

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, denying a protest of a stipulation required as a condition of approval of a logical mining unit application for coal leases W-6266 and W-23411, and rejecting an application for modification of coal lease W-6266, respectively.

Reversed and remanded in part, affirmed in part.

1. Coal Leases and Permits: Leases--Coal Leases and Permits:
Readjustment--Coal Leases and Permits:
Rentals--Coal Leases and Permits: Royalties

As a general rule, rental payments on coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of 1976 may be credited against royalties due on production until the lease terms are readjusted.

2. Coal Leases and Permits: Leases--Coal Leases and Permits:
Readjustment--Coal Leases and Permits:
Rentals--Coal Leases and Permits: Royalties--Regulations: Force and Effect as Law

The Department has provided by regulation that the terms of a Federal coal lease committed to an LMU, except for the royalty rate, shall be amended to be consistent with the stipulations of the LMU. The Department is bound by its regulations and a decision effectively amending the royalty rate by barring a credit of rental against royalty for a pre-Federal Coal Leasing Amendments Act lease committed to an LMU will be reversed as unsupported by the regulation.

3. Coal Leases and Permits: Leases

Under sec. 203 of the Mineral Leasing Act, modification of a coal lease by including additional coal lands may be approved by the Secretary upon a finding that it would be "in the interest of the United States." A decision rejecting an application for modification of a coal lease will be affirmed on appeal where it appears that approval of the application is not in the public interest.

APPEARANCES: Mary C. Gilbride, Esq., Omaha, Nebraska, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Black Butte Coal Company, Rosebud Coal Sales Company, and Kiewit Mining and Engineering Company, collectively referred to as Black Butte, appeal from a letter-decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 1, 1987, denying their protest of a stipulation disallowing a credit of Federal lease rental payments against production royalties. The stipulation was required as a condition of approval of their application for a logical mining unit (LMU) including leases W-6266 and W-23411. This appeal has been docketed as IBLA 87-528.

Black Butte has also appealed a January 17, 1989, decision of BLM rejecting its application for modification of coal lease W-6266 to include additional acreage sought by appellant. This latter appeal has been docketed as IBLA 89-246. By order dated May 8, 1989, we granted appellant's motion for expedited consideration of this appeal in light of appellant's representation that mining plans must be made by January 1990 to avoid bypassing this coal acreage. We have consolidated these cases for review by the Board in consideration of the related factual context.

Black Butte Coal Company is the lessee by assignment of Federal coal lease W-6266 which was issued April 1, 1976, prior to enactment of the Federal Coal Leasing Amendments Act (FCLAA), P.L. 94-377, 90 Stat. 1083, on August 4, 1976. Rosebud Coal Sales Company is the lessee of Federal coal lease W-23411 which was issued April 1, 1983.

In accordance with Departmental regulations at 43 CFR Subpart 3487, Kiewit Mining and Engineering Company, operator for the Black Butte Mine, filed an application for approval of the Black Butte Mine LMU. The Black Butte Mine LMU would include two Federal coal leases (W-6266 and W-23411) and one private coal lease which together comprise a total of 20,420 acres of land in Sweetwater County, Wyoming.

On October 23, 1986, BLM issued a decision in which it stated that it had completed its review of the Black Butte LMU and had determined that it was in conformance with the basic criteria for approval of LMU's. As a condition to the approval of the LMU, BLM required appellant to consent to certain stipulations which it enclosed with its decision. The stated purpose of these stipulations was to

make all Federal coal leases within the LMU subject to uniform requirements for submittal of resource recovery and protection plans, LMU recoverable coal reserves exhaustion, diligent development, continued operation, maximum economic recovery, advance royalty, and royalty reporting periods (but not royalty rates).

Stipulation 3 of BLM's Oct. 23, 1986, decision; see also 43 CFR 3487.1(b). The specific stipulation which generated this appeal is stipulation 3(e), which states in pertinent part: "Upon approval and for the duration of this LMU, no Federal rentals may be credited against production royalties for any Federal coal lease contained in the LMU, the Federal coal lease terms of which allowed for such credits prior to the effective date of the LMU."

