

ALASKA STATEBANK  
THE TRAVELERS INDEMNITY CO.

IBLA 87-638

Decided October 27, 1989

Appeal from a decision of the Alaska State Office, Bureau of Land Management, requiring payment of unpaid annual rentals and reclamation costs with respect to preference-right coal lease F-04923.

Affirmed.

1. Alaska: Coal Leases and Permits--Coal Leases and Permits: Assignments or Transfers

Where BLM has approved the assignment of a record title interest in an Alaskan coal lease at a time when the lease account is not in good standing, the assignment is not void but voidable at the discretion of BLM. If the assignment has not been voided by BLM, it remains in effect and binds the assignees.

2. Alaska: Coal Leases and Permits--Coal Leases and Permits: Assignments and Transfers--Coal Leases and Permits: Leases--Coal Leases and Permits: Rentals--Coal Leases and Permits: Royalties

The assignee of the record title interest in an Alaskan coal lease effectively agrees to assume the obligations of the lessee upon acceptance, with BLM's approval, of an assignment of such interest and, thus, becomes obligated to pay any unpaid rental and royalty and the costs of reclaiming the minesite, even where these accrued or arose prior to the assignment.

APPEARANCES: Deborah K. Periman, Esq., Anchorage, Alaska, for appellants; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Alaska Statebank (Statebank) and the Travelers Indemnity Company (Travelers) have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 5, 1987, requiring them to pay unpaid annual rentals and reclamation costs with respect to preference-right coal lease F-04923.

Effective September 18, 1947, BLM issued this lease, encompassing 600 acres of land situated in sec. 35, T. 12 S., R. 8 W., Fairbanks Meridian, Alaska, to James W. Norris and Constantine Pastrokakis (Gus Parris) for a term of 50 years, pursuant to section 3 of the Act of October 20, 1914, 38 Stat. 742 (1914) (repealed by section 1 of the Act of Sept. 9, 1959, 73 Stat. 490 (1959)). The record indicates that coal was produced from the leased land by means of a strip-mining operation until 1972. <sup>1/</sup>

The history of the matter relevant to this appeal begins on September 4, 1969, when BLM approved the assignment of 100 percent of record title in the lease from the successors-in-interest to the original lessees to Elmer N. Ringstad and Carl R. Burnett, effective October 1, 1969. On March 9, 1972, BLM received a document entitled "Assignment of Lease." The top half of the document consists of a paragraph followed by the notarized signatures of Ringstad and Burnett, bearing the date June 1, 1971. The paragraph states that the "undersigned Lessee hereby assigns to Alaska State Bank \* \* \* all of the Lessee's right, title and interest" in the subject lease and further provides that "[t]his Assignment is made solely for the purpose of securing the repayment of a loan from the Alaska State Bank."

The second half of the document, which bears the heading "Lessor's Consent to Assignment of Lease," consists of a paragraph which is followed by a signature line for an official of the United States of America. The paragraph states:

The Lessor \* \* \* hereby consents to the Assignment by [Elmer N. Ringstad and Carl R. Burnett] of all its right, title and interest in and to said Lease to the Alaska State Bank as partial security for a loan made to [Ringstad and Burnett], and to any reassignment by Alaska State Bank, in the event of default under the subject loan by [Ringstad and Burnett]; provided, however, that so long as the Alaska State Bank has not entered into possession of the premises covered by said Lease for the purpose of operating a business, it shall not be liable for rent or any other obligations of [Ringstad and Burnett], and [Ringstad and Burnett] shall remain liable for rent and all such other obligations, and in the event of any default under subject Lease, said Lessor hereby agrees not to terminate the Lease or take any action to enforce any claim with respect thereto without giving Alaska State Bank at least sixty days prior written notice thereof, and the right to cure such default within said period.

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<sup>1/</sup> See note 14, below.

This proviso, which (as discussed below) dictates procedures directly at odds with Federal regulations, was never executed by BLM.

Nor was the assignment of record title approved immediately. By decision dated March 28, 1972, BLM denied approval of the assignment from Ringstad and Burnett to Statebank based on its conclusion that the assignment was "fatally defective" because the assignee had failed to comply with various Departmental regulations. <sup>2/</sup> On April 25, 1972, Statebank submitted the required documents, including a lease bond in the amount of \$1,000 with Travelers as the surety. Significantly, Statebank filed a document dated April 24, 1972, entitled "Application for Coal Lease Assignment," in which it expressly recognized that, if the assignment were approved, it would be holding "the entire interest in coal lease F-04923."

