

MOUNTAIN STATES RESOURCES CORP.

IBLA 84-616

Decided June 12, 1986

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying a petition for waiver of rents, suspension of operation and minimum production requirements, and reduction of royalties on coal leases U-5135 and U-5146.

Affirmed as modified.

1. Coal Leases and Permits: Diligence -- Coal Leases and Permits:
Suspension of Operations and Production

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1982), requires that any coal lease not producing in commercial quantities at the end of 10 years be terminated. No suspension of this obligation to commence production is authorized by statute or regulation.

2. Coal Leases and Permits: Rentals -- Coal Leases and Permits:
Royalties -- Mineral Leasing Act: Rentals -- Mineral Leasing Act:
Royalties

A petition to waive rentals and reduce production royalties required by a coal lease shall contain the information set forth at 43 CFR 3485.2. The authorized officer may either reject a petition not meeting the criteria set forth in the regulation or request additional data.

3. Coal Leases and Permits: Rentals -- Coal Leases and Permits:
Royalties -- Mineral Leasing Act: Rentals -- Mineral Leasing Act:
Royalties

A lessee seeking the waiver, suspension, or reduction of rental or minimum royalty, or the reduction of production royalty must show that such relief would encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under the lease terms.

APPEARANCES: George A. Hunt, Esq., R. Scott Howell, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Mountain States Resources Corporation (MSRC) has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated April 30, 1984, denying a petition for waiver of rents, suspension of operation and minimum production requirements, and reduction of royalties for coal leases U-5135 and U-5146. Each lease was issued pursuant to 43 CFR Subpart 3430 as a preference right lease and bears an effective date subsequent to the enactment of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201 through 209 (1982). ^{1/}

BLM's decision states in part:

It is our position that the petition filed by Mountain States would in effect allow the leases to be held without remuneration to the Federal Government until such a time as economic

^{1/} The effective date of lease U-5135 is May 1, 1977; the effective date of lease U-5146 is Apr. 1, 1983. FCLAA was enacted on Aug. 4, 1976, as P.L. 94-377, 90 Stat. 1083.

or other conditions would be favorable for development of the coal resource. This is not consistent with the intent of the Federal Coal Leasing Amendments Act of 1976 and Interior Department policy. Therefore, the petition is hereby denied for the following reasons:

1. Waiver of Rents

It is determined that to waive or reduce the rental payment on undeveloped Federal leases U-5135 and U-5146 at this time would not encourage "the greatest ultimate recovery of the coal * * * or promote development." Existing coal mines in the area are currently operating at well below capacity and it is apparent that markets do not now exist which would justify additional coal development at this time. It is acknowledged that current market conditions might not justify the capital expenditures to develop the leases at this time, but waiving or reducing the rent would not alter this situation.

2. Suspension of Operations and Minimum Production

As stated above Federal coal leases U-5135 and U-5146 are undeveloped and, therefore, the question of suspension of operations is not germane. Continued operation, which requires the production of 1 percent of the recoverable reserves, or payment of advanced royalty in lieu of continued operation, is required only after diligent development has been achieved (43 CFR 3483). Diligent development and continued operation requirements are mandated by Section 6 of the Federal Coal Leasing Amendments Act of 1976 and cannot be waived "except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee."

3. Royalty Reduction

The petition being considered does not meet the regulatory requirement or current department policy for royalty reduction consideration. Royalties on Federal coal leases may be reduced in accordance with the requirement of 43 CFR 3485.2. An application for royalty reduction is to be filed in triplicate with the authorized officer and must meet the requirements of the regulations. [Emphasis added.]

The underscored quotations set forth in BLM's decision are statutory in origin. Section 6 of FCLAA, 30 U.S.C. § 207 (1982), and section 39 of the Mineral Leasing Act (as amended by section 14 of FCLAA), 30 U.S.C. § 209 (1982), are their sources. 30 U.S.C. § 207 (1982) provides:

(a) Term of lease; annual rentals; royalties; readjustment of conditions

A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. 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. * * *

(b) Diligent development and continued operation; suspension of condition on payment of advance royalties

Each lease shall be subject to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee. The Secretary of the Interior, upon determining that the public interest will be served thereby, may suspend the condition of continued operation upon the payment of advance royalties. Such advance royalties 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). * * * Nothing in this subsection shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of ten years.

