provisions at issue, Senator Melcher made the following remarks which were answered by Senator Haskell of Colorado:

Mr. MELCHER. Mr. President, when we passed the Federal Coal Leasing Act [^{8/}] a couple of years ago, we increased the royalties that were required to be collected from any Federal mine to the customary 12.5 percent similar to other minerals. That is a minimum of course; and the Secretary, if he felt he could get more, could receive above the minimum. However, there were a number of coal leases that were outstanding at that time.

The usual terms of the coal lease, I think in all cases, was that every 20 years they would have to be renewed. The effect of the bill passed in 1976 was that, as those leases became renewable at the end of 20 years, the terms of the lease would be changed to 12.5 percent royalty. There were a few leases, however, that had not had to be renewed prior [to] the passage of the act, and the requirements of the bill seemed a little fuzzy.

So this closes the gap and says that if any of those leases were renewable prior to, I believe, August 4, 1976, the passage of the act, and had not been renewed, and are not renewed now, they will be renewed by notice and proper procedure, and the payment of the royalty will be set at 12.5 percent. It will be the Secretary's duty to

fn. 6 (continued)

"(f) This amendment does not affect the Secretary's authority to readjust terms and conditions of a lease other than those involving the royalty rate."

124 Cong. Rec. S15616-15617 (daily ed., Sept. 20, 1978).

S. 3189 was subsequently amended by the House of Representatives to conform to H.R. 13553. Sec. 9 did not appear in H.R. 13553, 124 Cong. Rec. 11389 (daily ed., Oct. 3, 1978), nor in P.L. 95-554 thereafter signed by President Carter. ^{7/} We note that provisions substantially similar to those deleted from S. 3189, supra note 6, appear in 43 CFR 3522.2-1(b) (1977), quoted in note 3, supra.

^{8/} On August 4, 1976, the Federal Coal Leasing Amendments Act of 1976 became law. P.L. 94-377, 90 Stat. 1083. The Act provided for royalty payments of not less than 12 1/2 percent of the value of coal obtained by surface mining.

make sure that the readjusted royalty rate of all these leases has been accomplished, that the readjustment of the royalty rate in the leases is accomplished prior, in any event, to the issuance of approval of a mining claim.

I think it is entirely what Congress intended in the 1976 act, and I believe this amendment will make sure that that clear intent is followed and accomplishable under the law.

Mr. HASKELL. Mr. President, I agree with my distinguished colleague that existing law requires this; but, in case there should be any ambiguity whatsoever, the amendment of the Senator from Montana would clear it up.

However, I stress that his amendment is entirely in accordance with existing law. Therefore, so far as I am concerned, I am pleased to accept the amendment.

124 Cong. Rec. S15613 (daily ed., Sept. 20, 1978).

The comments of Senators Melcher and Haskell undercut appellants' argument by suggesting that the provisions at issue may have been deleted because previously existing law provided sufficient authority for readjustments following the 20-year period. No reason for deletion appears in further Congressional debates or in any of the materials submitted by the parties. While deletion of a provision may well evidence Congressional disapproval, Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974), any such conclusion in this case would be little more than speculation in light of the comments of Senators Melcher and Haskell and the complete absence of specific language evidencing disapproval.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the BLM Utah and Wyoming State Offices appealed from are affirmed.

Douglas E. Henriques
Administrative Judge

I concur.

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I agree with the result reached in the majority decision, I wish to address, in greater detail, the contention made by appellants that the plain wording of the statute prohibits the readjustments of the royalty terms after the expiration of each 20-year period. ^{1/}

The relevant portion of the statute provided in 1975: "[A]t the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine * * *." Section 7 of the Act of February 20, 1920, 41 Stat. 439, 30 U.S.C. § 207 (1970) (Emphasis supplied). Appellants contend, in effect, that the phrase, "at the end of" clearly means that the Secretary must act to readjust the coal lease on or prior to the completion of the 20-year period. In support of their argument, appellants cite dictionary definitions of the word "end." While such definitions are relevant, they are not controlling.