By letter dated January 22, 1987, appellant requested that BLM revise stipulation 3(e) by deletion of that part of the stipulation prohibiting the crediting of rentals against production royalties (Statement of Reasons (SOR) Exh. D). Appellant pointed out that it could not accept this stipulation because it is a change in the terms of lease W-6266 which is not authorized by statute or regulation. Appellant asserted that there is no provision in the regulations at 43 CFR Subpart 3487 which requires that lease rental payments for pre-FCLAA leases no longer be credited against production royalty. Citing 43 CFR 3474.3-1(c), appellant noted that the prohibition applies only to leases issued or readjusted after August 4, 1976.

In a memorandum dated January 28, 1987, the Wyoming State Director requested the Regional Solicitor's opinion on the application of rental to royalty payments for lease W-6266. Believing the continued application of rental to royalty payment to be permissible the State Director wrote:

The Wyoming State Office believes the continued application of rental to royalty payments in the W-6266 portion of an LMU is permissible according to 43 CFR 3487.1(b) which specifies that an LMU would be subject to a number of uniform requirements "but not royalty rates." We propose that the agreed upon application of rental to royalty constitutes a "royalty rate" and separate royalty rates per each original lease should be maintained upon LMU approval.

(Exh. E to appellant's SOR).

In response to the State Director's request, the Regional Solicitor stated in a memorandum dated April 15, 1987, that BLM had set forth its policy prohibiting the crediting of rental payments against royalty obligations for leases committed to an LMU regardless of whether the lease terms permitted such a credit prior to commitment to the LMU. The Regional Solicitor cited provisions of the BLM guidelines published at 50 FR 35145, 35151, and 35162 (Aug. 29, 1985), and noted his office was not free to suggest a different conclusion.

By letter dated May 1, 1987, BLM informed appellant that it would not, as a matter of policy, allow the Federal lease rental payments to be credited against production royalties should the LMU application be approved for the subject leases. Appellant filed a timely appeal of this decision.

In its SOR, Black Butte contends that BLM's stipulation 3(e) effectively increases the royalty rate of Federal coal lease W-6266, which increase is specifically prohibited by regulation at 43 CFR 3487.1(b). Appellant asserts that the leases included in the LMU are subject only to certain uniform requirements of an LMU as specified in 43 CFR 3487.1(b) and that none of these requirements relate to crediting annual rental payments against production royalty.

Appellant asserts that lease terms of coal leases included within an LMU cannot be suspended or reversed by LMU stipulations unless such stipulation is authorized by regulation. Appellant points out that the list of stipulations set forth at 43 CFR 3487.1(e) does not include a stipulation which prohibits the crediting of rentals against royalties for all leases within an LMU. Appellant refers to 43 CFR 3473.3-1(c) which provides that the prohibition of crediting rentals against production royalty is required only when leases are issued or readjusted after August 4, 1976, and not when they are included in an LMU.

Appellant notes that BLM admits in the commentary to its policy guidelines that the only lease terms which are superseded once a lease is included in an LMU are the diligence terms. Appellant asserts that the ability to credit advance annual rental payment against production royalty is not a diligence term.

Appellant acknowledges that the regulations allow BLM to add other stipulations if they are necessary for the efficient and orderly operation of an LMU. Appellant asserts that prohibiting the crediting of rentals against royalties is not necessary for the efficient and orderly operation of the Black Butte LMU. Appellant concludes that prohibiting Black Butte from crediting rentals against royalties on the pre-FCLAA lease is merely an arbitrary stipulation without basis and cannot be justified under the camouflage of diligence terms.

[1] Section 7 of the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 439, prior to amendment by FCLAA, provided, that "rental for any year shall be credited against the royalties as they accrue for that year." Consistent with this provision of the Act, section 4 of appellant's coal lease (W-6266) provides in pertinent part that "the rental shall be creditable against any production and advance royalties for that year as they accrue under this Lease." Section 7 of the Mineral Leasing Act prior to enactment of FCLAA further provided for periodic readjustment of lease terms:

[Coal] [l]eases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary may determine, unless otherwise provided by law at the time of expiration of such periods.

Similarly, section 27 of appellant's coal lease provides for readjustment of the lease terms effective on the twentieth anniversary date of the lease.

Section 6 of FCLAA, 90 Stat. 1087, enacted August 4, 1976, repealed the provision authorizing crediting of rental payments against royalty obligations. In promulgating regulations to implement FCLAA, the Department provided in 43 CFR 3473.3-1(c) that for "leases issued or readjusted after August 4, 1976, rental payments shall not be credited against royalties." Recognizing the rights of pre-FCLAA lessees the regulations also expressly provide that "[u]ntil a lease issued before August 4, 1976, is readjusted, the rental paid for any year shall be credited against the royalties for that year." 43 CFR 3473.3-1(b). Thus, the issue raised by the appeal is whether inclusion of a pre-FCLAA lease in an LMU after repeal of the authority to credit rental against royalty is such an event as will justify alteration of that lease to eliminate the credit notwithstanding the fact the lease has not been readjusted.

[2] An LMU is defined by statute to be "an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources." 30 U.S.C. | 202a(1) (1982). Further, the statute provides that: "The Secretary may amend the provisions of any lease included in a logical mining unit so that mining under that lease will be consistent with the requirements imposed on that logical mining unit." 30 U.S.C. | 202a(4) (1982).

The Department has implemented this statutory authority by promulgation of regulations governing LMU's which are codified at 43 CFR Subpart 3487. Inclusion of pre-FCLAA coal leases is authorized provided that the operator/lessee consents to making such leases within the LMU

subject to the uniform requirements for submittal of a resource recovery and protection plan, LMU recoverable coal reserves plan, LMU recoverable coal reserves exhaustion, diligent development,

continued operation, MER [maximum economic recovery], advance royalty and royalty reporting periods (but not royalty rates) made applicable by the LMU stipulations and the rules of this part. [Emphasis added.]

43 CFR 3487.1(b). Similarly, the terms of the stipulations required as a condition of approval of an LMU provide: "The terms and conditions of the Federal leases, except for Federal royalty rates, shall be amended so that they are consistent with the stipulations of the LMU." 43 CFR 3487.1(e)(4), (emphasis added). The analysis of comments accompanying the promulgation of this rule ^{1/} remove any doubt that the LMU provisions were not intended to alter the lease royalty rate:

Two comments stated that Federal lease terms should only be amended at lease readjustment. Also, one comment stated that royalty rates should not be amended at the time of LMU formation. The MLA [Mineral Leasing Act] provides for amendment of any Federal lease terms so that mining under that lease will be consistent with requirements imposed on that LMU. Under these rules, royalty rates do not enter into determination of the establishment of an LMU. 30 CFR 211.80(e)(4) states that royalty rates will not be amended at the time of LMU formation. Further, royalty rates will only be subject to change at the times of Federal lease readjustment.

47 FR 33177 (July 30, 1982). Thus, the question under the regulation is whether the stipulation imposed by BLM which precludes the crediting of rentals against royalties for the pre-FCLAA lease affects the royalty rate for the lease.

The authority cited by BLM for denial of the credit for rental payments against royalties is the policy set forth in the Final Guidelines for processing LMU applications and developing stipulations published in the Federal Register at 50 FR 35145-35163 (Aug. 29, 1985). The provision which provides the apparent basis for the BLM decision reads as follows:

3. Reporting periods for rental and royalty payments for Federal coal leases within the LMU must be exactly the same. This provision applies to the LMU. However, although the Federal coal lease rental and royalty rates are not changed by LMU formation, lease-specific rentals are not allowed to be credited against lease-specific production and royalty payments must be made on a monthly basis as long as the Federal coal leases are contained in the approved LMU. These conditions are made a part of the

^{1/} The regulation at 43 CFR 3487.1 governing LMU's was originally promulgated as 30 CFR 211.80. 47 FR 33193-33194 (July 30, 1982). The regulation was subsequently recodified. 48 FR 41589, 41593 (Sept. 16, 1983).

