

KAISER STEEL CORP.

IBLA 84-322 Decided June 19, 1985
84-323

Appeals from decisions of the Utah State Office, Bureau of Land Management, imposing certain readjusted terms and conditions in coal lease U-0126947, U-0126948 and SL-062966-063383-U-010140.

Affirmed.

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

A decision by the Bureau of Land Management to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation, or where such provisions are in accordance with proper administration of the public lands.

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

A provision in a readjusted coal lease requiring the lessee to conduct operations so as to avoid or, where avoidance is impracticable, to minimize and, where practicable, to repair, damage to Federal forage and timber, improvements including crops, of a surface owner, and improvements owned by the United States or by its permittees, licensees, or lessees, is appropriate and properly included in a lease readjustment.

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

It is proper to include a provision in a readjusted coal lease which reserves to the United States the right to authorize other uses of the leased lands that do not unreasonably interfere with the exploration and mining operations of the lessee, since any authorized use would be subject to the lease.

4. Coal Leases and Permits: Leases -- Environmental Quality: Generally
-- Mineral Leasing Act: Generally

It is proper to include in a readjusted coal lease a provision requiring the lessee to conduct at its own expense a survey and inventory of archaeological and paleontological values prior to approval of a mining plan or any activity that would disturb the surface of the land.

APPEARANCES: M. William Tilden, Esq., San Bernardino, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Kaiser Steel Corporation (Kaiser) has filed two appeals from separate decisions issued by the Utah State Office, Bureau of Land Management (BLM), overruling in part appellant's objections, and readjusting the terms and conditions of three coal leases.

The first appeal docketed as IBLA 84-322 includes leases U-0126947 and U-0126948 which were issued effective December 1, 1963. BLM notified appellant on December 2, 1982, that as of December 1, 1983, the terms and conditions of these leases were subject to readjustment. BLM informed appellant of the proposed readjustment on November 8, 1983, and enclosed a copy of the terms and conditions of the readjusted coal leases effective as of February 1, 1984. Appellant filed objections to certain of these provisions. On January 25, 1984, BLM issued the decision on appeal which overruled in part Kaiser's objections to specific provisions of the terms and conditions of the readjusted coal leases.

The second appeal docketed as IBLA 84-323, involves consolidated coal lease SL-062966-063383-U-010140 issued effective November 12, 1943. ^{1/} Kaiser was notified in December of 1982 that the lease was subject to readjustment on November 12, 1983. On October 27, 1983, BLM issued a Notice of Proposed Readjustment of the lease and enclosed a copy of the readjusted terms and conditions of the lease effective as of January 1, 1984. Kaiser filed objections to certain provisions in the readjusted lease. On January 23, 1984, BLM issued the decision on appeal which overruled Kaiser's objections and readjusted its coal lease.

For the most part, both appeals challenge the same provisions in their respective coal leases, and appellant has submitted identical arguments to support its position. Accordingly, we will consider the appeals together.

^{1/} Utah Fuel Company was the original lessee of SL-062966-063383 issued Nov. 12, 1943. Subsequently, that company merged with Kaiser. Coal lease U 010140 was issued to Kaiser on Feb. 1, 1955. The consolidated coal lease was issued to Kaiser on "May 4, 1956, as of Nov. 12, 1943."

Appellant challenges the BLM decision overruling its objections to the following provisions in readjusted leases U-0126947, U-0126948: all or portions of section 1, Statutes and Regulations; section 12, Operations on Leased Lands; section 13, Authorization of Other Uses and Disposition of Leased Lands; section 28, Appeals; and Subsections (4), (5), and (6) of section 30, Special Stipulations. In addition to its objections to these provisions, in appeal IBLA 84-323 appellant challenges BLM's decision not to consider supplemental objections to section 7, Advance Royalty; section 20, Noncompliance, and section 26, Inspections and Investigations, and section 28 Appeals.

[1] When these leases were issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. § 207 (1958) 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 the law at the time of the expiration of such periods.

Section 7 of the Mineral Leasing Act of 1920 was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), 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 each ten-year period thereafter if the lease is extended."

Consistent with the readjustment authority reserved to the United States by statute, the Department may promulgate regulations prescribing new terms and conditions to be included in coal leases upon readjustment. A decision by BLM to readjust a coal lease will be affirmed where the readjusted provisions appealed by the lessee are mandated by statute or regulation or where such provisions are in accordance with the proper administration of the public lands. Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984); Mid Continent Coal & Coke Co., 76 IBLA 312 (1983); Gulf Oil Corp., 73 IBLA 328 (1983); Coastal States Energy Co., 70 IBLA 386 (1983). 2/

Appellant's objections to section 1 of the Proposed Readjustment Lease focuses on language in the provision which makes the lease subject to regulations promulgated prior to the next readjustment.

