

HIKO BELL MINING AND OIL CO.

IBLA 80-267

Decided June 26, 1981

Appeal from the decision of the Utah State Office, Bureau of Land Management, rejecting preference right lease application U 0145657.

Set aside and remanded.

1. Administrative Procedure: Hearings -- Coal Leases and Permits: Leases -- Coal Leases and Permits: Permits: Generally -- Rules of Practice: Hearings

A coal prospecting permittee who applies for a coal lease, alleging with supportive data that there is coal in commercial quantities within certain lands in its permit, is entitled to a hearing conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554 (1976), before its application may be finally rejected because it has not shown coal in commercial quantities.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits: Permits: Generally -- Evidence: Generally

A preference right lease applicant must be allowed to perform additional drilling tests to prove that it discovered commercial quantities of coal during the term of its prospecting permit even though that permit has expired, where the record reflects that a satisfactory demonstration of such discovery was made under the regulatory standards in effect during the term of the permit and revised regulations imposing more stringent requirements of proof of the discovery are

applied to the lease application after expiration of the permit.

APPEARANCES: Robert E. Covington, Secretary-Treasurer, Hiko Bell Mining and Oil Company, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Hiko Bell Mining and Oil Company has appealed the decision of the Utah State Office, Bureau of Land Management (BLM), dated December 4, 1979, rejecting preference right lease application, U 0145657, for failure to show that coal exists in commercial quantities on the lands identified in the application.

By letter dated September 22, 1969, appellant filed application for a preference right coal lease for sec. 28, T. 42 S., R. 3 E., Salt Lake meridian, lands then covered by its prospecting permit, U 0145657. In response to a request from BLM, the Director, Geological Survey (Survey), examined the records of activities during the term of the prospecting permit, concluded that commercial quantities of coal had been discovered, and on December 5, 1969, recommended issuance of the preference right lease. Thereafter, BLM apparently deferred action on the application pending receipt from its Kanab District of a report regarding compliance with technical requirements specified in 43 CFR Part 23. In November 1972 the BLM State Director notified the Kanab District Manager that the environmental information in the case file of this application was insufficient and asked that an environmental analysis be prepared. The case file evidences no further consideration of the application until June 1976 when BLM notified appellant that the regulations governing preference right leases, 43 CFR Part 3520, had been revised and that the new regulations applied to pending applications. ^{1/} By decision dated July 13, 1976, BLM granted appellant a 1-year time extension to submit the initial showing required by 43 CFR 3521.1-1(b) (1976). Apparently no information was submitted.

^{1/} These revised regulations, 43 CFR Part 3520 (1976), governed preference right leasing on mineral lands generally. In 1979 the regulations governing preference right leasing of coal were separated from Part 3520 and put into a new subpart 3430 as part of a total reorganization of the regulations governing coal management. 44 FR 42609, 42650 (July 19, 1979). The definition of commercial quantities is the same under 43 CFR 3430.1-2 as it was under 43 CFR 3520.1-1(c) (1976). The requirements for the initial showing now found in 43 CFR 3430.2-1 are the same in substance as those in 43 CFR 3521.1-1 (1976), although the language varies slightly. References in this decision will be to the current regulations unless otherwise indicated.

Therefore, on July 13, 1977, BLM asked Survey to advise whether the information on which its 1969 recommendation was based would constitute sufficient initial showing to fulfill the requirements of the revised regulations. There was no response. In December 1977 BLM notified appellant that processing of its application would be further delayed until evidence was submitted indicating that appellant met the criteria for short-term leasing set out in NRDC v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), as amended, 454 F. Supp. 148 (D.D.C. 1978). In January 1979 BLM again requested Survey to advise whether an initial showing had been made or to identify what information was lacking. In response, Survey indicated that a complete submission of the required information was necessary. By decision dated February 7, 1979, BLM allowed appellant 60 days to make its showing.

In March 1979 appellant submitted material which was then reviewed by Survey which concluded in a memorandum dated April 17, 1979, that it was deficient as to the following:

(1) Quantity and quality of the coal within the permit area. Reserve estimates and supporting maps for the "B" and "Basal" coal seams are based upon an inadequate number of data points. Only one thickness of the "B" seam is available upon the permit area and there is none for the "Basal" seam. The coal quality data for the permit area were not submitted. The information submitted by the applicant is insufficient to determine the quantity and quality of the coal within the permit area.

(2) Maps which show topography with existing features and proposed locations of mine facilities. The maps submitted are technically sufficient, but they are confusing because too much information has been crowded onto each map (i.e., Mine Plan Map). A detailed legend should also accompany each map.

(3) Narrative Statement. The narrative concerning the method of development and mining operations, sequence and production rates, and the relationship between the proposed operation and adjacent lands meet the initial showing provisions for parts i-iii. Parts iv and v, concerning environmental aspects of the operation are not sufficiently covered as required by the regulations. The report states that these concerns are covered by outside sources which were not included in the report.