LMU-specific diligence stipulations; the lease-specific terms and conditions shall not be so amended. [2/] [Emphasis in original.]

50 FR at 35151.

In the comments which accompanied the guidelines, BLM responded to the contention that inclusion of a lease in an LMU should not affect lease terms by characterizing the rental credit term as a diligence term which is superseded by LMU diligence stipulations:

9. Rent and royalty. Several comments stated that inclusion in an LMU should not affect any of the lease specific terms and conditions of the those Federal coal leases not otherwise subject to the provisions of section 7 of MLA. The guidelines clearly state that the rental and royalty rates of existing leases are not modified by inclusion in an LMU. However, lease-specific diligence terms and conditions are superseded by the LMU diligence stipulations which are governed by Section 7 of MLA.

50 FR 35146 (Aug. 29, 1985). Thus, while purporting not to alter the royalty rate of pre-FCLAA coal leases committed to an LMU, the policy guidelines effectuate this result 3/ by defining the rental credit provision as a diligence term.

As a general rule, this Board has upheld the policy guidelines adopted by BLM in implementing its responsibilities under regulations promulgated pursuant to statutory authority. See, e.g., The Wilderness Society, 81 IBLA 181 (1984) (Wilderness Inventory Handbook standards); Red Rock 4-Wheelers, 75 IBLA 140 (1983). 4/ However, in the course of deciding appeals under the regulations we have declined to apply policy guidelines which were inconsistent with the terms of the relevant regulations. See Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981). In that case, subsequent to promulgation of a regulation specifying bank money orders as an acceptable form of remittance, BLM issued an instruction memorandum declaring certain types of bank money orders to be unacceptable without amending the regulation to reflect the change. The Board upheld the regulation and declined to follow the modification set forth in the memorandum.

2/ This policy of precluding credit of rentals against royalties for pre-FCLAA leases committed to an LMU was restated in a subsequent provision of the guidelines. 50 FR at 35162.

3/ There can be no good faith doubt that disallowance of the credit for rental payments against royalty liability alters the effective royalty rate of the lease. Based on rental of \$3 per acre, appellant asserts that the rental payment is \$44,709 per year. This is the amount by which the royalty on production increases each year without the credit.

4/ In Red Rock 4-Wheelers, supra, we noted that the Board has held that the guidelines at issue were not binding on the Board and, hence, were not required to be promulgated as regulations through formal rulemaking procedures. 75 IBLA at 142-43.

We acknowledge that the guidelines at issue in this case were published in the Federal Register after notice and comment. However, the fact that the guidelines were published in the Federal Register does not raise them to the status of an amendment of the regulation. This issue was addressed by the U.S. Court of Appeals, District of Columbia Circuit, in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). The court stated:

Our conclusion is not at all cast in doubt by the fact that the Secretary's guidelines were published in the Federal Register. Failure to publish in the Federal Register is indication that the statement in question was not meant to be a regulation, see Brennan v. Ace Hardware Corp., 495 F.2d 368, 376 (8th Cir. 1974), since the Administrative Procedure Act requires regulations to be so published. See 5 U.S.C. || 552(a)(1)(D), 553(d) (1982). The converse, however, is not true: Publication in the Federal Register does not suggest that the matter published was meant to be a regulation, since the APA requires general statements of policy to be published as well. See U.S.C. | 552(a)(1)(D). The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents "having general applicability and legal effect." 44 U.S.C. | 1510 (1982) (emphasis added), and which the governing regulations provide shall contain only "each Federal regulation of general applicability and current or future effect," 1 C.F.R. | 8.1 (1986) (emphasis added).

Id. at 538-39. We also note that the guidelines published in the Federal Register on August 29, 1985, were characterized by BLM as a "notice" rather than regulations. 5/

The regulation regarding the crediting of rentals against royalties for pre-FCLAA leases, 43 CFR 3473.3-1(b), and the regulation providing that royalty rates shall not be amended, 43 CFR 3487.1(e), are duly promulgated regulations. Therefore they have the force and effect of law and are binding on the Department. Carl H. Alber, Jr., 100 IBLA 257 (1987); see Brock v. Cathedral Bluffs Shale Oil Co., supra at 536-37. Because we find the provisions of the guidelines barring the credit of rental payments against royalties for pre-FCLAA leases committed to an LMU is contrary to the express terms of the regulations at 43 CFR 3473.3-1(b) and 43 CFR 3487.1, we must reverse the decision of BLM denying appellant's protest with respect to lease W-6266 on the basis of the guidelines.

5/ Although we recognize that some published "notices" may be found to constitute a regulation, see Notice to Lessees Numbered [NTL-] 5 Gas Roy-alty Act, P.L. 100-234, § 1(b), 101 Stat. 1719 (1988), finding NTL-5, 42 FR 22610 (May 4, 1977), to be a duly promulgated rule, we think it is clear from the publication in the Federal Register that the Department intended the guidelines to establish a policy for adjudication of LMU applications rather than a regulation. In the introduction to the Notice of Final

[3] With respect to the appeal of Black Butte's application for modification of its coal lease to include 160 additional acres, we note that the relevant statutory authority for lease modification is found at section 3 of the Mineral Leasing Act, as amended, 30 U.S.C. | 203 (1982). That statute provides, in pertinent part that:

Any person, association, or corporation holding a lease of coal lands or coal deposits under the provisions of this chapter may with the approval of the Secretary of the Interior, upon a finding by him that it would be in the interest of the United States, secure modifications of the original coal lease by including additional coal lands or coal deposits * * *. [Emphasis added.]

The requirement that the modification be found to be in the interest of the United States is repeated in the regulations promulgated pursuant to section 203. 43 CFR 3432.2(a).

The BLM decision in this case was less than clear regarding the ground for rejection, noting that the Director of BLM had "decided not to lease any Federal coal in Wyoming to Black Butte Coal Company" until certain litigation has been resolved. Appellant has asserted in its brief on appeal that the application was not properly adjudicated under the law and that the application may not be rejected on a basis not permitted by law. Counsel for BLM has elaborated further on the basis for rejection in the answer to appellant's SOR: "[B]ecause of litigation pending in the District of Wyoming and the Claims Court, the BLM has determined that it may need the tract applied for by appellant to use in settlement of those lawsuits. For that reason, the BLM has declined to lease this parcel." ^{6/} Although the

fn. 5 (continued)

Guidelines published in the Federal Register, BLM included a "summary" which reads as follows:

"SUMMARY: This notice sets forth guidelines for the Department of Interior's administration of section 2[d] of the Act of February 25, 1920, (otherwise known as the Mineral Leasing Act (MLA)). These guidelines will be used by Bureau of Land Management personnel in order to process logical mining unit (LMU) applications, develop stipulations, ensure public participation, and monitor operator compliance of an approved LMU." 50 FR at 35145.

^{6/} Counsel for BLM has also indicated that "the initial decision not to lease may have Secretarial approval," promising to inform the Board if BLM locates "documents showing Secretarial approval." While it is well established that this Board has no authority to review a decision which has been approved by the Secretary, 43 CFR 4.410(a)(3), we are unable to dismiss an appeal on this basis in the absence of evidence to support this fact.

circumstances are admittedly unusual, we believe it has been shown on the record that leasing this tract of coal lands is not in the public interest at this time. This is all that is required under the broad discretion granted to the Secretary under the terms of the statute and the implementing regulations. Accordingly, the decision to reject appellant's application for coal lease modification is affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision denying appellant's protest of the LMU stipulation as it applies to lease W-6266 is reversed and the decision rejecting appellant's lease modification application is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge