

Editor's note: Appealed -- aff'd in part, rev'd in part, Civ. No. C83-0347 (D.Wyo. (June 29, 1984), 587 F.Supp. 1545, aff'd, in part, rev'd in part (aff'd IBLA), No. 84-2175, 84-2208 (10th Cir. April 8, 1987), recon en banc denied, 816 F.2d 496; cert denied 484 U.S. 1041 (1988)

FMC CORP.

IBLA 83-594

Decided July 29, 1983

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing a protest regarding readjustment of coal leases, W-061421 and W-061422.

Affirmed.

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

Coal lease issued prior to the enactment of the Federal Coal Leasing Amendments Act is at the time of readjustment subject to the requirements of that Act and regulations promulgated pursuant to that Act. A decision by BLM to readjust coal leases to include requirements mandated by statute and regulation will be affirmed.

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

Where the Bureau of Land Management has provided the lessee with a notice of intent to readjust a coal lease and specific terms and conditions of the readjusted lease, and has established that the effective date of those readjustments shall be the twentieth anniversary date of the lease, postponing administration of those terms and conditions pending review of the lessee's protest is not inconsistent with requirements for readjustment or untimely application of the terms and conditions by BLM.

3. Coal Leases and Permits: Leases -- Rules of Practice: Appeals: Generally

A coal lease clause which implements a statutory benefit is not ambiguous where

the terms to be applied are expressed in a regulation which is cited in that clause. Where there is no allegation that the applicable process is erroneous or that a cognizable interest has been adversely affected, the proposed clause of the readjusted lease will be affirmed.

APPEARANCES: Marilyn S. Kite, Esq., Carol A. Statkus, Esq., Cheyenne, Wyoming, and John F. Shepherd, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

FMC Corporation (FMC) appeals an April 6, 1983, decision of the Wyoming State Office, Bureau of Land Management (BLM), dismissing FMC's objections to BLM's proposed readjustment of coal leases W-061421 and W-061422.

The two leases were issued to FMC on March 1, 1963, pursuant to the Mineral Leasing Act of 1920. Under section 3(d) of both leases, the United States reserved the right to readjust royalties and other terms and conditions at the end of 20 years from the date of the lease. BLM informed FMC of its proposed readjustment of the two leases in a notice dated August 23, 1982. In a notice dated December 22, 1982, BLM presented the proposed terms and conditions to FMC and informed it that the readjustment would be effective March 1, 1983, the anniversary date of the lease. On February 11, 1983, appellant filed a protest with BLM objecting to the proposed increase of the production royalty and the advance royalty requirement. BLM dismissed the protest in a decision dated April 6, 1983, addressing each objection presented by appellant. 1/

FMC filed its appeal of BLM's decision to dismiss its protest on May 4, 1983, and asserts in its statement of reasons the following reasons for its appeal of the BLM decision:

1/ The following are FMC's points of objections and BLM's responses to those points as contained in the Apr. 6, 1983, decision.

"Objection 1: 'Nonapplicability of FCLAA to existing leases.'

"Response: Leases issued prior to August 4, 1976, subject to readjustment after August 4, 1976, must be readjusted to include mandatory terms and conditions of the FCLAA. See Solicitor's Opinion M-36939, 88 I.D. 1003 (1981) and Coastal States Energy Co., 70 IBLA 386 (1983).

"Objection 2: 'FMC is only subject to regulations in force at the time of execution of the lease.'

"Response: Current regulations promulgated to implement the FCLAA must be imposed on pre-FCLAA leases readjusted after August 4, 1976.

"Objection 3: 'Readjustment must be reasonable.'

"Response: The new royalty rates imposed in the readjusted leases conform to the mandatory royalty rates as set out in FCLAA.

"Objection 4: 'The proposed production royalty increase is an unconstitutional taking of property without compensation.'

1. The proposed 12.5% production royalty violates the terms of the leases, which bind the United States as lessor to reasonable royalty rates.
2. The automatic imposition of a 12.5% royalty rate upon readjustment without any factual evaluation to determine an appropriate and reasonable royalty for FMC's mining operations, is arbitrary, capricious, and an abuse of discretion.
3. The 12.5% statutory minimum royalty, established by the FCLAA [Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1976)] for new leases issued on and after August 4, 1976, is not mandatory upon readjustment of pre-FCLAA leases.
4. FMC's leases are subject only to regulations in force at the time they were executed; therefore, post-FCLAA regulations setting a 12.5% minimum royalty are inapplicable.
5. Lease provisions governing royalties for underground and strip mines do not apply to special bituminous coal mines.
6. Failure to complete readjustment of the leases at the end of the initial 20-year period is contrary to statutory authority and the terms of the leases.

fn. 1 (continued)

"Response: The question of constitutionality is not properly one the Bureau or the Department may rule on. (Madison D. Locke, 65 IBLA 122 (1982))

"Objection 5: 'The 12-1/2 percent production royalty fails to consider the unique nature of FMC's special bituminous coal mine.'

"Response: The 12-1/2 percent royalty is mandatory and prescribed by the FCLAA. Relief from the mandatory royalty rate is provided a lessee through a separate petition process pursuant to 30 U.S.C. 209 and regulations in 43 CFR 3473.3-2(d) and 30 CFR Part 211.

"Objection 6: 'The proposed readjustment of the royalty rate will place the FMC Skull Point operation at a competitive disadvantage.'

"Response: The royalty rates imposed in readjustment of your leases are mandatory. Our failure to timely readjust adjacent leases in no way affects the readjustment of your leases. To not readjust your leases would be a dereliction of our duty in administering Federal Coal leases and in assuring a fair return to the United States.

"Objection 7: 'Extreme increases in production royalty are inflationary.'

"Response: The response to objection 3 above applies to this objection.

"Objection 8: 'FMC objects to the payment of advance royalties on the Federal coal leases which are part of this ongoing operation. If an advance royalty is in fact imposed, it should be clarified that the intent of Section 7 is to credit all advance royalties paid, with no maximum limit, against production royalties incurred.'

"Response: Advance royalty provisions are mandatory terms prescribed by FCLAA. Section 7 states that payment of advance royalties in lieu of continued operations will be consistent with regulations in 43 CFR 3473 and 30 CFR 211. We feel that Section 7 with references to applicable regulations is sufficient."

7. The proposed advance royalty requirement is ambiguous and should be clarified.
[2/]

At the time each lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1970) provided:

Leases shall be for indeterminate periods upon 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.

Section 7 was amended by section 6 of FCLAA to read in pertinent part as follows: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of such ten-year period thereafter if the lease is extended." 30 U.S.C. § 207(a) (1976).

FCM asserts that FCLAA and its pertinent regulations are not applicable to pre-FCLAA leases and that imposition of the 12-1/2 percent production royalty violates the terms of the lease. In support of its assertions, FMC argues that FCLAA is silent on readjustment of existing leases and that the express terms of the lease limit the right of readjustment to the imposition of reasonable terms and conditions. It charges that it has been deprived of the benefits of the bargain it has made.

[1] Where readjusted lease terms or conditions are addressed by statute or regulation, BLM is required to impose those terms and conditions. Likewise, this Board must apply those provisions imposed by law, and we are without authority to waive or disregard legal obligations merely because a lessee challenges their imposition in the administrative appeals process. Coastal States Energy Co., 70 IBLA 386, 391 (1983); 3/ Lone Star Steel Co., 65 IBLA 147, 150 (1982).

FCLAA amended the Mineral Leasing Act to require new mandatory lease terms, most notably the minimum 12-1/2 percent production royalty for surface mined coal and a 10-year production requirement. 30 U.S.C. § 207 (1976). The 12-1/2 percent minimum royalty rate is by its terms absolute. FCM contends that, based on legislative history and statutory interpretation, FCLAA does not apply to coal leases issued prior to enactment (August 4, 1976) of that Act. That issue was addressed in Solicitor's Opinion, M-36939, 88 I.D. 1003 (1981). Therein, the Solicitor concluded that "when the Secretary readjusts a pre-FCLAA lease he must do so in conformity with the [Mineral Leasing Act] as amended." Id. at 1004 (emphasis added). That conclusion has

2/ BLM has not declared what royalty rate FMC's operation will be assessed under the readjusted lease. Despite its arguments that its operation is neither an underground nor strip mine, FMC assumes and therefore argues that the 12-1/2 percent minimum royalty pertinent to strip mine operations will be assessed.