Thereafter, by decision dated May 18, 1972, BLM notified Ringstad, Burnett, and Statebank that, while the assignment was "in order for approval," it was holding approval of the assignment in abeyance because counsel for the assignors had informed BLM that the "assignment was not to have been filed for approval" and had requested that no further action on the assignment be taken. BLM stated that, in view of the apparent "disagreement between the parties as to the purpose for executing the assignment document" and the policy of the Department not to act on requests for approval of assignments where it had notice of a controversy between the parties as to the effect or validity of the assignment, it would withhold approval of the assignment for a period of 30 days. BLM concluded that "[i]f this office has not been notified within 30 days after receipt of this decision that litigation has been initiated or that the parties involved have privately resolved the dispute, we will proceed with approval of the assignment."

No further communication from counsel for Ringstad and Burnett was received within 30 days after receipt of the May 1972 BLM decision. On July 13, 1972, BLM received a letter from counsel for Statebank which, noting that the bank wished "to begin making plans with regard to the lease, but hesitates to do so until the assignment has been confirmed," offered his assistance in expediting final approval of the assignment. By decision dated July 18, 1972, BLM approved the assignment of the subject lease from Ringstad and Burnett to Statebank, effective August 1, 1972. BLM also terminated the period of liability under the existing bond in favor of Ringstad and Burnett effective that same date.

By decision dated August 28, 1972, BLM required Statebank to increase the amount of its lease bond coverage from \$1,000 to \$5,000 within 30 days

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<sup>2/</sup> Specifically, BLM stated that the assignee had failed to submit a request for approval of the assignment, statements of citizenship and acreage holdings, evidence of qualifications, a statement that it was the sole party in interest or the names of other parties in interest, and a description of the affected lands. Also, BLM held that Statebank had failed to satisfy bond requirements.

from receipt of the decision. The increase in the bond coverage was specifically in response to a request for an increase contained in a letter to the Chief Adjudicator, Alaska State Office, BLM, dated July 25, 1972, from the Area Mining Supervisor, Alaska-Pacific Region, Conservation Division, Geological Survey. The Area Mining Supervisor sought the increase because of "possible arrearages and reclamation requirements," stating:

Our records show that the lessee has been in violation of [the royalty provisions] of the lease since September 1971 having failed to make monthly reports on operations despite numerous requests. We are currently checking deliveries of the Alaska Railroad to military and civilian customers and as soon as the audit has been performed we will recommend action toward collection.

On September 18, 1972, Statebank submitted a rider to its existing bond, increasing the coverage to \$5,000. Travelers remained the surety on the bond. The rider was accepted by BLM on October 24, 1972.

The record indicates that an audit of the lease account subsequently conducted by the Geological Survey confirmed its suspicions that the lessees had violated the royalty provisions and had failed to report 53,966 tons of coal produced from the lease during the period July 1970 to August 1971, which resulted in unpaid royalty in the amount of \$8,094.90. By letter dated February 15, 1974, the Area Mining Supervisor required Statebank to promptly pay the outstanding unpaid royalty. After another unsuccessful effort to collect, the delinquent royalty account was transferred to BLM on October 17, 1974, and BLM thereafter undertook to collect the unpaid royalty. Evidently, no payment of the delinquent royalty has ever been received.

On May 21, 1975, BLM received a statement from the Geological Survey indicating that, as of February 28, 1975, Statebank had failed to pay annual rental in the amount of \$600. The record indicates that efforts were made to obtain payment of the unpaid annual rental. On October 6, 1975, Statebank informed the Geological Survey that it was not liable for the unpaid rental, for the stated reasons that BLM had chosen to cancel the subject lease rather than collect the unpaid rental. As discussed below, this assertion was based on a default notice form sent by BLM on October 25, 1974, which correctly stated that Statebank was in default, on account of its failure to pay the delinquent royalty, but incorrectly stated that, if the default continued for 30 days from its receipt of the notice, its lease would be canceled without further notice. 3/ Evidently, no payment of the delinquent rental was ever received from Statebank, and the arrearage has continued to grow year by year. 4/

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3/ This form was in error and misinformed Statebank, since cancellation of this lease could be accomplished only by judicial action.