Based on Survey's conclusions, BLM issued a decision dated May 31, 1979, requiring appellant to submit within 60 days information to correct the deficiencies. In June 1979 appellant responded by submitting a revised report and, by letter, explaining that only one hole had been drilled in sec. 28 because that was all that was required in 1969 when its application was filed. Appellant stated that it acquired the rights

to permit U 0145657 after that hole was drilled and the core analysis of the hole had not been made available to it. Appellant asserted further that it had requested permission from BLM to drill another hole to obtain the data, but BLM denied its request. BLM requested that Survey review its submissions and advise whether appellant had met the initial showing requirements. Survey responded that the initial showing was

inadequate to demonstrate the quality and quantity of the coal underlying the application. * * * Without additional drilling, it is not possible to establish a reserve base for which a reasonable plan could be developed to recover the resource. A conceptual proposal has been submitted but is too general to meet the requirements of the regulations.

BLM thereafter rejected preference right coal lease application U 0145657.

In its statement of reasons, appellant argues that, although it accepts that the revised regulations apply to pending applications, 7 years (from 1969-1976) is an unreasonable amount of time to wait for BLM to take action on an application when, at the time of submission, the application satisfied the regulatory requirements for conversion to a lease. In addition, appellant asserts that it has made every attempt in good faith to meet requirements of the revised regulations. Appellant claims that the Survey contention that coal does not exist in commercial quantities is not true and the drilling of core hole KC-5 proved that commercial coal does exist. It notes that all of its requests for additional drilling have been denied over the last 10 years and submits for our review an independent evaluation of the coal reserves under its permit.

[1] A coal prospecting permittee is entitled to a preference lease pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b) (1976), if the permittee shows to the satisfaction of the Secretary of the Interior that the land contains coal in commercial quantities discovered prior to the expiration of the permit. Kin-Ark Corp., 45 IBLA 159, 164, 87 I.D. 14, 17 (1980); J & P Corporation, 13 IBLA 83 (1973); Peter I. Wold II, 13 IBLA 63, 80 I.D. 623 (1973); 43 CFR 3430.1-1. The burden of showing sufficient data so that the Secretary may ascertain that commercial quantities of coal have been discovered rests with the permittee. Peter I. Wold II, supra at 66, 80 I.D. at 625.

Examination of the record reflects that appellant at a minimum has shown the existence of some coal on its permit lands. Survey has advised BLM that the available information is inadequate to determine the quantity or quality and this recommendation is the basis for BLM's rejection of appellant's preference right lease application. In its statement of reasons, appellant specifically refutes this finding. In Peter I. Wold II, supra at 67, 80 I.D. at 626, we said:

Appellants have shown the existence of some coal, but whether there exists coal in commercial quantities, as alleged, cannot be determined properly from the record before us. Before the applications are finally rejected as to the lands involved in this appeal on a finding that the factual condition prerequisite to the statutory entitlement to a lease has not been met, the applicants are entitled to a hearing before an administrative law judge in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 554 (1970). Wolf Joint Venture, [75 I.D. 137 (1968)]; Kaiser Aluminum and Chemical Corporation, [A-30982 (May 3, 1968)]; cf. Don E. Jonz, 5 IBLA 204 (1972); United States v. O'Leary, 63 I.D. 341 (1959); Claude E. Crumb, 62 I.D. 99 (1955).

We find that we cannot properly determine on the record before us whether commercial quantities of coal exist on the lands encompassed by appellant's permit for several reasons and, thus, it is necessary to remand this case for further consideration and for a hearing if necessary.

First, as part of its statement of reasons, appellant submitted an independent evaluation of the coal reserves under its permit lands. While this Board has general de novo authority to review new evidence presented to it in a case such as this, we believe BLM and Survey should have the opportunity to review the data.

[2] Second, it is evident from reviewing the evaluations of appellant's submissions that, although the data developed during the term of appellant's prospecting permit may be insufficient to meet the initial showing requirements under current Departmental regulations, both BLM and Survey believe that additional drilling and testing would more than likely reveal the necessary data for an adequate showing. Appellant has noted several times that BLM has refused to allow it to do any drilling to supply additional data on the coal reserves and argues that such refusal is patently unfair given the long period of time over which BLM evaluated its lease application and the 1976 promulgation of regulations imposing more stringent requirements of proof.

The law is clear on two points: (1) the applicant must demonstrate that "he discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit," 43 CFR 3430.1-1; and (2) the application must be adjudicated on the basis of the applicant's conformity with the regulations now in force. Kin-Ark Corp., *supra*; 43 CFR 3430.0-7. The problem in this case is evidentiary. By denying the requests for further drilling BLM and Survey have seemingly held that appellant may only demonstrate the validity of a discovery made during the term of a prospecting permit by evidence obtained during the term of the permit, even though appellant is now being held to more stringent requirements of proof than existed during

the term of its prospecting permit and even though under the regulations in effect in 1969 Survey concluded that commercial quantities of coal had been discovered.

