

TEXASGULF, INC.

IBLA 87-510

Decided October 26, 1989

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, increasing bond requirements for Federal sodium leases W-057154, W-064005, W-064006, W-081608, W-0252726, W-0252727, W-0256443, W-0313075, W-0313077, and W-85356.

Affirmed.

1. Sodium Leases and Permits: Leases

Pursuant to 43 CFR 3504.1, BLM has authority to increase the bond for a sodium lease on Federal lands when a change in coverage is considered appropriate. Where BLM advises the lessee that the bonding requirements have been raised in light of recent production and sales data and in accordance with a bonding formula prescribed by Instruction Memorandum No. 86-145, lessee cannot be heard to complain that its bonding requirements were increased arbitrarily.

APPEARANCES: Frank Erisman, Esq., Denver, Colorado, for Texasgulf, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Texasgulf, Inc. (Texasgulf), appeals from an April 24, 1987, decision of the Wyoming State Office, Bureau of Land Management (BLM), modifying a March 24, 1987, decision increasing lease bonds required for its 10 Federal sodium leases, W-057154, W-064005, W-064006, W-081608, W-0252726, W-0252727, W-0256443, W-0313075, W-0313077, W-85356.

Prior to March 24, 1987, appellant's 10 sodium leases were supported by a \$25,000 Statewide sodium lease bond. In its March 24, 1987, decision, BLM notified Texasgulf that based on a report received on March 18, 1987, from BLM's Rock Springs District Office, the \$25,000 Statewide bond was no longer adequate to cover all of the Federal sodium leases. Accordingly, BLM advised that a \$5,000 bond would be required for leases W-057154, W-064005, W-064006, W-081608, W-0252726, W-0252727, W-85356, and a \$148,000, \$107,000 and \$373,000 bond would be required for leases W-0256443, W-0313075, and W-0313077, respectively. In an April 24, 1987, decision, BLM modified the bond requirements for sodium leases W-0256443,

W-0313075, W-0313077 to \$37,000, \$173,000, and \$244,000, respectively. Texasgulf has timely appealed from the March 24, 1987, decision, as modified by the subsequent decision of April 24, 1987.

On appeal Texasgulf submits that BLM's action is arbitrary and capricious for the following reasons: the bond increase was effected without prior notice to the lessee or any notice of prior problems with its compliance with the Mineral Leasing Act, Departmental regulations, or lease terms; the action was improperly based on an Instruction Memorandum as though the terms thereof were the equivalent of duly promulgated regulations; and the report relied upon as the basis for the adjustment, viz., a memorandum from the Rock Springs District Office, had not been furnished to appellant.

We affirm BLM's action. To the notice issues, there is no requirement that before BLM may increase the bond for a solid mineral lease, prior notice of such action must be afforded the lessee with a corresponding opportunity to object to such action before issuance of a BLM decision. On the other hand, there is nothing which would preclude BLM from following such a process in the adjustment of bonds, if it so desires. That it did not advise appellant of a proposed increase subject to protest to the agency constitutes no procedural infirmity. Cf. 43 CFR 4.450-2. As a matter of procedural due process, if BLM takes an action that adversely affects the lessee, the Department provides for a right of objective review of such a decision by appeal to this Board. 43 CFR 4.1, 4.410. This right of appeal in cases involving BLM's administration of Federal sodium leases is set forth at 43 CFR 3500.4. Appellant is properly before this forum in accordance with the foregoing regulations.

Nor must any increase in bonding be preceded by findings that the lessee has been found in noncompliance with lease terms, as, for example, a failure to timely pay necessary rentals or royalties. In fact, the record before us does not contradict, nor does BLM dispute, appellant's characterization that it has "always promptly paid the production royalties and rental due to the United States under the Leases and has never received a notice of default from the United States for failure to pay production royalties or rental in a timely and proper manner."

