

RANDALL J. GERLACH

IBLA 85-391

Decided February 26, 1986

Appeal from a decision of the Oregon State Office, Bureau of Land Management, holding coal lease application OR 36744 for rejection.

Set aside and remanded.

1. Coal Leases and Permits: Applications -- Rules of Practice: Appeals: Generally -- Rules of Practice: Appeals: Notice of Appeal -- Rules of Practice: Protests

A BLM decision holding a coal lease application for rejection which requires the filing of certain information within 30 days of receipt of the decision, failing in which the application will be rejected without further notice, is interlocutory and the 30-day period for filing a notice of appeal does not commence until expiration of the time for compliance. A notice of appeal filed within the compliance period is actually an objection to action proposed to be taken and, thus, is a protest.

2. Coal Leases and Permits: Applications

When one files a coal lease application citing the leasing on application regulations in 43 CFR Subpart 3425, but in a subsequent submission declares that he will be using the coal for domestic energy needs, a conflict arises because one seeking coal for such a use must acquire a license to mine in accordance with 43 CFR Subpart 3440.

APPEARANCES: Randall J. Gerlach, Brookings, Oregon, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Randall J. Gerlach has appealed from a February 12, 1985, decision of the Oregon State Office, Bureau of Land Management (BLM), holding coal lease application OR 36744 for rejection pending submission within 30 days of certain information listed in the decision and required by the regulations in 43 CFR Subpart 3425.

Gerlach filed a coal lease application with the Oregon State Office on June 23, 1983, seeking to lease certain described lands in Coos County, Oregon. He stated therein: "My bid is \$ 3.00 per acre per year plus 8% of the value of coal removed from mine." The application cited the regulations at 43 CFR Subpart 3425 -- Leasing on Application. On August 11, 1983, Gerlach submitted a letter to the Oregon State Office stating: "I will be using the coal described in my application for my domestic energy needs." He also referred to section 8 of the Mineral Leasing Act, 30 U.S.C. § 208 (1982), which provides:

In order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this chapter as in his opinion will safeguard the public interests.

[1] Before turning to the substance of this appeal, we must address a procedural issue. The BLM decision held Gerlach's application for rejection. It provided Gerlach 30 days in which to supply certain information, failing in which the application would be rejected without notice. Such a decision is interlocutory; it is not a final decision until expiration of the 30 days compliance period without submission of the information. The 30-day appeal period commences upon the expiration of the 30-day compliance period. Carl Gerard, 70 IBLA 343, 346 (1983). Judge Stuebing succinctly described the nature of an interlocutory decision in his concurring opinion in John R. Anderson, 71 IBLA 172 (1983), when he stated at page 176:

Historically, BLM has, from time to time, followed the practice of issuing decisions captioned "Application Held for Rejection" or "Application Rejected Subject To Compliance," or something similar. Such decisions may, or may not, be interlocutory, depending on their content.

* * * * *

However, when the decision merely calls on the applicant to cure a perceived deficiency in the application or to provide something additional by submitting information, evidence, or money, no final decision adverse to the applicant has yet been made by BLM, even where the decision advises the applicant that a failure to comply within the prescribed time will render the application "subject to rejection," as the actual rejection has not occurred at that point, and remains a matter for the exercise of discretion. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960). Even a contingent decision to reject in futuro is not subject to appeal immediately, as the adverse action has not yet occurred, but is only anticipated. Such a decision is interlocutory.

The BLM decision did not clearly explain when the appeal period commenced, however, and within the compliance period Gerlach filed his appeal. Since his "appeal" constituted an objection to an action proposed to be taken by BLM (rejection had not become final), under 43 CFR 4.450-2, BLM should have treated it as a protest. See Goldie Skodras, 72 IBLA 120 (1983). It did not. It forwarded the case to the Board.

[2] Rather than merely sending the case file back to BLM to consider Gerlach's objections, we must set aside the BLM decision and remand the case for the following reasons. Despite the form of Gerlach's June 23, 1983, application, it would appear what he actually seeks is a license to mine coal pursuant to 43 CFR Subpart 3440, rather than a lease on application under 43 CFR Subpart 3425. ^{1/} The regulations at 43 CFR Subpart 3440 were promulgated primarily to implement section 8 of the Mineral Leasing Act, 30 U.S.C. § 208 (1982). They provide for the issuance of licenses to mine coal for domestic needs. 43 CFR 3440.1-1.

In addition, even if Gerlach were seeking a lease on application under 43 CFR Subpart 3425, the BLM decision was only partially correct in its request for information. First, it asked for the showings required by 43 CFR 3425.1-4 relating to emergency leasing. Then it requested the preliminary data required by 43 CFR 3425.1-7(b). The case file contains a copy of a letter from the Acting Chief, Division of Solid Mineral Leasing, BLM, Washington, D.C., dated June 27, 1983, to Gerlach in response to a June 8, 1983, letter Gerlach had sent to the Secretary of the Interior requesting clarification of the lease on application coal regulations. Therein, it was stated:

This citation (43 CFR 3420.3 through 43 CFR 3420.5-2) describes regional coal lease sales in coal production regions. Oregon does not lie within one of these regions so that the regulations which apply are at 43 CFR 3425.1-5. [Leasing outside coal production areas] (Emergency leasing described at 43 CFR 3425.1-4 occurs only in coal production regions where there is a need for coal in advance of the regional lease sale in that area.)

Based on this explanation, there is no reason for the BLM decision to have required the showings for an emergency coal lease sale under 43 CFR 3425.1-4. The preliminary data requested in the BLM decision, however, is required by regulation to be contained in an application filed under 43 CFR Subpart 3425.

Gerlach's present application fails to comply with the leasing on application regulations (43 CFR Subpart 3425) because of the failure to provide the preliminary data. It also fails to comply with the license to mine regulations which require at 43 CFR 3440.1-1(a) that the applicant file "[f]our copies of the application for license to mine coal for domestic needs

^{1/} In his notice of appeal Gerlach states, "I request a response from B.L.M. * * * regarding my application for coal permit, license or lease under section 8 Sixty-sixth Congress session II chapter 85 1920 (enclosed) as requested under August 9, 1983 portion of coal license, permit or lease application."

* * * on a form approved by the Director [BLM], or on a substantial equivalent of the form, in the Bureau of Land Management State Office having jurisdiction over the lands involved (43 CFR Subpart 1821)."

On remand BLM should ascertain from Gerlach whether, in fact, he desires to seek a license to mine coal pursuant to 43 CFR Subpart 3440. If so, he must comply with those regulations.

Accordingly, 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 set aside and the case remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