4/ The record repeatedly indicates that no rental was paid on the lease since 1971, which would have covered the period through midnight, Sept. 18, 1972. This would result in an accrued arrearage of \$9,000 (15 years at

At no time has Statebank filed a formal relinquishment of this lease. 5/

On January 10, 1980, BLM prepared a mineral report in order to assess the effect of mining operations on the leased land and the amount of work needed to reclaim that land. The report described the results of such operations as follows: "Three major trenches were opened along strike of the coal beds (east-west) with spoil displaced down dip and affecting about 12 acres of land surface. The trenches are 20 to 50 feet deep and 150 to 300 feet long." The report concluded that it would require \$16,019 to adequately reclaim the 12 acres of affected land by backfilling, grading and reseeding the mined areas, and scarifying and reseeding access roads. In an April 22, 1980, memorandum to the Chief, Branch of Lands and Minerals Operations, the Area Mining Supervisor concurred in the report.

Thereafter, by letters dated April 20 and 21, 1981, BLM requested Ringstad, Burnett, and Statebank to relinquish whatever interest they had in the subject lease. BLM stated that it had decided to accept such relinquishments, in lieu of initiating judicial action to collect unpaid rental and royalty, "[d]ue to some uncertainty as to the validity of the assignment from Ringstad and Burnett to Alaska State Bank and in order to clear the land records." The letter sent to Ringstad and Burnett was returned to BLM, marked "Addressee unknown." While Statebank received its letter, there is no evidence in the record that it ever responded.

No further action was taken with respect to the subject lease by BLM for some time. Finally, on June 5, 1987, BLM issued the decision appealed herein. In that decision, BLM determined the liability of various parties with respect to the subject lease and required them to make full payment within 30 days of receipt of the decision. BLM concluded that Ringstad and Burnett were obligated to pay the delinquent royalties in the amount of \$8,094 because they were the lessees of record at the time the royalty became due in 1971, but held that they were released from that liability by their discharge in bankruptcy. Nevertheless, BLM concluded that their sureties continued to be liable to the extent of the bond coverage (\$1,000). Ringstad and Burnett and their surety have not appealed. Since Statebank and Travelers are not adversely affected by this portion of BLM's decision, and Ringstad et al. have not appealed, it is not at issue here.

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fn. 4 (continued)

\$1 per acre times 600 acres) as of the date of BLM's decision of June 5, 1987.

5/ On June 19, 1975, Travelers did write BLM, requesting that its bond be terminated "as to any future liability effective April 24, 1975," noting that it had been advised by Statebank "that they are in the process of winding up their involvement" with the lease. While this letter is informative regarding Statebank's attitude towards its obligations under the lease, it does not amount to a formal relinquishment. BLM correctly denied Travelers' request for termination of the bond by letter dated July 16, 1975. See Fidelity & Deposit Co. of Maryland, 109 IBLA 389 (1989).

However, BLM also concluded that Statebank was obligated to pay delinquent rental in the amount of \$9,000, which rental had accrued for the period September 18, 1972, to September 18, 1986 (15 years x \$600/year), because it was the lessee of record during that time period. With respect to this delinquent rental, BLM stated that Statebank's surety, Travelers, would be liable only to the extent of the bond coverage (\$5,000). Next, BLM concluded that Ringstad, Burnett, and Statebank, along with their sureties, were jointly and severally liable for reclamation costs estimated to be \$16,019. Finally, BLM stated that failure to make the required payments would constitute grounds for cancellation of the subject lease. Statebank and Travelers have appealed from the June 1987 BLM decision.

In their statement of reasons for appeal (SOR), appellants contend that, for a number of reasons, they are not liable for payment of the unpaid rental and reclamation costs. We will deal with those arguments seriatim. <sup>6/</sup>

Appellants first argue that they are not liable for the unpaid rental and reclamation costs because the assignment to Statebank was void, because it was approved by BLM in violation of the applicable Departmental regulation, 43 CFR 3506.2-4 (1972), which provides: "Permit or lease account status. The account under the permit or lease must be in good standing before approval of a transfer will be given." See also 43 CFR 3506.2-3(b) (1972). Appellants argue that this provision "expressly prohibited approval of assignments if the lease sought to be assigned was not in good standing" (Statement of Reasons at 3). They assert that the lease was not in good standing at the time of approval of the assignment because \$8,094 in unpaid royalty was outstanding at that time. In addition, appellants state that BLM's termination of the bond liability in favor of Ringstad and Burnett, in conjunction with approval of the assignment, violated the applicable Departmental regulation, 43 CFR 3504.2-5 (1972), which provides: "Termination of period of liability. The period of liability of any bond will not be terminated until all terms and conditions in the permit or lease have been fulfilled."