We find that this situation may be analogized to that in United States v. Foresyth, 15 IBLA 43 (1974). In that case, Foresyth was attempting to establish discovery of a valuable mineral deposit on several mining claims. After location of the claims, he decided that the drilling of core holes was needed to determine the extent of the deposit. The Forest Service prevented him from doing such drilling and thereafter instituted a contest to invalidate the claims. Prior to the contest hearing, some joint drilling was performed until an application for withdrawal of the lands temporarily segregated the land. As Foresyth prepared to do further testing, the Forest Service obtained a temporary injunction against Foresyth's activities in Federal district court. In our review of the subsequent contest decision we held:

There can be no question that for the claims to be valid a discovery of a valuable mineral deposit must be shown to have existed prior to a valid withdrawal. Cases so holding are legion. * * * There is, however, a great difference between requiring that a discovery be shown to have existed prior to a withdrawal and requiring that the discovery must be proven prior to the withdrawal. Acceptance of the latter proposition as the standard which must be met could well lead to the conclusion that samples taken from a claim prior to a withdrawal could not be considered in determining the validity of the claim unless the results of the assays were communicated to the mineral claimants before the land was withdrawn. We know of no justification of such a result.

We think the rule to be applied is that stated in United States v. Converse, 72 I.D. 141 (1965), aff'd 262 F. Supp. 583 (D. Ore. 1966), aff'd 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). In that case the issue involved was not whether a discovery of a valuable mineral deposit existed at all, but whether it had existed prior to July 23, 1955, so as to exclude the claim from the effects of sec. 4 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612 (1970), relating to the control and management of the surface of mining claims. On appeal from a finding of no discovery as of July 23, 1955, contestee had argued that the Hearing Examiner had unfairly allowed the Government to submit the results of assays taken after July 23, 1955, while it had excluded similar evidence presented by the contestee. In affirming the decision of the Hearing Examiner, the Department examined this allegation and declared:

* * * It was therefore necessary, in order to establish the fact of a discovery prior to July 23, 1955, to demonstrate such discovery on the basis of showings of mineral value from portions of the claims exposed prior to that date. It was for this reason that the hearing examiner rejected most of the appellant's evidence based upon mineral showings exposed at a subsequent time.

Contrary to the allegation of the appellant, the hearing examiner did not apply one rule of evidence to the contestant and a different rule to the mining claimant in admitting into evidence assays of samples of ore taken by the contestant after July 23, 1955. It was the date of exposure of the source of the ore sample and not the date of the taking of the sample that determined whether or not a sample was proper evidence. (Emphasis supplied).

Id. at 146.

In United States v. Gunsight Mining Co., supra, this Board declared that:

[W]e cannot consider the drilling, sampling and other activities pursued on the claims after May 27, 1955, for any purpose other than the extent to which such geological investigations may tend to support an assertion that valuable deposits of minerals had been physically disclosed within the boundaries of each of the claims prior to that date. (Emphasis supplied).

Id. at 64.

Thus, evidence in the case at bar was admissible to the extent that it confirmed and corroborated pre-existing exposures of a valuable mineral deposit, even assuming the the withdrawal application segregated the land from mineral location.

United States v. Foresyth, supra at 47-49.

Although the lands in the permit at issue have not been segregated, the impact of the expiration of the permit is the same -- appellant does not have access for the purpose of further exploration to

make a discovery of commercial quantities of coal. But appellant has demonstrated that during the permit term coal was found to exist on the permit lands. The original Survey recommendation showed that the deposit constituted a discovery of commercial quantities under regulatory standards governing activities during the term of the permit. Appellant is now trying to prove the existence of that discovery of commercial quantities it alleges was made during the term of its permit and has sought permission to drill for the purpose of meeting the stricter evidentiary standards now in effect. It is attempting to prove that a discovery was made during the term of the permit, not to make a discovery where none had existed. As in Foresyth, supra, we believe that appellant should have been allowed to do test drilling for the limited purpose of obtaining the evidence necessary to prove its alleged discovery of commercial quantities.

We remand this case to BLM for examination of the new data now available and reconsideration of its decision. If BLM determines that appellant's submission still presents insufficient data for an acceptable initial showing of commercial quantities under 43 CFR 3430.2-1, BLM shall notify appellant, giving the basis for its determination, and allowing appellant the opportunity of requesting a hearing before an Administrative Law Judge. If appellant makes such a request, the case shall be sent to the Hearings Division for a hearing on the issues of whether a discovery of commercial quantities of coal was made during the permit term. Before such hearing, appellant must be afforded a reasonable period of time to do test drilling to provide the necessary evidence to support its alleged discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeal by the Secretary of the Interior, 43 CFR 4.1, this case is remanded for action consistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