In the first place the phrase consists of two relevant components: "at" and "end." Neither of these words are terms of art. Thus, "at" when used in a contractual provision requiring certain action at the end of a specified period has been held to mean "within a reasonable time thereafter." Thompson v. Fairleigh, 300 Ky. 144, 187 S.W.2d 812 (1945). Moreover, the phrase "at the end of" has been construed to mean after the expiration of the period of time in question. Tacoma National Bank v. Sprague, 33 Wash. 285, 74 P. 393 (1903). See also, Weston v. Foreman, 108 C.A. 2d 686, 239 P.2d 513 (1952).

Generally, "at" is seen as implying nearness in space or time. See, e.g., Birmingham Electric Co. v. Rylant, 234 Ala. 332, 174 So. 511; Haynes v. Douglas Fir Exploitation & Export Co., 161 Ore. 538, 90 P.2d 761 (1939). Admittedly, cases also exist in which use of the word "at" has been held to mean the precise moment or "no later than." See Grant v. Commissioner of Internal Revenue, 174 F.2d 891 (5th Cir. 1949). The point which should not be lost sight of, however, is that the phrase "at the end of" is devoid of meaning unless it is examined within the context in which it appears. Cf. Interstate North Association v. Hensley-Schmidt, 138 Ga. App. 487, 226 S.E.2d 315 (1976). Simple recourse to dictionary definitions is of no real efficacy.

^{1/} In this regard, the November 4, 1976, memorandum of the Associate Solicitor is of little assistance. The memorandum examined the question of estoppel but did not consider the more fundamental question of the authority of the Department to readjust the lease terms after the completion of the 20-year period.

When the provisions of 43 U.S.C. § 207 (1976) are read in conjunction with the entire statute, giving due concern to the rights of the parties to the lease, it is clear that permitting the Government to readjust the terms and conditions of the lease after the end of the 20-year period works no real injury to appellants.

An essential element of this analysis is the recognition that regardless of when it is determined to readjust the rates, such readjustment is not retroactive to the end of the twentieth year of the lease, but is only effective as of the date of the notification of the readjustment. Therefore, to the extent that a readjustment might have been made earlier, appellants reap the benefits of the delay.

The terms of the leases expressly recognize the possibility that the lessees may be adversely affected by the royalty rate change and thus provide, in section 3, that: "[I]n case the lessee be dissatisfied with the rate of royalty or other terms and conditions so fixed, he may terminate this lease in the manner and under the conditions provided in Sections 6(b) and 6(c) hereof." This provision is applicable upon the imposition of new terms, not upon the running of 20 years. Appellants' remedy, should they feel that the royalty increase is unjustified, is exercisable upon notification of the proposed increase in royalty. The mutuality of rights and remedies is maintained whenever the Government seeks to exercise its right to readjust the terms of the lease, and is unaffected by any delay by the Government in seeking to invoke its authority to readjust royalty.

There is additional support for the decision of the majority in the fact that as early as 1947 the Department readjusted a coal lease more than 20 months after the 20-year period had run. Coal lease Salt Lake 027304 was issued effective September 1, 1925, and thus 20 years were completed on August 31, 1945. On May 19, 1947, however, in a decision approving an assignment of the lease, BLM noted that the lease became subject to readjustment in 1945 and conditioned approval of the assignment upon acceptance of an increase in the royalty rate from 10 cents to 15 cents per ton. On appeal, the Bureau's action was approved by the Assistant Secretary of the Interior. Emmett K. Olson, A-24801 (October 31, 1947). Moreover, in a letter also dated on May 19, 1947, to Congressman W. K. Granger, who had inquired as to the status of the assignment application, the acting assistant director, BLM, noted that the rental for the lease was increased from 10 to 15 cents a ton "as the 20-year period of the lease expired on August 31, 1945, and its terms are subject to readjustment as provided in section 3 of the lease." In view of the fact that no lease would have been subject to readjustment until 1940 at the earliest, this early construction of the statute and lease forms lends support to our present interpretation.

Appellants' argument relating to estoppel suffers a different flaw. The regulations in effect in 1975 provided, in relevant part, that "the lessee will be notified of the proposed readjustment of terms or notified that no readjustment is to be made." 43 CFR 3522.2-1 (1974). Inasmuch as appellants did not receive notification that BLM intended "no readjustment" appellants had no basis upon which to predicate detrimental reliance. Estoppel will simply not lie. See United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970).

For those reasons, as well as other considerations discussed in Judge Henriques' decision, I concur in the denial of this appeal.

James L. Burski
Administrative Judge

