

UTAH POWER & LIGHT CO.

IBLA 83-544

Decided April 16, 1984

Appeal from decision of Utah State Office, Bureau of Land Management, imposing a requirement of a production royalty of 8 percent for coal leases. Utah 040151 and Utah 083066.

Set aside and remanded.

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

Departmental regulation 43 CFR 3473.3-2(a)(1) and (a)(3) implementing 30 U.S.C. § 207(a) (1976), provides that a royalty rate as low as 5 percent may be established for an underground coal mine at lease issuance if conditions warrant such reduced royalty rate. A BLM decision overruling a coal lessee's objection to a provision in readjusted coal leases establishing a royalty rate of 8 percent will be set aside and remanded where, on appeal, BLM requests that the Board remand the cases to BLM to allow the lessee the opportunity to establish that the conditions warrant a royalty rate of less than 8 percent.

APPEARANCES: Ralph L. Jerman, Esq., for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Utah Power & Light Company (UP&L) appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated March 22, 1983, requiring a production royalty of 8 percent of the value of the coal removed by underground methods in readjusted coal leases Utah 040151 and Utah 083066.

These leases were originally issued to Cooperative Security Corporation (CSC) on March 1, 1962, under the provisions of section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1976), which provides that the United States may readjust the terms of leases executed thereunder at the end of 20 years.

In 1971 CSC subleased the leaseholds to Peabody Coal Company, which assigned the leases to UP&L by documents dated March 24, 1977. These assignments were approved effective September 1, 1977, by BLM. In February 1982,

prior to the readjustment date of each lease, BLM notified CSC that there would be a readjustment of the terms and conditions of each lease pursuant to the provisions of 43 CFR 3451. 1/ BLM notified CSC of specific alterations in the lease terms and conditions. UP&L filed objections to certain readjusted lease terms and BLM responded to these objections in its March 22, 1983, decision. This appeal focuses solely on that portion of BLM's decision dealing with the 8 percent royalty rate which reads as follows:

Objection Overruled: Section 6 of the lease form is inserted to comply with Section 7(a) of the Mineral Lands Leasing Act of 1920, as amended (MLLA), which requires a royalty rate on Federal coal leases of 12.5 percent, "except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." Present regulations (43 CFR 3473.3-2(a)(3)) fix the underground royalty rate at 8 percent but allow the authorized officer to lower the rate to 5 percent if conditions warrant. The recommended royalty rates in this instance conform with minimum royalty requirements prescribed in the regulations at 43 CFR 3473.3-2. The regulatory minimum requirement for coal mined underground was established by Secretarial discretion as authorized by Congress under Section 6 of the Federal Coal Leasing Amendments Act of 1976. This requirement has been determined by the Solicitor to apply to new leases and leases subject to readjustment.

Based on this policy the Minerals Management Service has no authority to recommend a royalty rate less than 8 percent in a readjustment of a coal lease. If the lessee feels this rate is excessive, an application should be filed for a temporary royalty rate reduction under Section 39 of the MLLA [30 U.S.C. § 209 (1976)]. Such application must be filed in triplicate with the appropriate Office of the Mining Supervisor. Note, these relief provisions do not eliminate the requirement to issue a new or readjusted lease at the FCLAA specified rate. In a Department of Interior Solicitor's opinion dated December 11, 1974, it is stated, "In no case, however, may such (royalty) reductions be prescribed as part of the initial or readjusted terms of any lease. The relief afforded by section 39 is meant to occur apart from the establishment of the basic lease terms for any given lease period." Thus any application for royalty reduction must be after acceptance of the readjusted lease terms and conditions.

Appellant objects to BLM's statement that any application for royalty reduction must be made after acceptance of the readjusted lease terms and conditions. Appellant contends that the decision for reduced royalty should be made in the lease itself and cites 30 U.S.C. § 207(a) (1976) and 43 CFR 3473.3-2(a) in support of its argument.

1/ That provision provides in pertinent part:

"§ 3451.1 Readjustment of lease terms.

"(a)(1) All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter. All leases issued after August 4, 1976, shall be subject to readjustment at the end of the first 20-year period and, if the lease is extended, each 10-year period thereafter."