[1] The Department's regulations governing the bonding of sodium leases and leases of other solid minerals other than coal and oil shale are found at 43 CFR 3504.1 - 3504.3. The bond increase at issue was made under authority of 43 CFR 3504.1-6, which states: "The authorized officer may elect to increase or decrease the amount of any bond to be issued or any outstanding bond when a change in coverage is determined appropriate, except no bond may be reduced below the established minimum amount for that mineral." Here, the BLM decision expressly noted that as guidance in effecting the bond increase, the agency was abiding by the provisions of Instruction Memorandum No. 86-145 (IM), a copy of which was furnished appellant. Pertinent to the situation in this case, the above IM provides:

For solid mineral leases, BLM is responsible for establishing and maintaining appropriate bonds which ensure compliance with

the requirements of the Mineral Leasing Act and the implementing regulations, and for compliance with the terms and conditions of leases and permits for Federal solid minerals. This includes production royalty, environmental protection, and reclamation for exploration and mining operations.

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C. For producing leases:

1. For royalty payments made monthly, the amount of the bond shall be sufficient to cover 3 months of estimated royalty, rounded up to the next even \$1,000; but in no case less than \$5,000.

D. Bonds must be reviewed annually to ensure adequacy and adjusted where necessary.

(IM No. 86-475 at Encl. 1-6 and 1-8).

Appellant does not argue or attempt to show that the amount of increase of its bonds exceeds the standard above prescribed. Rather, it asserts that the IM provisions constitute substantive rulemaking of general applicability, as the term "rule" is defined by the Administrative Procedure Act, 5 U.S.C. § 551 (1982). Appellant concludes: "The BLM failed to follow the Notice and Comment procedure before issuing the I.M. and thus the I.M. and the BLM decision increasing Texasgulf's sodium lease bond must be set aside. 5 U.S.C. § 706(2)(D). Furthermore, the BLM's action offends justice and fairplay and is violative of due process" (Statement of Reasons at 6).

The Board has had frequent occasion to examine whether BLM Manual provisions have been improperly invoked as the equivalent of regulatory requirements to a party's detriment. See, e.g., Pamela S. Crocker-Davis, 94 IBLA 328 (1986) (BLM Manual provisions pertaining to delineation of boundaries of a known geologic structure not binding on the Board). On the other hand, the Board has also recognized that the BLM Manual is of considerable utility to the agency, and, as long as its provisions are consistent with the law as codified in regulations and statutes, BLM's attention to the Manual promotes correct and consistent decisionmaking. As stated in Beard Oil Co., 105 IBLA 285 (1988):

We recognize that the BLM Manual, like BLM Instruction Memoranda, is not promulgated with the procedural protections provided for regulations and therefore does not have full force and effect of law. United States v. Kaycee Bentonite, 64 IBLA 183, 214 (1982); see Schweiker v. Hansen, 450 U.S. 785, 789 (1981). Nevertheless, BLM employees are obliged to follow the terms and instructions of its manual. Further, where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will

not hesitate to follow those procedures and to require their enforcement. See Margaret A. Ruggiero, 34 IBLA 171 (1978).

Id. at 288.

In this case, appellant was advised that its bonds were required to be increased in light of production and sales data related to the leases in question and in accordance with an IM formula for calculating appropriate bonding for producing leases. Quite apart from being left in doubt as to the basis of the BLM decision, appellant was told the precise reason for the increased bonding requirements. Further, as the producer who generates the reports from which the Government's royalty payments are determined, appellant is in the best position to know whether the bond increases ordered by BLM in accordance with its bonding formula are excessive. <sup>1/</sup> No such argument or showing is attempted.

The record in this case establishes sufficient grounds for BLM's modification of the bond requirements. In the absence of establishment of error in BLM's bonding determination, appellant cannot prevail. Pardee Petroleum Corp., 98 IBLA 20, 24 (1987).

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.

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Wm. Philip Horton  
Chief Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

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<sup>1/</sup> Appellant's access to its own production and sales data undermines any argument that it has been prejudiced by the failure of BLM to furnish it with one or more memoranda sent from the Rock Springs District Office to the Wyoming State Director. The administrative record, which has at all times been open to inspection and copying by appellant, contains two such memoranda: one dated Mar. 17, 1987; the other Apr. 16, 1987. Specific production and sales data is not delineated in either memorandum, though the April memorandum advises that the adjusted bond amounts "were derived using the production and sales data for the months of July through December 1986."