

Appeal from a decision of the Utah State Office, Bureau of Land Management, disapproving assignments of Federal coal leases U-098783 and U-098787.

Affirmed.

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

Under 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), where parties have held a Federal coal lease for 10 years from which they were not producing the coal deposits in commercial quantities, in the absence of extraordinary circumstances concerning the failure to produce coal on this lease, BLM is prohibited from approving an assignment transferring an interest in any existing Federal coal lease to them. Under 43 CFR 3472.1-2(e)(1)(ii), an entity seeking to obtain approval of a transfer must qualify on the date the transfer is disapproved. Where the parties did not qualify for the assignment at the time BLM considered their application for approval of assignment, BLM properly disapproves the application.

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

The requirement that a coal lease be "diligently developed" on pain of termination is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits "in commercial quantities." It is irrelevant to the application of 43 CFR 3472.1-2(e)(1)(i) when and whether the holders of a lease not producing coal deposits in commercial quantities might also be required to accomplish "diligent development" of that lease.

3. Coal Leases and Permits: Generally--Mineral Leasing Act: Generally--Regulations: Force and Effect as Law--Regulations: Validity

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department; such regulations have the force and effect of law and are binding on the Department. Sec. 3472.1-2(e) of 43 CFR was "duly promulgated" and, accordingly, has binding force and effect of law. Further, this provision is amply authorized by relevant provisions of the Mineral Leasing Act.

4. Coal Leases and Permits: Generally--Mineral Leasing Act: Generally--Regulations: Force and Effect as Law--Regulations: Validity

The intent of the proviso in a Federal coal lease that it is "pursuant and subject to the terms and provisions of the [Mineral Leasing Act], and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. The implementation of the burden imposed by 43 CFR 3472.1-2(e)(1)(i) is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

APPEARANCES: Richard B. Johns, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Veola and Aaron Rasmussen (appellants) have appealed from the January 21, 1987, decision of the Utah State Office, Bureau of Land Management (BLM), disapproving assignments to them from Consolidation Coal Company (Consolidation) of interests in Federal coal leases U-098783 and U-098787.

These leases were acquired by Consolidation on assignment from MidWestern Minerals, Inc. (Mid-Western), effective on March 1, 1968. Appellants are successors to an option to reacquire the leases that was retained by Mid-Western. On December 31, 1986, appellants filed an assignment of record title for the leases with BLM, apparently as part of their exercise of this option to reacquire. The assignment document from Consolidation to appellants was signed and dated on November 26, 1986.

In its decision, BLM disapproved the assignment, citing 43 CFR 3472.1-2(e)(1), which sets out the following "special leasing qualification":

(i) On or after December 31, 1986, no lease shall be issued and no existing lease shall be transferred to any entity that holds or has held for 10 years any lease from which the entity is not producing the coal deposits in commercial quantities, except as authorized under the advance royalty or suspension provisions of [set out elsewhere in the regulations].

BLM noted that appellants "are lessees of record in coal lease SL-049042, which, effective December 31, 1986, was not in compliance with sec. 2(a)(2)(A) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. | 201(a)(2)(A) (1982)." ^{1/} The details of appellants' noncompliance with this provision were not specified in BLM's decision and are not otherwise evident from the record. However, appellants acknowledge in their state-ment of reasons that they "have been the lessees of record for 10 years under federal coal lease SL-049042, and [they] have not produced coal in commercial quantities from that lease during the 10-year period."

[1] Thus, appellants do not deny that, at all times relevant, they were holding and had held a lease (SL-049042) for 10 years from which they were not producing the coal deposits in commercial quantities. Appellants do not allege that any extraordinary circumstances exist concerning the failure to produce coal on this lease. Under the express terms of 43 CFR 3453.3-1(a) and 3472.1-2(e)(1), BLM was prohibited in these circumstances from approving the transfer of any existing Federal coal lease to appellants. ^{2/}

Appellants argue that the assignment to them from Consolidation does not violate 43 CFR 3472.1-2(e)(1):

[The regulation] only states that "on or after December 31, 1986, no lease * * * shall be transferred" unless certain conditions are met. Leases U-098783 and U-098787 were in fact transferred to the Appellants more than a month prior to the cut off date of December 31, 1986. The regulation only prohibits transfers which occur on or after that date.

^{1/} Section 2(a)(2)(A) provides as follows:

"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 [elsewhere in the Act], producing coal from the lease deposits in commercial quantities."

^{2/} Under 43 CFR 3453.3-1(a)(1), "[n]o transfer of a lease shall be approved if [t]he transferee is not qualified to hold a lease or an interest in a lease under Subpart 3472 of this title."

The Utah State Office is applying the regulation as though it states "on or after December 31, 1986, the Department shall not approve the previous transfer of a lease" unless the specified conditions are met. [Emphasis in original.]

In making this argument, appellants overlook 43 CFR 3472.1-2(e)(1)(ii), providing in effect that an entity seeking to obtain approval of a transfer must qualify on the date the transfer is approved, or, as in this case, disapproved. ^{3/} BLM considered the request for transfer in January 1987, at which time appellants did not qualify. Accordingly, BLM was following its regulations by disapproving the request for approval of assignment.

[2] Appellants also argue that they are not in violation of the regulation because the 10-year "diligent development period" for lease SL-049042 does not expire until July 1, 1989, at the earliest. However, the requirement that a coal lease be diligently developed on pain of termination (which arises from section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. | 207(b) (1982)) is not equivalent to the restriction imposed by 43 CFR 3472.1-2(e)(1)(i) on transfer of lease interests to lessees with other Federal coal leases that they have held in excess of 10 years without producing the coal deposits in commercial quantities (which restriction, as discussed below, is inspired by the Congressional intent evidenced in section 3 of FCLAA, which amended section 2(a)(2)(A) of the Mineral Leasing Act, supra). See Georesources, Inc., 107 IBLA 311, 320-21, 96 I.D. ___ (1989).

Thus, it is irrelevant here when and whether appellants were required to accomplish "diligent development" of SL-049042. The significant inquiry under 43 CFR 3472.1-2(e)(1)(i) is simply whether, as of the date of consideration for approval of their application for approval of assignment, appellants, as prospective assignees, were holding and had held for more than 10 years a lease from which they were not producing coal in commercial quantities. These requirements are demonstrably different, at least in the present case. By their own admission, appellants were holding and had held for more than 10 years lease SL-049042, from which they were not producing coal in commercial quantities. Accordingly, appellants were not qualified to be approved as transferees of lease interests in Federal coal leases, regardless of whether the failure to achieve commercial development on lease SL-049042 might also be held, at some point in time, to be a failure to develop that lease diligently.

^{3/} This provisions states as follows: "An entity seeking to obtain a working interest in a lease, or approval of a transfer * * *, shall qualify both on the date of determination of lessee qualifications and on the date the lease is issued or transfer approved." It is not clear from the regulations what the difference is between the "date of determination of lease qualifications" and the "date the * * * transfer [is] approved." However, it is enough in this case to note that, as of the date BLM disapproved the transfer, appellants did not qualify under 43 CFR 3472.1-2(e)(1)(i).

[3] Appellants also challenge 43 CFR 3472.1-2(e) as being in excess of the authority granted to the Department by Congress in section 2(a)(2)(A) of the Mineral Leasing Act, supra, stressing that this provision only applies to restrict the issuance of new leases, and not to transfer of existing leases by approval of assignments. The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department. Western Slope Carbon, Inc., 98 IBLA 198 (1987); Chugach Natives, Inc., 80 IBLA 89 (1984), and cases cited. We have recently specifically considered the promulgation of 43 CFR 3472.1-2(e) and held that this provision was "duly promulgated" and, accordingly, had binding force and effect of law. Georesources, Inc., supra at 314-17, 96 I.D. at ____.

In any event, there is ample statutory authority for the Department to restrict transfer of existing coal leases as provided by 43 CFR 3472.1-2(e)(1)(i). The prohibition against approval of transfers of coal leases to persons who are not qualified to hold such leases because of failure to produce coal in commercial quantities from other Federal coal lease deposits held by them dates back to July 30, 1982 (47 FR 33147), when 43 CFR 3472.1-2(e) was promulgated, first giving notice that no lease would be transferred to any person that holds or has held for 10 years any Federal coal lease from which coal is not being produced in commercial quantities. Thus, in its rulemaking of December 2, 1986 (51 FR 43910 (Dec. 5, 1986)), the Department did not alter the substance of its rule concerning approval of transfers of coal leases.

Under section 30 of the Mineral Leasing Act, 30 U.S.C. | 187 (1982), the Department is granted discretionary authority to grant or deny assignments of Federal mineral leases. Under section 32 of the Act, 30 U.S.C. | 189 (1982), the Secretary is authorized to promulgate rules and take other actions he deems "necessary and proper" to carry out the purposes of the Act. As the Solicitor has observed, in commenting on 43 CFR 3472.1-2(e) (1982):

Any rule consenting to assignments, related to section 2(a)(2)(A), would have to further its purposes--to tell those who continue to hold nonproducing coal leases more than 10 years after FCLAA or after they acquired them to develop, divest, or be disqualified. The current rule on post-1986 assignees[, 43 CFR 3472.1-2(e) (1982),] is such a rule--an exercise of statutory discretion reasonably to extend the express Congressional prohibition to serve the Congressional purpose.

Solicitor's Opinion (M-36951), 92 I.D. 537, 556 (1985). The rule under challenge in this appeal, 43 CFR 3472.1-2(e)(1)(i) (1987), is also a rule intended to extend the above-described purpose of section 2(a)(2)(A), as amended, and, for the reasons described above, is justified as an exercise of the statutory authority granted to the Department by sections 30 and 32 of the Mineral Leasing Act.

[4] Appellants challenge the application of the regulation, asserting that it constitutes an illegal, retroactive, unilateral alteration of the

contractual obligations of the Federal coal leases. Appellants argue that the terms of leases U-098783, U-098787, and SL-049042 have been effectively modified by promulgation of the regulation being applied here.

The leases in question contain the express proviso that they are "pursuant and subject to the terms and provisions of the Act of February 25, 1920 (41 Stat. 437), as amended * * *, and to all reasonable regulations of the Secretary of the Interior, now or hereafter in force which are made a part hereof." ^{4/} (Emphasis supplied.) This Department has long recognized that the intent of the term "now or hereafter in force" is to incorporate future regulations, even though inconsistent with those in effect at the time of execution of the lease under the Mineral Leasing Act, and even though to do so creates additional obligations or burdens for the lessee. Coastal Oil & Gas Corp., 108 IBLA 62, 66 (1989); Gilbert V. Levin, 64 I.D. 1, 3-4 (1957). As noted above, the implementation of the burden imposed by this regulation is consistent with the enforcement of the congressionally imposed obligation to develop Federal coal leases.

To the extent not specifically addressed herein, appellants' arguments have been considered and rejected.

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 affirmed.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

^{4/} We have not been provided with a copy of SL-049042, but may safely presume that it contains such language, which was part of the standard form coal lease agreement.