30 U.S.C. § 207(a) (1976) provides in part:

The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12-1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. 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 * * *.

43 CFR 3473.3-2(a) states in part:

(a)(1) Royalty rates shall be determined on an individual case basis prior to lease issuance. For competitive leases, initial royalty rates shall be set out in the notice of lease sale.

* * * * *

(3) A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the Minerals Management Service may determine a lesser amount, but in no case less than 5 percent if conditions warrant. [Emphasis added.]

Appellant also argues that there is ample evidence in the record and files relating to mining from the Hiawatha seam at the Wilberg mine to warrant a recommendation for reduction in the royalty rate. Appellant notes that BLM neither takes issue with the fact that difficult conditions do exist nor with the fact that a royalty reduction may be warranted. Therefore, appellant requests that BLM's decision be reversed and that the royalty rate in the leases be reduced to not more than 5 percent of the value of the coal mined therefrom.

In response, BLM admits that the regulations do allow a royalty rate of less than 8 percent to be placed on a readjusted coal lease if the coal is removed from an underground mine and BLM finds that conditions warrant a lesser rate. In support of this proposition, BLM cites 43 CFR 3473.3-2(a), previously cited, and 43 CFR 3451.1(a)(2) which reads as follows: "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." BLM goes on to conclude that the reasons given in its decision for denying a royalty rate of less than 8 percent are incorrect and that appellant should be allowed an opportunity to establish that conditions warrant a royalty rate of less than 8 percent.

BLM submits, however, that the Board should not attempt to set the royalty rate as requested by appellant. BLM requests that the cases be remanded to BLM (as the successor agency to the Minerals Management Service (MMS)) so that it may examine the records and make a determination as to whether the evidence presented by appellant warrants a royalty rate of less than 8 percent and, if so, what rate is appropriate.

[1] BLM erred in stating in its decision that MMS has no authority to recommend a royalty rate less than 8 percent in a readjustment of a coal lease. Subsections (a)(1) and (a)(3) of 43 CFR 3473.3-2 implement 30 U.S.C. § 207(a) (1976) and provide that a rate as low as 5 percent may be determined at lease issuance if conditions warrant such reduced royalty rate. Alternatively, the Department may establish a royalty rate in the lease and provide relief after lease issuance upon application of the lessee under 43 CFR 3473.3-2(d), which implements 30 U.S.C. § 209 (1976). ^{2/} We have held that these regulations apply to the readjustment terms of leases, issued prior to the Federal Coal Leasing Amendments Act but readjusted after passage of the Act, in the same manner that they apply to the issuance of new leases. Coastal States Energy Co., 70 IBLA 386 (1983). ^{3/}

In the recent past, the Board has upheld as reasonable BLM decisions denying special royalty relief at lease readjustment, requiring lessees to seek such relief under 43 CFR 3473.3-2(d). Coastal States Energy Co., *supra*; Blackhawk Coal Co., 68 IBLA 96 (1982); Lone Star Steel Co., 65 IBLA 147 (1982). In this case, however, BLM has determined that appellant should be allowed an opportunity to establish prior to lease issuance that "conditions warrant" a royalty rate of less than 8 percent under 43 CFR 3473.3-2(a) and asserts that, in the absence of any technical findings below, the Board should not attempt to set the royalty rate. We agree. BLM should review the records and make the initial determination as to what royalty rate should be imposed. Accordingly, we remand this case to BLM so that BLM may determine the royalty rate based on the evidence now before it and such additional evidence as appellant may submit to BLM in support of its request for royalty relief.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, that portion of the decision appealed from dealing with the royalty issue is set aside and this case is remanded to BLM for further consideration consistent with this opinion.

Wm. Philip Horton
Chief Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Franklin D. Arness
Administrative Judge

^{2/} 43 CFR 3473.3-2(d) reads:

"(d) The Secretary, whenever he/she determines it necessary to promote development or finds that the lease cannot be successfully operated under its terms, may waive, suspend or reduce the rental, or reduce the royalty but not advance royalty, on an entire leasehold, or on any deposit, tract or portion thereof, except that in no case shall the royalty be reduced to zero percent. An application for any of these benefits shall be filed with the Mining Supervisor in accordance with 30 CFR Part 211."

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