30 U.S.C. § 209 (1982) provides:

The Secretary of the Interior, for the purpose of encouraging the greatest ultimate recovery of coal, oil, gas, oil shale, gilsonite (including all vein-type solid hydrocarbons), phosphate, sodium, potassium and sulphur, and in the interest of conservation of natural resources, is authorized to waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein. * * * In the event the Secretary of the Interior, in the interest of conservation shall direct or shall assent to the

suspension of operations and production under any lease granted under the terms of this chapter, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto.

In a letter to the State Director dated April 13, 1984, appellant explained that the "most important part" of MSRC's petition is its request for "suspension of operations, which suspends the lease and diligent development requirements of the lease." (Emphasis added.) Appellant seeks this suspension to allow the coal industry to "come out of its depression." Id. In its statement of reasons, MSRC refers to the legislative history of section 39, 30 U.S.C. § 209 (1982), which was enacted, appellant states, at a time when the supply of oil and gas far exceeded demand. By enacting section 39, Congress established a means of entitling an oil or gas or mineral lessee the benefit of the full term of the lease by extending the lease period if production was suspended in order to conserve resources, MSRC contends. Appellant maintains Congress also provided a basis for a lessee to request that production be suspended if development of the resources under current market conditions would lead to economic waste of the resources (Statement of Reasons at 4).

As BLM's decision points out, no development has taken place on the two leases at issue. Because there are no operations taking place, appellant's request for a suspension of operations is actually a request for suspension of its diligent development obligation and the statutory 10-year period required for its satisfaction. "Diligent development" is defined at

43 CFR 3480.0-5(a)(12) to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." For the leases at issue, the diligent development period is the 10-year period beginning at the effective date of each lease. 43 CFR 3480.0-5(a)(13). "Commercial quantities" is one percent of recoverable coal reserves. 43 CFR 3480.0-5(a)(6).

[1] The language of FCLAA, its legislative history, and the Department's regulations all foreclose a suspension of the diligent development requirement. 30 U.S.C. § 207(a) (1982) provides, in its second sentence, that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. § 207(b) (1982) provides, in its last sentence, that nothing in that subsection "shall be construed to affect the requirement contained in the second sentence of subsection (a) of this section relating to commencement of production at the end of ten years." Thus, the first sentence of section 207(b) subjecting each lease "to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee" must be interpreted as allowing an exception only from the continued operation condition, and then only under the specified circumstances.

In enacting the requirement that a lease not producing in commercial quantities at the end of 10 years shall be terminated, Congress was responding to the widespread speculation that pervaded the coal leasing program prior to 1976. Geological Survey reported that of the 533 leases outstanding

at that time only 59 were currently producing coal. ^{2/} The House report noted that the then current law specified that a coal lease shall be subject to the conditions of "diligent development" and "continued operation" and "except for the 59 leases currently in production, all of the remaining 474 Federal leases are being held under a waiver of the condition of continued operation issued by the Secretary of the Interior." ^{3/} "The problems of speculation are addressed directly by the bill," the report stated, "which requires termination of any lease which is not producing in commercial quantities at the end of 15 years." ^{4/} Each lease would be subject to diligent development and continued operation, the report continued, and "[a]s under current law, the condition of continued operation [but not of diligent development] may be suspended in favor of an advanced royalty payment." ^{5/}

When Congress was considering FCLAA it was also aware of the meaning of the terms "diligent development" and "continuous [sic] operation" employed in 30 U.S.C. § 207 (1982) published as proposed rules by the Department in part to "remedy * * * the problem of speculative holding of leases." ^{6/} "Continuous operation" was defined as "extracting, processing, and marketing of coal in commercial quantities * * * subject to the

^{2/} H.R. Rep. No. 681, 94th Cong., 2d Sess. 9, reprinted in 1976 U.S. Code Cong. & Ad. News 1943, 1945.

^{3/} Id. at 15; see 1976 U.S. Code Cong. & Ad. News 1950.

