

KAISER COAL CORP.

IBLA 86-1412

Decided August 5, 1988

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting coal lease SL-066145.

Affirmed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

In accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), it is error for BLM, in readjusting a coal lease for an underground coal mine, to automatically set a royalty rate of 8 percent for coal removed from such mine without first determining if conditions warrant a lower rate.

APPEARANCES: Denise A. Dragoo, Esq., Rosemary J. Beless, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Kaiser Coal Corporation has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated May 28, 1986, readjusting coal lease SL-066145. This lease was originally issued on June 19, 1946, and was subsequently readjusted on June 19, 1966. Land described therein is the situs of Kaiser's underground mine. By letter of August 1, 1984, BLM notified appellant that this lease would be readjusted for a second time effective June 19, 1986. The terms of such readjusted lease were set forth in a decision dated January 17, 1986, to which appellant filed objections. BLM's response to those objections is the decision on appeal.

The gist of appellant's arguments on appeal is that BLM may not apply provisions of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. | 201 (1982), in readjusting a lease, such as SL-066145, entered prior thereto. Such "retroactive" application is contrary to the express terms of the lease, appellant charges, and to the Mineral Leasing Act of 1920, 30 U.S.C. | 188 (1982), upon which such terms are based. In appellant's view, BLM erred in relying upon Coastal States Energy Co. v. Watt, 629 F. Supp. 9 (D. Utah 1985), when another case, FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545 (D. Wyo. 1984), provided contrary precedent.

Specifically, Kaiser contends that BLM erred by inserting in part 1 of the proposed lease a provision requiring that future readjustments occur at the end of each 10-year lease period. Further error is found by Kaiser in

part I, section I, subjecting lease SL-066145 to the regulations and formal orders of the Secretary "which are now or hereafter in force, when not inconsistent with the express and specific provisions herein." Part II of lease SL-066145 is the subject of numerous objections. Among them: rental credits (¶ 1(b)); production royalties (¶ 2(a)); royalty payment dates (¶ 2(a)); advance royalty amounts (¶ 2(b)); diligence (¶ 4), and proposed stipulations (¶ 15).

After appellant filed its statement of reasons, the Court of Appeals for the Tenth Circuit decided two cases, FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987), cert. denied, 108 S. Ct. 772 (1988), and Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), resolving the conflicting district court decisions cited above. The court held that BLM could not automatically impose a production royalty of 8 percent for coal mined by underground methods, but affirmed BLM in all other respects.

The argument that the provisions of FCLAA may not be applied to a pre-FCLAA lease was squarely rejected by the Court of Appeals in FMC Wyoming Corp. v. Hodel, supra. At page 501, the court held, "Further, and importantly, we find nothing in our reading of FCLAA (1976), or in its legislative history, to indicate that FCLAA (1976) was not to be applied to pre-FCLAA coal leases on their post-FCLAA anniversary date." (Footnote omitted.)

In Coastal States Energy Co. v. Hodel, supra, the Court of Appeals considered a number of lease terms that Kaiser objects to in the present appeal. Specifically, the court examined the royalty rate increase, the deletion of the credit against royalty payments for rental payments, the substitution of monthly royalty payments for quarterly payments, ^{1/} and the

^{1/} Kaiser raises an argument regarding the schedule of royalty payments that was not addressed by the Court of Appeals, viz., that BLM violated the Administrative Procedure Act in establishing monthly payments without rule-making. BLM's requirement of monthly payments is, in appellant's view, "a statement of general policy and interpretation of general applicability formulated and adopted by the Department of the Interior" (Statement of Reasons at 25-26). As such, the mandatory rulemaking procedures set forth at 5 U.S.C. § 552-553 (1982) were applicable, appellant contends, and such were not satisfied by BLM's publication of lease terms in the Federal Register at 49 FR 12757 (Mar. 30, 1984).

The mandatory rulemaking procedures (notice and comment) that appellant finds lacking in the present case apply to substantive, i.e., legislative, rulemaking. The procedures are expressly inapplicable to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)A (1982). The Board has never regarded proposed lease terms to be substantive rulemaking because such terms, with the exception of those mandated by statute or regulation, may be changed by BLM in response to a lessee's objection or by the Board in response to an appeal. See, e.g., Coastal States Energy Co., 81 IBLA 171 (1984), and Red Rock 4-Wheelers, 75 IBLA 140, 142 (1983).

change of the readjustment intervals from 20 to 10 years. 816 F.2d at 505. With the exception of the royalty rate increase, the court found BLM's imposition of such terms to be proper. Kaiser's challenge to these provisions is, accordingly, rejected.

Not mentioned by the court but directly challenged by Kaiser is the requirement in section 4 that a lessee satisfy conditions of diligent development. This provision is specifically required by section 6 of FCLAA, 30 U.S.C. | 207 (1982). Because the Court of Appeals held that BLM could apply the provisions of FCLAA to leases such as SL-066145, Kaiser's challenge to the diligence requirements must be rejected. See also Ark Land Co., 97 IBLA 241, 245 (1987).

[1] With respect to BLM's imposition of an 8-percent royalty rate for coal produced by underground mining methods, the Court of Appeals held that it was error for BLM to automatically fix the readjusted royalty rate for all underground coal at 8 percent, because such action ignored regulation 43 CFR 3473.3-2(a)(3). That regulation called for a royalty rate of not less than 8 percent for coal removed from an underground mine, "except that an authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant." Because the record does not reveal that BLM considered whether a royalty rate less than 8 percent was warranted, we set aside BLM's decision in this one regard and direct that BLM on remand determine whether conditions warrant a lower rate.

As noted above, Kaiser also objects to the provisions of part 1, section 1, whereby the lease is expressly made subject to regulations and formal orders of the Secretary which are "now or hereafter in force." A similar objection is made to the lease provision calculating advance royalties "in the manner established by the advance royalty regulations in effect at the time" the lessee requests approval to pay such in lieu of continued operation. This Board has previously approved the adoption of similar provisions subjecting a lease to future regulations pertaining to coal leasing and held such provisions to be within the scope of authority delegated to the Secretary. Gulf Oil Corp., 91 IBLA 93, 100 (1986);

fn. 1 (continued)

Moreover, it appears from the record that the benefits which Kaiser seeks from the notice and comment provisions of 5 U.S.C. | 553 (1982) have already been granted it. That section requires an agency to publish notice of proposed rules and to afford a comment period to all interested. In the present case, appellant received a copy of the proposed lease terms and was granted a 60-day period in which to file objections. Any procedural defects that appellant perceives appear to be harmless.

The procedures followed by BLM are consistent with 43 CFR 3485.2(d), a regulation promulgated pursuant to 5 U.S.C. | 553 (1982). That regulation provides: "Operators/lessees shall submit Federal royalty payments as provided for in the Federal lease. The payment shall be made within 30 days after the end of the royalty reporting period for which the royalty accrued." See also 43 CFR 3485.1(d).

Consolidation Coal Co., 86 IBLA 60, 67 (1985). In those cases we found the lessees were adequately protected from unreasonable application of new or revised regulations. If a decision is rendered in the future adversely applying changed regulations to this lease, appellant may appeal for relief from that decision. Accordingly, Kaiser's objection to these provisions was properly rejected.

Kaiser also objects to stipulations 2 through 15 which, it contends, are redundant, unreasonable, and a breach of its contractual rights under lease SL-066145. Appellant does not set forth the provisions of its mining permit that allegedly replicate the lease stipulations, nor does appellant say why such stipulations are unreasonable. As to a breach of its contractual rights, the Board has repeatedly held that a lessee of a coal lease undergoing readjustment has only one existing right: the right to accept or reject the continuation of a coal lease beyond a 20-year period under such reasonable terms as the Secretary deems proper. Coastal States Energy Co., supra at 174. We find that appellant's allegations as to reasonableness are wholly conclusory and, as such, fail to demonstrate error in the BLM decision on appeal.

Appellant's final challenge to BLM's decision focuses upon notice to the Attorney General and to the Governor of Utah. Subsection (d) of regulation 43 CFR 3451.1 directs that no lease readjustment shall be effective until 30 days after BLM has transmitted certain information 2/ furnished by the lessee to the Attorney General. The regulation also points out that a lessee need furnish such information to BLM only at BLM's request. Thus BLM's duty to transmit is dependent upon its first requesting such information of the lessee. Gulf Oil Corp., 73 IBLA 328, 334 (1983). In the present case, BLM has not so requested. We hold, therefore, that no violation of 43 CFR 3451.1(d) has occurred. Notice to the Governor of Utah is required by subsection (e) prior to readjustment. In its decision of May 28, 1986, BLM stated that such notice would be transmitted prior to the readjustment date (June 19, 1986). Kaiser's subsequent pleading does not respond to this statement of BLM and we hold, accordingly, that Kaiser has failed to demonstrate error in this aspect of BLM's decision.

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 State Office is affirmed in part, set aside in part, and remanded for action consistent herewith.

Franklin D. Arness
Administrative Judge

We concur:

Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

C. Randall

2/ The information involved is described at 43 CFR 3422.3-4.