PEABODY COAL CO.

IBLA 83-571 Decided February 9, 1984

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting coal preference right lease applications for failure to make a final showing within 90 days. W-24984, etc.

Reversed and remanded.

1. Coal Leases and Permits: Applications

The regulation at 43 CFR 3430.4-1(c) allows a coal preference right lease applicant 90 days in which to respond to a Bureau of Land Management request for final showing of the existence of commercial quantities of coal. A decision rejecting a preference right lease application on the ground that the information was filed after the 90-day period will be reversed where applicant requested an extension of time, there is no evidence of bad faith on the part of the applicant, and no indication that the late filing unduly interfered with the administration of the public lands.

APPEARANCES: Brent R. Kunz, Esq., Cheyenne, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Peabody Coal Company from a March 21, 1983, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's preference right coal lease applications. 1/ The basis for the decision was that appellant had failed to file the final showing required in support of its preference right lease applications within the 90-day period allowed by the regulation at 43 CFR 3430.4-1(c). 2/ The BLM decision also denied appellant's request for an extension of time in which to make the showing, holding that there is no authority in the regulations for granting such an extension. The request for extension had been filed with BLM on March 10, 1983, after the 90 days had run. Appellant filed the final showing for the applications with BLM on March 18, 1983.

1/ The preference right coal lease applications rejected were the following: W-24984, W-24985, W-26198, W-26199, W-32061, and W-32062.

2/ In a letter decision dated Nov. 5, 1982, BLM gave notice of the 90-day filing period. This was received by Peabody on Nov. 15, 1982.

Counsel for appellant contends in the statement of reasons for appeal that there is no basis either in statute or regulation for holding that the 90-day requirement for filing supporting information is an absolute deadline with respect to which no extension can be granted. Counsel contends, in essence, that the application of such a rigid deadline and failure to grant appellant's reasonable request for an extension of time is arbitrary, capricious, and an abuse of discretion. Counsel points out that the holder of a prospecting permit who purports to have made the showing required for a preference right lease has superior rights to one who has filed a mere application for a lease or permit the granting of which is entirely within the discretion of the Department.

The record discloses that coal prospecting permits for the lands involved were issued in 1968 and 1970 to appellant's predecessors in interest. The prospecting permits were issued pursuant to section 2 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b) (1970) (amended 1976). 3/ That statute at that time provided, in pertinent part, as follows:

> (b) Prospecting permits; terms; maximum tract; leases by permittee; extension of permit.
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> Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this chapter, prospecting permits for a term of two years, for not exceeding five thousand one hundred and twenty acres; and if within said periods of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit.

The brief filed by counsel for appellant provides some background on the circumstances of this appeal:

> [A]ll of the involved applications for preference right leases were pending on February 13, 1973, when the Secretary suspended issuance of prospecting permits by Secretarial Order No. 2952, and imposed a moratorium on federal coal leasing pending implementation of a new federal coal leasing policy. Between then and now, our nation's federal coal leasing policy has been in a constant state of flux. Substantial changes in policy have occurred and continue to occur as the result of rule making, legislation, and litigation. These changes are particularly pronounced in regard to Preference Right Lease Applications. * * *

3/ Section 2 of the Mineral Leasing Act was substantially amended by the Federal Coal Leasing Amendments Act of 1976, P.L. 94-377, §§ 2-4, 90 Stat. 1083, 1085. The provision authorizing prospecting permits and issuance of preference right leases based thereon was deleted. The current version is codified at 30 U.S.C. § 201 (1976 and Supp. II 1978).

> * * * Pursuant to the [current] regulations, either an environmental assessment or impact statement is to be completed prior to a request [of the applicant] for final showing [in support of the preference right lease application]. Thereafter, a proposed lease with stipulations and either the environmental assessment [or impact statement] with stipulations are to be submitted to the applicant to allow preparation of an estimate of costs. This is done for the purpose of determining whether there is a reasonable expectation that revenues will exceed costs. The Department decided that an EIS was not required, and that an environmental assessment would be sufficient. The environmental analysis completion target for the involved South Gillette leases was October 1, 1981, and the request for final showing was expected to occur after September 1, 1981. For whatever reason, the BLM unilaterally failed to meet and comply with its own schedule. Once again the standards and time frames within which Peabody had to operate were in limbo.
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> On November 5, 1982, in a so-called "decision letter" the Wyoming BLM advised Peabody that the environmental assessment had been completed. The assessment and a proposed lease were sent to Peabody to use in making its revenue and cost estimates. According to the decision letter, Peabody was required to file a final showing within 90 days from receipt of the decision. On March 10, 1983, as a follow-up to a conversation of March 9, 1983, with a coal adjudicator, Peabody requested an extension of time in which to submit the final showing for the subject applications * * *.

The decision appealed from reflects that appellant's request for extension of the 90-day period provided by 43 CFR 3430.4-1(c) for filing the required information in support of its preference right lease applications was received by BLM on March 10, 1983. Further, the decision notes that the information was filed with BLM March 18, 1983. The only reason given for denying appellant's extension request and rejecting the applications was that the regulation did not authorize it.

[1] As pointed out by appellant herein, there is nothing in the relevant regulation precluding an extension of the 90-day period to file the final showing in support of a preference right coal lease application. No allegation has been made that appellant was being dilatory or was not acting in good faith. Where the regulations under which BLM operates provide that a document must be filed within a specified period of time, the filing of the document after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed <u>except</u> where: (1) The law does not permit him to do so; (2) the rights of a third party have intervened; or (3) a finding is made that further consideration of the document would unduly interfere with the orderly conduct of business. 43 CFR 1821.2-2(g). None of the exceptions apply here and Peabody's applications must be considered. <u>See</u> <u>William R. White</u>, 1 IBLA 273, 78 I.D. 49 (1971), <u>aff'd</u>, <u>Kerr-McGee Chemical Corp.</u> v. <u>Morton</u>, Civ. No. 71-1852F (C.D. Calif. Oct. 27, 1971). In light of all the changes and delays in adjudication of coal preference right lease applications since these applications were filed,

it would be an act of bad faith in this case for BLM to reject the applications on the ground that the supporting documentation was filed late.

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 reversed and the case is remanded for further consideration.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge