

GEORESOURCES, INC.

IBLA 87-300

Decided March 2, 1989

Appeal from a decision by the Bureau of Land Management, Montana
State Office, rejecting oil and gas offers to lease MTM 72086, MTM 72087, MTM 72088, and MTM 72097.

Affirmed.

1. Regulations: Validity

While the Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department which have the force and effect of law, the Board will consider a challenge to Departmental regulations insofar as it is alleged that the regulations were not "duly promulgated."

2. Regulations: Validity

Regulations of the Department implementing 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act are duly promulgated in accordance with the requirements of Exec. Order No. 12291 and the Regulatory Flexibility Act.

3. Mineral Leasing Act: Generally--Oil and Gas Leases: Offers to Lease

Oil and gas offers to lease were properly rejected by BLM pursuant to 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act, 30 U.S.C. | 201(a)(2)(A) (1982), requiring that a lessee who has held a Federal coal lease for a period of 10 years must be producing coal in commercial quantities in order to

qualify for other Federal leases under the Mineral Leasing Act, where oil and gas offers to lease were made, and offeror could not show that production was occurring in commercial quantities from a readjusted coal lease held by offeror for a period of more than 10 years.

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

Where offeror who has held a coal lease in excess of 10 years seeks to qualify for exemption from Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring production from offeror's coal lease in commercial quantities, and claims that its lease is under application for a logical mining unit, offeror must show that its logical mining unit application was pending at the time the oil and gas offer to lease was rejected.

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

Under 1976 Federal Coal Leasing Amendments Act amendments to the Mineral Leasing Act requiring coal lessees who have held leases for a period of 10 years to produce coal in commercial quantities in order to qualify for other Federal leases, where coal lessee offers to bid on other Federal leases pursuant to the Mineral Leasing Act, terms and conditions of offeror's coal lease or leases are subject to the qualifying provision of 30 U.S.C. | 201(a)(2)(A) (1982) insofar as the lessee seeks to qualify to hold other Federal leases.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

GeoResources, Inc. (GeoResources), has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated January 23, 1987, rejecting oil and gas offers to lease MTM 72086, MTM 72087, MTM 72088,

and MTM 72097, filed by GeoResources with the Montana State Office on January 20, 1987. BLM's rejection of appellant's lease offers relied on section 3 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), which amended section 2(a) of the Mineral Leasing Act of 1920 (MLA) to prohibit further lease issuances under the Act where the lessee has held a Federal coal lease for a period of 10 years after August 4, 1976, and has not produced coal from the lease in commercial quantities by August 4, 1986. 30 U.S.C. | 201(a)(2)(A) (1982). 1/

Appellant does not dispute BLM's determination that its coal leasehold was not producing in commercial quantities at the time it made its oil and gas lease offers. Appellant argues that the coal lease in question is pending before BLM for a determination upon application for a logical mining unit (LMU), and claims exemption from compliance with the FCLAA amendment to section 2(a)(2)(A) of the MLA (hereinafter 2(a)(2)(A)) pursuant to 43 CFR 3472.1-2(e)(4)(i)(C). Appellant further contends that BLM's actions should be reversed because proper rulemaking procedures were not followed, in that BLM failed to consider rules made pursuant to 2(a)(2)(A) major rules under

1/ 30 U.S.C. | 201(a)(2)(A) (1982) provides:

"The Secretary shall not issue a lease or leases under the terms of this chapter to any person, association, corporation, or any subsidiary, affiliate, or persons controlled by or under common control with such person, association, or corporation, where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in section 207(b) of this title, producing coal from the lease deposits in commercial quantities. In computing the ten-year period referred to in the preceding sentence, periods of time prior to August 4, 1976, shall not be counted."

P.L. 99-190 extended the effective date of the amendment to Dec. 31, 1986.

Exec. Order No. 12291 (Feb. 17, 1981) (5 U.S.C. | 601 note (1982)), and failed to consider their economic impact under the Regulatory Flexibility Act. Id.

[1, 2] While this Board will not entertain attacks upon the validity of duly promulgated regulations of the Department, 2/ appellant charges that BLM has improperly promulgated regulations pursuant to 2(a)(2)(A), by failing to comply with Exec. Order No. 12291 and the Regulatory Flexibility Act, which require publication of a regulatory impact analysis for major rulemaking. The Board will consider appellant's argument insofar as it pertains to the question whether pertinent regulations were in fact "duly promulgated."

Proposed guidelines for the implementation of 2(a)(2)(A) were subject to a 60-day comment period published in the Federal Register on February 15, 1985. 50 FR 6398. That comment period was extended for an additional 30 days, in response to public requests. Final guidelines were published in the Federal Register on August 29, 1985. 50 FR 35125. Proposed rulemaking amending existing regulations at 43 CFR 3100, 3400, 3470, and 3500 was published in the Federal Register on October 20, 1986, and given a 30-day comment period from October 20 through November 19, 1986. 51 FR 37202.

2/ See Chugach Alaska Corp., 94 IBLA 24, 26 (1986), quoting Chugach Natives, Inc., 80 IBLA 89 (1984): "The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Board. Sam P. Jones, 71 IBLA 42 (1983); Enserch Exploration, Inc., 70 IBLA 25 (1983); Altex Oil Corp., 61 IBLA 270 (1982)." See also Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981).

Economic impacts are addressed in the proposed rulemaking at 51 FR 37203, as follows:

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The economic impact of this rulemaking is not significant and its impact will fall equally on all affected entities, whether large or small.

In its notice of final rulemaking, published in the Federal Register on Friday, December 5, 1986, BLM explained that the amendments to existing regulations implementing 2(a)(2)(A) were effective upon publication in compliance with 5 U.S.C. | 553(d) (1982), because the rulemaking "recognizes exemptions and relieves restrictions." 3/ 51 FR 43911. BLM found "the

3/ 5 U.S.C. | 553 (1982) provides, in pertinent part:

"| 553. Rule making

* * * * *

"(b) General notice of proposed rule making shall be published in the Federal Register, * * *.

* * * * *

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. * * *

* * * * *

"(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

adverse consequences of section 2(a)(2)(A) will occur by operation of law on December 31, 1986, whether or not these regulations are in effect." Id. (emphasis added).

Section 2(a)(2)(A) prohibits Federal lessees holding undeveloped coal leases for more than 10 years from further eligibility for leases issued pursuant to the MLA. Even if appellant's assumption that this limitation harbors adverse economic impacts were accepted, the consequences of this amendment have been mandated by Congress, and are without the purview of the Department's discretion. As BLM has stated, the adverse consequences of 2(a)(2)(A) became law on December 31, 1986. As 2(a)(2)(A) was enacted in 1976, appellant had 10 years to economically adjust.

While 5 U.S.C. | 603 (1982) requires the preparation of a regulatory flexibility analysis upon general notice of proposed rulemaking, 4/ 5 U.S.C. | 605(b) (1982) provides that: "Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Further, Exec. Order No. 12291, at section 9, provides that "[t]his Order * * * is not intended to create

4/ 5 U.S.C. | 603 (1982) provides, in pertinent part, as follows:

"(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule."

any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person." Id. Appellant's recourse, therefore, if it was aggrieved by BLM's rule-making, was to file objection with BLM during the comment period from October 20 through November 19, 1986.

As required notices were published in the Federal Register, and as appellant was granted an opportunity to respond, we find that BLM committed no errors contrary to Exec. Order No. 12291 and the Regulatory Flexibility Act which would render regulations implementing 2(a)(2)(A) not "duly promulgated." Publication in the Federal Register meets the Administrative Procedure Act requirement of constructive notice to persons subject to proposed agency regulations. Rodway v. U.S. Department of Agriculture, 514 F.2d 809, 815 (D.C. Cir. 1975).

[3, 4] Appellant contends that it has had application pending for consideration of its leasehold as part of an LMU, and therefore is exempt from the requirements of 2(a)(2)(A) pursuant to 43 CFR 3472.1-2(e)(4)(i)(C), which provides:

(4)(i) An entity, seeking to qualify for lease issuance, or transfer approval under Subpart 3453 of this title, shall not be disqualified under the provisions of this subpart if it has one of the following actions pending before the authorized officer for any lease that would otherwise disqualify it under this subpart:

* * * * *

(C) Application for approval of a logical mining unit that the authorized officer determines would be producing on its effective date.

On March 13, 1987, subsequent to the filing of its notice of appeal in this action on February 20, 1987, appellant filed a letter with the Montana State Office, BLM, submitting an "amendment to Georesources' 1984 Logical Mining Unit (LMU) and Resource Recovery and Protection Plan (R2P2) application."

Previously, on June 12, 1984, BLM had corresponded with GeoResources concerning its LMU application as follows:

Our office has reviewed the preliminary R2P2 and LMU application which were hand delivered to us on May 17, 1984. We have provided our comments below on a point-by-point basis for items, which in our estimation are deficient. * * *

* * * * *

In our opinion the necessity of an LMU in your case is questionable. * * *

* * * * *

As was mentioned in your LMU application, the federal lease would not be mined on for eight years. In Year Nine, you produce 34,000 tons from the federal lease which satisfies your diligent development requirement within the ten year time limit. You then enter the continued operation phase which also requires the production of 8,000 tons/yr. If the mine plan is followed, 34,000 tons of federal coal are mined each year until the lease is mined out. No violation of continued operations would occur.

We cannot foresee that you need an LMU established at your mine. Our advice is to wait about five years to see if conditions change. For instance if you acquire American Colloid's lease or an emergency federal lease, then an LMU may become necessary. If you still wish to submit an LMU, you may certainly do so. Its merits will be judged when officially submitted.

Appellant's lease, issued on December 1, 1964, was readjusted effective December 1, 1984, and was agreed upon and accepted by appellant on

August 30, 1984. Section 4 of the readjusted lease provides for diligent development of the lease, and contains provision for termination of the lease if the lessee has not produced coal in commercial quantities within 10 years. Section 5 of the readjusted lease contains the following terms with respect to LMU's:

Either upon approval by the lessor of the lessee's application or at the direction of the lessor, this lease shall become an LMU or part of an LMU, subject to the provisions set forth in the regulations.

The stipulations established in an LMU approval in effect at the time of LMU approval will supersede the relevant inconsistent terms of this lease so long as the lease remains committed to the LMU. If the LMU of which this lease is a part is dissolved, the lease shall then be subject to the lease terms which would have been applied if the lease had not been included in an LMU.

Appellant claims that its offers for oil and gas leases should not be denied under 2(a)(2)(A), but excused pursuant to 43 CFR 3472.1-2(e)(4)(i)(C), as it has a pending application for LMU on file with BLM. The June 12, 1984, letter from BLM, however, rejects appellant's "preliminary application" for LMU status. There is no documentation on file which would indicate that appellant reapplied to BLM until March 13, 1987, after this appeal was filed. 43 CFR 3472.1-2(e)(4)(i)(C) requires that an application for approval of an LMU be pending before the authorized officer for any lease that would otherwise disqualify it under 43 CFR Subpart 3472. Since appellant had no pending application for an LMU on file at the time official action was taken by BLM rejecting its oil and gas offers to lease, it cannot be excused from the operation of 2(a)(2)(A) under the exemption provided by 43 CFR 3472.1-2(e)(4)(i)(C).

[5] A final question is addressed to clarify an ostensible ambiguity in BLM's actions with respect to appellant, raised by the June 12, 1984, letter by BLM rejecting appellant's LMU application, and the readjusted lease. The letter provides a 10-year development plan for the lease; the lease itself contains a termination clause if there is not production in commercial quantities within 10 years. Might appellant not assume that BLM had approved an "extension" of the 2(a)(2)(A) deadline by its tacit approval of a development plan that extends until December 1, 1994? 5/

BLM addressed this issue in the notice of final rulemaking published on December 5, 1986, as follows:

Section 2(a)(2)(A) is a "qualification" provision, affecting the ability of an entity, or any of its affiliates, to acquire new Federal leases granted under the Mineral Leasing Act. Section 2(a)(2)(A) is not a "diligence" provision. It is not to be equated with amended section 7(a) of the MLA which provides for production in commercial quantities at the end of 10 years after lease issuance or after the lease becomes subject to the amended Mineral Leasing Act, nor with amended section 7(b) of the Mineral Leasing Act, which provides for diligent development and continued operation. Diligence relates to the obligation to develop a specific Federal coal lease or lose that Federal coal lease. The diligence clock is tied to the date that the Federal coal lease is readjusted (20 years after issuance), or otherwise made subject to the amended Mineral Leasing Act. The diligence production clock is independent of the section 2(a)(2)(A) 10-year Federal coal leaseholding clock. If a Federal coal lessee does not seek to qualify for new Federal leases granted under the Mineral Leasing Act (but decides rather to hold those Federal coal leases it currently holds), section 2(a)(2)(A) does not compel that Federal coal lessee to do anything. Section (2)(a)(2)(A) requires that a

5/ While appellant has not raised an estoppel argument in its statement of reasons, we address this issue sua sponte as this case is one of first impression before the Board and our analysis of the issues raised by appellant would itself create ambiguity if this obvious question were not addressed.

lessee be "producing" coal in order to be issued a new lease under the Mineral Leasing Act. [Emphasis added.]

(51 FR 43911. See also 50 FR 35126, explaining Departmental guidelines concerning coal leasing.) See Conoco, Inc. v. Hodel, 626 F. Supp. 287 (D. Del. 1986). 6/

BLM's communications rejecting appellant's LMU application and readjusting the coal lease concerned the MLA requirements of production within 10 years and diligent development of appellant's coal lease. 7/ The 2(a)(2)(A) requirement of production in commercial quantities before December 31, 1986, by Federal coal lessees in order to qualify for other Federal leases did not appear in BLM's correspondence with appellant concerning its LMU application or the readjusted lease. This is understandable, however, since the 2(a)(2)(A) requirement did not become an issue until BLM received notice of appellant's offers to bid on other Federal leases in the Montana State Office on January 20, 1987.

While BLM did not officially notify appellant of the specific consequences of the proposed 10-year development plan for its coal lease vis-a-vis appellant's ability to qualify for other Federal leases, appellant

6/ The quoted material is taken from the notice of final rulemaking; the notice of final guidelines published in the Federal Register on Aug. 29, 1985 (50 FR 35125, 35126), provides essentially the same information. While this quotation is interpretative textual material which does not achieve the legal status of a regulation (see note 2, supra), an enforcing agency's interpretation of a statute is given great deference. See Conoco, Inc. v. Hodel, supra, upholding the Department's interpretation of 2(a)(2)(A) as applying to any Federal mineral leases, not just Federal coal leases.

7/ See 30 U.S.C. | 207(a) and (b) (1982).

is not entitled to relief from the mandate of 2(a)(2)(A) because of reliance upon incomplete information.

Ward Petroleum Corp., 93 IBLA 267 (1986). As was stated in Ward at page 269:

All persons * * * who deal with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). * * * reliance upon * * * incomplete information provided by a BLM employee cannot relieve an oil and gas operator of an obligation imposed by statute and regulation, create rights not authorized by law, or relieve the operator of the consequences imposed by the statute for failure to comply with its requirements. Parker v. United States, 461 F.2d 806 (Ct. Cl. 1972); Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972); Northwest Citizens for Wilderness Mining Co., 33 IBLA 317 (1978).

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.

Franklin D. Arness
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member