3/ Appeal pending, Coastal States Energy Co. v. Watt, No. C83-0730J (D. Utah filed June 1, 1983).

been applied by the Board in Gulf Oil Corp., 73 IBLA 328 (1983), Coastal States Energy Co., supra, Blackhawk Coal Co., 68 IBLA 96 (1982), and Lone Star Steel Co., supra.

FCLAA certainly cannot alter leases issued prior to its enactment before those leases become subject to readjustment. But FCLAA does affect conduct, events, and circumstances which occur after its enactment. The lessee of a pre-FCLAA lease has no vested rights to the indefinite continuation of existing lease terms, since all the terms and conditions were prescribed subject to periodic readjustment. Solicitor's Opinion, supra at 1008.

We also reject FCM's assertion that it is somehow insulated from regulations promulgated pursuant to FCLAA and in effect at the time of readjustment (43 CFR 3541.1 (1982)) 4/ because of general provisions of its leases relating to regulations "in force at date hereof." That general lease language cannot serve to negate the statutory authority of the Secretary to readjust lease terms and conditions. Regulations in effect at the time of readjustment are applicable to leases subject to readjustment. Just as the statute authorizes readjustment of terms and conditions, so too may the procedures for implementation be adjusted. Coastal States Energy Co., supra. Those procedures were revised pursuant to FCLAA. We find no ban to applying those regulations to readjustment of these leases.

Thus, the readjustment of the leases to include an increase in production royalty to 12-1/2 percent is required by both statute and regulation. Because the Board must adhere to statutory and regulatory authority, decisions by BLM properly applying statutory or regulatory requirements will be affirmed on appeal.

FMC asserts that BLM failed to recognize the unique nature of its special bituminous coal mine and that the lease provisions governing royalties is inapplicable to such a mine. FCM refers to special relief afforded special bituminous coal mines under section 527 of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1277 (Supp. V 1981). However, that statutory provision is directed towards providing authority in the Department to adjust several environmental standards. 1977 U.S. Code Cong. & Ad. News 593, 659. Such authority does not address royalty payments. As pointed out to FMC in BLM's decision, if special circumstances warrant relief from imposition of the royalty rate established by BLM, such relief is to be sought pursuant to 43 CFR 3473.3-2(d) and 30 CFR 211.63(c). 5/

4/ 43 CFR 3451.1(a)(2) reads: "Any lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section." 43 CFR 3473.3-2(a)(2) establishes that "[a] lease shall require payment of royalty of not less than 12-1/2 percent of the value of the coal removed from a surface mine."

5/ 30 CFR 211.63(c)(1) (47 FR 33179, 33191 (July 30, 1982)) provides:

"The District Mining Supervisor may waive, suspend, or reduce the rental on a Federal lease, or reduce the Federal royalty, but not advance royalty, on a Federal lease or portion thereof. The District Mining Supervisor shall take such action for the purpose of encouraging the greatest ultimate recovery of Federal coal, and in the interest of conservation of Federal

[2] FCM questions the timeliness in readjusting these leases, stating that readjustment was not completed until "weeks after the March 1, 1983 deadline," and argues that such readjustment was outside statutory authority and contrary to the terms of the lease. However, FMC incorrectly interprets the readjustment process and improperly compares BLM's actions with those requirements.

BLM's initial notice to FMC that the leases were to be readjusted was dated August 3, 1982. The proposed terms and conditions were received by FMC on December 27, 1982, with the announcement that those terms and conditions were to be effective March 1, 1983. In its notice, BLM also informed FMC of an opportunity to file within 60 days objections to the proposed terms and conditions. FMC filed its objections. However, such filing of objections did not alter the effective date of the readjustment. 43 CFR 3451.2(b). BLM informed FMC of that fact in the notice.

We find that where administration of new terms and conditions is postponed pending review of a lessee's objections concerning the imposition of such new terms and conditions, such practice is not inconsistent with statutory requirements for readjustment. This Board has held that notice of intent to readjust is all that is necessary on or prior to the anniversary of the lease and that such policy is consistent with Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), which FMC significantly relies upon. See Coastal States Energy Co., supra. In this case not only was the required notice given, but the specific terms and conditions for readjustment were also provided and scheduled to become effective prior to the end of the 20-year period. BLM's readjustment of the terms and conditions was timely and in accordance with the statutory and regulatory requirements.