^{4/} Id.; see 1976 U.S. Code Cong. & Ad. News 1951. As enacted the law requires production in commercial quantities at the end of 10 years.

^{5/} Id.

^{6/} Id. at 12-14; see 1976 U.S. Code Cong. & Ad. News 1948-49. The proposed rules were included in the House report "[b]ecause of their importance to this legislation." Id. See also 39 FR 43229 (Dec. 11, 1974).

contained in 30 U.S.C. 207." 7/ The exceptions were not mentioned in the proposed definition of diligent development. Thus, the legislative history of FCLAA demonstrates that Congress was aware of and confirmed the view that the diligent development condition could not be suspended.

This congressional intent is carried out in the Department's regulations promulgated after enactment of FCLAA and in the accompanying preamble. 8/ One comment proposed that payment of advance royalty should be allowed in lieu of diligent development, as well as continued operation. The comment was rejected because the language of section 207(b) only provides that the Secretary may suspend the condition of continued operation upon payment of advance royalties and states specifically that subsection 207(b) is not to be construed to affect the requirement set forth in the second sentence of subsection 207(a), quoted above. 9/ Another comment on the proposed regulations "was in favor of suspensions of diligent development. The DOI had determined that such extensions are not provided for by MLA [Mineral Leasing Act]. Several comments stated that suspensions should not extend the 10-year diligent development period. The MMS [Minerals Management Service] agrees and this final rulemaking has been revised accordingly." 10/

The Department also considered appellant's concern that market conditions could make compliance with the diligent development requirement difficult:

7/ Id.

8/ See generally 47 FR 33114-51, 33154-95 (July 30, 1982).

9/ 47 FR 33156 (July 30, 1982).

10/ 47 FR 33171 (July 30, 1982).

Several comments opposed the 10-year deadline for achievement of diligent development because the deadline is set without consideration of market conditions or amount of recoverable coal reserves. This deadline is based upon the explicit requirements of MLA which, in Section 7(a), specifies that any Federal lease "not producing in commercial quantities at the end of ten years shall be terminated."
[11/]

These comments explain why the Department's regulations provide (in 43 CFR 3475.5) that each coal lease shall require diligent development and either continued operation (except when interrupted by strikes, etc.) or payment of advance royalty, and provide (in 43 CFR 3483.3(b)(1)) that a suspension of operations and production of a Federal coal lease "suspends all other terms and conditions * * * except the diligent development period." (Emphasis added.)

11/ 47 FR 33157 (July 30, 1982). The rest of the comment explains the relationship between the definition of "commercial quantities" and the diligent development requirement:

"By defining 'diligent development' in terms of 'commercial quantities,' DOI thus allows operators/lessees the maximum flexibility to tailor the timing of the operations while still complying with the statutory mandate. Another alternative considered by DOI to implement this statutory requirement was to establish uniform, nationwide milestones for every operation to meet in ensuring that an operation would be producing commercial quantities at the end of 10 years. However, DOI believes that the methods for development of operations should be left to the individual operators/lessees under an approved permit and should not be mandated by DOI. For this reason, DOI decided that the 10-year requirement for producing commercial quantities was equated with the definition of diligent development, leaving the method for achieving this amount of production to the individual operators/lessees. It should be noted that in the second sentence of Section 7(a) of MLA, the term 'producing' implies a continuing obligation; therefore, this final rulemaking defines the statutory production requirement of 'continued operation' as 1 percent every year thereafter based on a 3-year average. This will allow the operator/lessee additional flexibility in meeting this production requirement." Id.

Paragraph 2 of BLM's decision of April 30, 1984, quoted above, focuses primarily on the lessee's obligation of continued operation. ^{12/} As correctly explained in the decision, this obligation arises after diligent development has been achieved. 43 CFR 3480.0-5(a)(8); 43 CFR 3483.1(a). Because it did not address appellant's request to suspend the condition of diligent development, BLM's decision may be affirmed, but as modified by the discussion above.

[2] Appellant also sought a "waiver of rents due April 1, 1984, May 1, 1984, and in subsequent years" and a reduction of royalties. In support thereof, appellant again points to the depressed condition of the coal industry. Utah coal production dropped 34.29 percent in 1983, appellant notes, a figure three times the national average. Two to three million tons of unsold coal are stockpiled in Carbon and Emery Counties, Utah, and in appellant's view, the outlook for the coal market into 1990 is substantially reduced. The leases at issue have been rendered uneconomical for the present time, appellant contends, by a lack of market (including the Pacific Rim), high transportation costs, a drop in electric utility demand, overproduction, and high royalty rates. Appellant, accordingly, seeks a waiver of rentals and a reduction of royalties until such time as a sufficient market can be established to allow MSRC to arrange the necessary contracts and commitments of capital for development of these leases in an orderly fashion and to maximize the resource.

^{12/} "Continued operation" means the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and an average of not less than commercial quantities thereafter. See 43 CFR 3480.0-5(a)(8).

Paragraph 3 of BLM's decision addressing MSRC's request for a reduction of royalties is an adequate answer not only to MSRC's request for royalty reduction, but also for its request for waiver of rentals. That decision refers to 43 CFR 3485.2, a regulation setting forth in some detail the information to be contained in any petition for royalty reduction or rental waiver. Among the data required by regulation, but missing from appellant's petition, are: A map showing the extent of existing, proposed, or adjoining mining operations; a tabulated statement of the Federal coal mined, if any, and subject to Federal royalty for the existing or adjoining operation; a detailed statement of expenses and costs of operating the entire mine; and full information as to whether royalties or payments out of production are paid to parties other than the United States. See 43 CFR 3485.2(c)(2). Although appellant appears to have been unaware of these requirements, BLM could properly reject MSRC's request for royalty and rental relief pursuant to 43 CFR 3485.2(c)(3), rather than return the request for supplemental information. See Sheridan-Wyoming Coal Co., A-25845 (June 27, 1950).

Addressing the waiver of rentals, BLM noted in paragraph 1 of its decision that a waiver or reduction of the rental amount would not encourage the greatest ultimate recovery of coal or promote development in an industry characterized by poor markets and below-capacity operations. In reply, MSRC states that BLM overlooks or de-emphasizes the statutory language authorizing waiver or reduction of rents and royalties in the interest of conservation or whenever the leases cannot be successfully operated. MSRC construes the statutory phrase "greatest ultimate recovery of coal" to mean

the greatest economic recovery of coal and contends that production of coal in the present market would reduce the economic recovery of coal, deprive the lessee of a reasonable profit, and diminish the Government's royalty.

[3] Under 30 U.S.C. § 209 (1982), any relief in the form of waiver, suspension, or reduction of rental or minimum royalty, or reduction of production royalty ^{13/} must encourage the greatest ultimate recovery of coal, advance the interest of conservation, and either be necessary to promote development or be directed to a lease that cannot be successfully operated under present lease terms. Accord, Monsanto Chemical Co., A-27132 (Nov. 1, 1955). Appellant has not shown how a waiver of rentals (or a reduction of royalties) will encourage recovery or promote conservation of natural resources even assuming, arguendo, that its leases cannot be successfully operated or that a waiver would promote development. No demonstration is made, for example, that coal will be bypassed and thus lost if the desired relief is denied. Eliminating the bypass of coal is one method of encouraging the greatest ultimate recovery of coal and advancing the interest of conservation. Likewise, there is no attempt to demonstrate that the greatest economic recovery of coal will result from granting a waiver of rental (or reduction of royalty) at this time, even assuming this is a proper interpretation of the statutory requirement that relief must encourage the "greatest ultimate recovery" of the resource. Royalty reductions are not intended to subsidize marginal or poorly run operations or to permit profitable extraction of coal that would be uneconomic to produce without a reduction. 47 FR

^{13/} Solicitor's Opinion, 87 I.D. 69, 70 n.2 (1979), explains the distinction between "minimum production royalties" and "minimum royalties."

33175 (July 30, 1982). Appellant's suggestion that, in the absence of rental waiver, it might be forced to mine coal in the current market in order to pay the lease rental is impractical; if it cannot profitably develop these leases it may simply let them terminate. BLM's denial of a waiver of rental was proper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Franklin D. Arness
Administrative Judge