Section 1 of the Proposed Readjustment of Lease provides in part that:

This lease is also subject to all regulations of the Secretary of the Interior (including, but not limited to, 30 CFR Part 211 and 43 CFR Group 3000) which are now or hereafter in force and which are made a part hereof. No amendment to the regulations made subsequent to the effective date hereof shall alter

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

the rental and production royalty requirements in Sections 5 and 6 of this lease until the next readjustment of this lease.

Appellant objects to the last sentence of this provision, and requests that it be revised to read as follows: "No amendment to the regulations made subsequent to the effective date hereof shall alter any provision of this lease until the next readjustment of this lease."

Appellant argues that unless the readjusted terms are firmly established at the onset the entire lease is essentially illusory. Kaiser contends BLM is given carte blanche to change any term of the lease at any time during the term of the lease excepting only the rental and production royalty provisions, merely by adopting new regulations which may adversely affect its interest.

In Lone Star Steel Co., 77 IBLA 96 (1983), we discussed the similar contention that section 1 of the standard readjusted lease terms required a lessee "to agree in advance to presently unknown terms embodied in future regulations." Id. at 96. The Board discussed two independent points in relation to this argument. First, the Board noted that the complaint was largely conjectural and hypothetical since injury to a lessee would be dependent upon the possibility that a regulatory change might be effected which would adversely affect a lessee who had relied on prior regulatory language. Second, by way of dicta, the Board expounded on the reason that the language in section 1 existed:

[T]here are many forms of new, revised or amended, regulations which might legitimately be applied to appellant's lease during the future, some which conceivably could work to the lessee's advantage, or at least not adversely affect it. Regulations can define terms, designate forms, or establish procedures. Other regulations may be necessary to implement new legislation concerning environmental protection, national emergency measures, or matters of health or safety, which could be made obligatory on the lessee in any event. Thus, the language of section 1 is not per se unlawful. Further, when new or revised regulations are promulgated, the Department must adhere to administrative procedures found in 5 U.S.C. § 553 (1976), which afford interested parties the opportunity to become involved in the rulemaking process. If such regulations are applied to the lease and appellant feels that its rights have been adversely affected, it may then have a right to appeal to this Board for relief.

Id. at 97-98. The Board further noted that "there is a statutory restraint against the readjustment of the basic lease terms except at the intervals specified." Id. at 98 n.2, citing Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849 (10th Cir. 1982).

It is inherently speculative and problematic to consider the extent to which future amendment of regulations might alter substantive provisions of the readjusted lease. Should such an occasion arise, appellant may, at that

time, seek review of the applicability of any changes to its outstanding lease. In the present context, appellant's concerns are purely conjectural and must be rejected. 3/

[2] Appellant objects to the inclusion of subsection 12(b) of the leases and the use of the words "to the maximum extent possible" in subsection 12(c). Section 12(b) and (c) state:

Section 12 OPERATIONS ON LEASED LANDS.

In accordance with the conditions of this lease, the exploration and mining plans, the regulations and the Act, the lessee shall exercise reasonable diligence, skill and care in all operations on the leased lands. The lessee's obligations shall include, but not be limited to the following:

* * * * *

(b) The lessee shall conduct operations in such a manner as may be needed to avoid or, where avoidance is impracticable, to minimize and where practicable, to repair damage to: (1) any forage and timber growth on Federal lands; (2) crops, including forage and timber, or improvements of a surface owner; or (3) improvements, whether owned by the United States or by its permittees, licensees, or lessees. The lessor must approve the steps to be taken and the restoration to be made in the event of the occurrence of damage described in this subsection.

(c) The lessee shall minimize to the maximum extent possible wasting of the mineral deposits and other resources, including, but not limited to, surface resources which may be found in, upon, or under such lands.

First, it is argued that the initial approval and periodic review of the lessee's exploration and mining plans are sufficient to cover subsection 12(b), and that any further control by BLM is unnecessary. With respect to subsection 12(c), appellant contends that it should be revised and that its responsibilities to avoid wasting of the resources should be followed with a qualification "to the extent reasonable and practical." Subsection 12(b) and 12(c) of the readjusted leases are based on and implement section 30 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 187 (1982), which mandates the inclusion of certain provisions in a coal lease. Section 30 reads in pertinent part:

3/ Appellant also objects to language in section 7 Advance Royalty; section 20 Compliance; and section 26 Inspections and Investigations, which makes Kaiser accountable under the "applicable regulation." Appellant argues that reference to "regulations" in these provisions should be deleted or modified by the words "in effect at the date of execution of the lease." The basis for objection to these proposed revisions is similarly speculative, and we reject them.

Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for * * * the prevention of undue waste as may be prescribed by [the] Secretary shall be observed, * * * and such other provisions as he [the Secretary] may deem necessary * * * for the protection of the interests of the United States, * * * and for the safeguarding of the public welfare. [Emphasis added.]

Appellant's argument that it was inappropriate to include subsection 12(b) in the readjusted lease is rejected, as it is clearly required by statute.

Nor are we persuaded that subsection 12(c) is objectionable. Section 30 requires the Secretary to include in a coal lease any provision he deems necessary to protect the interest of the United States. Consistent with section 30, the Secretary requires a lessee to minimize waste to the maximum extent possible. The revision of subsection 12(c) sought by appellant permits the lessees to determine the extent of its responsibility to avoid waste in light of what is practical and reasonable in its own self interest.

[3] Appellant objects to section 13 of the readjusted coal lease, "AUTHORIZATION OF OTHER USES AND DISPOSITION OF LEASED LANDS," which reserves to the United States the right "to authorize other uses of the leased lands by regulation or by issuing, in addition to this lease, licenses, permits, easements or rights-of-way, including leases for the development of minerals other than coal under this Act."

Section 13 also reserves the right (1) to sell or otherwise dispose of the surface of the leased lands or (2) to dispose of any resources in such lands if such disposal will not unreasonably interfere with the exploration and mining operations of the lessee and provides that, if the leased lands are disposed of, the lessee shall comply with all conditions as are or may hereafter be provided by the relevant laws and regulations.

Appellant seeks specific revision of the section to effectively subject the rights reserved by the United States to those of appellant. Kaiser seeks to contain what it perceives as BLM's unrestricted right to make determinations regarding use and disposition of the leased land without considering Kaiser's use of the land.

As far as contractual rights are concerned, 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 are prescribed subject to periodic readjustment. Mid-Continent Coal & Coke Co., 78 IBLA 178 (1984); FMC Corp., 74 IBLA 389, 393 (1983); Solicitor's Opinion, M-36939, 88 I.D. 1003, 1008 (1981). However, appellant does have certain rights in relation to others authorized to use the lands covered by its lease. We find that appellant's objection to that provision is invalid because uses authorized by the provision would still be subject to the lessee's rights. Mid-Continent Coal & Coke Co., 76 IBLA at 320; Gulf Oil Corp., supra at 334.

Section 28 grants the lessee the right to appeal an action or decision issued by BLM, 43 CFR 3000.4, or the Minerals Management Service under 30 CFR Part 290.

The section also gives the lessee the general right of appeal from any action or decision of any other official of the Department affecting the lease lands. Appellant seeks to add to the provision the following: "Nothing in this paragraph shall be construed as limiting any rights otherwise held by lessee and not specifically enumerated in this section." No reason is given to justify the addition. Appellant has not suggested that the appeal procedures provided by the Department and cited in the readjusted leases are inadequate to protect appellant's rights with respect to the leased lands. Under this provision appellant has the right to appeal any action or decision under any regulation. 43 CFR 4.410 allows any party to a case who is adversely affected by a BLM decision a right to appeal to this Board. During the appeal process the decision is stayed until this Board has ruled on the events of the case. The provision, as drafted, is appropriate, and we see no reason to require BLM to reconsider the language.

[4] Appellant objects to section 30, Special Stipulations, Subsections 4, 5, and 6. Subsections 30 (4), (5), and (6) relate to cultural resources, paleontological resources, and threatened or endangered plant and animal resources. Kaiser objects to those provisions to the extent that they require Kaiser to be responsible for cost of investigation, surveys, reports, or mitigating measures required with respect to the particular resource involved. In General Crude Oil Co., 28 IBLA 214, 83 I.D. 666 (1976), and Cecil A. Walker, 26 IBLA 71 (1976), the Board reviewed an oil and gas lease stipulation which required the lessee to provide for a survey of the land for archaeological values and protect such values at cost to the lessee. After making a detailed analysis of legislation concerning cultural resource values on the public lands, the Board sustained the stipulation. In Blackhawk Coal Co., 68 IBLA 96 (1982), and Gulf Oil Corp., supra, the Board held that it was not objectionable for BLM to require the lessee to bear all cost of protecting paleontological, archaeological, historical, or cultural values on the leasehold.

We have considered all of appellant's objections to the readjusted lease terms; thus we find it unnecessary to address whether appellant was entitled to have supplemental objections considered by BLM when they were submitted after the 60-day filing period provided in the notice, where no explanation or justification for the late filing accompanied the filing. Appellant has provided no evidence that the terms, conditions and special stipulations of its readjusted leases are not in conformance with FCLAA or its implementing regulations or that they are arbitrary and capricious or constitute an abuse of discretion. Appellant has demonstrated no error by BLM in the readjustment of these coal leases.

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 affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