[3] Finally, FMC alleges that section 7 of the readjusted lease, governing advance royalty payment, is ambiguous because it does not specify within the clause either the minimum tonnage or the percent of value on which the advance royalty is to be based. FMC argues that imposition of an ambiguous requirement is arbitrary and capricious and requests that section 7 be reworded to eliminate such ambiguity. Section 7 of the readjusted lease reads:

Upon request by the lessee the District Mining Supervisor may accept, for a total of not more than 10 years, the payment of advance royalties in lieu of continued operation consistent with the regulations in 43 CFR 3473 and 30 CFR 211. The advance royalty shall be based on a percent of the value of a minimum

fn. 5 (continued)

coal and other resources, whenever in his judgment it is necessary to promote development, or if he finds that the Federal lease cannot be successfully operated under its terms. In no case shall the District Mining Supervisor reduce to zero any royalty on a producing Federal lease." See also 43 CFR 3473.3-2(d).

The record indicates that FMC filed a detailed letter with BLM on June 2, 1983, discussing the uniqueness of its situation. Although this letter is not framed as an application under 30 CFR 211.63(c)(1), FMC's circumstances as presented therein may be sufficient to merit the requested relief if an application is filed.

number of tons which shall be determined in the manner established by the regulations in 30 CFR 211.

FMC charges that such reference to regulations does not express the conditions of the clause with clarity since the regulations are subject to change.

The opportunity afforded FMC to submit advance royalty in lieu of continued operation arises under statutory authority. "The Secretary of the Interior, upon determining that the public interest shall be served thereby, may suspend the condition of continued operation upon the payment of advance royalties." 30 U.S.C. § 207(b) (1976). Thus, the privilege to seek suspension of a lease obligation is not a right peculiar to the contract and subject to bargaining, but it is an opportunity made available by Congress and appears in the lease to implement the statute and regulations. See 30 CFR 211.63(c)(1) (47 FR 33179, 33191 (July 30, 1976)); 43 CFR 3473.3-2(b).

The applicable statute, 30 U.S.C. § 207(b) (1976), also provides that such advance royalty "shall be no less than the production royalty which would otherwise be paid and shall be computed on a fixed reserve to production ratio (determined by the Secretary)." That fixed ratio and the advance royalty determination process are elaborated with clear meaning in 30 CFR 211.23 (47 FR 33179, 33188 (July 30, 1982)). Such duly promulgated regulations have the force and effect of law and are binding on the Department. See Sam P. Jones, 71 IBLA 42 (1983); Altex Oil Corp., 61 IBLA 270 (1982). ^{6/} It is also generally accepted in contract law that independent elements of an agreement may be determined by a process set forth separate from the agreement and that where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. See 1 Corbin on Contracts § 95, 393 (1963); 4 Williston on Contracts § 628, 901-04 (3d. ed. 1961). This is particularly applicable in this situation, for BLM is governed by the statute and regulations in the manner in which it may grant the described relief. Accordingly, section 7 of the readjusted lease reflects BLM's balance between notification of the availability of a statutory opportunity and its duty to administer the public land in accordance with applicable statutes and regulations.

FMC requests the Board to address circumstances that may not occur during the term that the lease is effective. It is the usual policy of the Board to forego adjudication where no actual controversy exists and no cognizable interest has been adversely affected, avoiding advisory opinions based on hypothetical circumstances. See 43 CFR 4.410; Hal V. Carlson, Jr., 62 IBLA 305 (1982). FMC may choose not to avail itself of the opportunity to petition for suspension of the continued operation requirement, the operating circumstances may never warrant application of the denoted relief, or the regulations may not be altered or amended prior to a petition under the lease clause. If new regulations are promulgated, the Department must adhere to proper administrative procedures found in 5 U.S.C. § 553 (1976), which afford interested parties the opportunity to become involved in the rulemaking process. Such guidelines and public involvement serve to negate the arbitrariness and capriciousness of which FMC complains. Without an allegation that it is

^{6/} Appeal dismissed, Altex Oil Corp. v. Watt, No. 82-0424A (D. Utah Oct. 19, 1982) (dismissed without prejudice).

totally erroneous, we hesitate to complicate an explicit, workable agreement which adheres to and applies the regulations.

BLM's reply to FMC's protest was cogent and well presented. FMC has not shown that any part thereof was erroneous.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

James L. Burski
Administrative Judge