In its answer, BLM contends that, rather than being void, the assignment to Statebank was "voidable" at BLM's option, because it was approved

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<sup>6/</sup> However, before addressing those arguments, we note that BLM contends that, in accordance with 1 U.S.C. § 109 (1958), the applicable Departmental regulations for purposes of deciding this appeal are those implementing regulations which were in effect at the time of repeal of the Act of Oct. 20, 1914, pursuant to which the subject lease was issued. Those regulations are principally set forth at 43 CFR 70.25 (1954). Appellants do not take issue with this contention. Nor can we find any basis for challenging BLM's assertion, since the question is one of liability under the repealed statute. See Allen v. Grand Central Aircraft Co., 347 U.S. 535, 554-55 (1954). However, as BLM recognizes, these regulations are "virtually identical" to the applicable Departmental regulations extant at the time of BLM's approval of the assignment in 1972. For purposes of this decision, we will, therefore, refer to those regulations.

at a time when the lease was not in good standing. BLM analogizes the current situation of the assignment of a lease in violation of the requirement that the lease be in good standing to that of a lease where the assignment is effected without the required consent of the lessor. BLM states that it is well accepted under common law that the requirement in a lease that a lessor's consent to assignment of a lease is intended to benefit the lessor and that, where such consent is not obtained, the lease is not void, but merely voidable at the option of the lessor. BLM argues that this common law principle has been carried over to the requirement under the Mineral Leasing Act that the Secretary consent to an assignment of a mineral lease, concluding that

if only the government, and not an individual, can take advantage of the prohibition against an assignment without consent of BLM in order to vitiate an assignment actually made without such consent, it is even clearer that only the government can raise the prohibition against an assignment of a coal lease not in good standing in order to defeat an assignment actually approved by BLM.

(BLM Answer at 11). BLM concludes that, since it has not been voided, the assignment continues to operate to transfer the assignors' interest in the subject lease. <sup>7/</sup>

[1] It is not disputed that \$8,094 in unpaid royalty was due and owing the United States as a result of production from the lease during the period July 1970 to August 1971 as of the date the assignment was approved. Further, it appears that, although the Geological Survey suspected that there might be problems with the lease in July 1972, prior to the approval of the assignment, the deficiency was not identified until after it was approved.

Nevertheless, we are not convinced that BLM's approval of the assignment to Statebank violated any regulatory provision. Neither 43 CFR 3504.2-5 (1972) nor 43 CFR 3506.2-4 (1972) expressly prohibited approval of a lease assignment where the lease was not in good standing, as appellants assert. Cf. Storm King Coal Mining Co., 105 IBLA 126, 129 (1988) (discussing 43 CFR 3453.3-2 and holding "The authorized officer shall deny approval of a transfer"). We read these provisions as merely giving notice to prospective assignors and assignees that the Government will not be expected to approve an assignment of a lease that is not in good standing, or may decline to terminate the period of liability of any bond when the lease terms remain unfulfilled. As such, these regulations provide a means of ensuring the government that a lessee may not avoid its obligations under the lease by assigning the lease to an irresponsible or judgment-proof third party.

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<sup>7/</sup> We note that, in promoting this position, BLM is arguing counter to an opinion issued by the Associate Solicitor, Energy and Resources, in a memorandum dated November 3, 1975. At several points in the record, it appears that BLM adopted the contrary view espoused in that memorandum, but we shall now consider its position to be that set forth in its answer on appeal.

In any event, we are persuaded by BLM that the assignment, once approved, was not void, but rather voidable at the discretion of BLM. Appellants base their argument that the assignment should be regarded as void essentially on their assertion that the requirement that the lease be in good standing at the time of approval of the assignment is "designed to protect lease transferees from incurring liability for the unmet obligations of their transferors." BLM takes issue with this assertion, arguing that the requirement was designed more "to protect the government, as landowner, against uncompensated loss of its coal by an assignor's failure to satisfy its contractual obligations under the lease." As discussed above, we agree with BLM.

As BLM points out, it has long been held that the requirement to obtain the Secretary's consent is for the benefit of the Government. Isaacs v. De Hon, 11 F.2d 943, 944 (9th Cir. 1926); Rock Island Oil & Refining Co. v. Simmons, 386 P.2d 239, 242-43 (N.M. 1963); Recovery Oil Co. v. Van Acker, 180 P.2d 436, 438 (Cal. Dist. Ct. App. 1947); Aronow v. Bishop, 86 P.2d 644, 648 (Mont. 1938); see generally Klee v. United States, 53 F.2d 58, 60-61 (9th Cir. 1931). In such circumstances, the Secretary has the option of voiding the assignment, but may choose not to do so. Similarly, in the present case, where we are concerned not so much with lack of consent but with consent granted in ignorance of outstanding obligations, we conclude that only BLM may take advantage of deficiencies extant at the time of assignment. While BLM may take advantage of the fact that an assignor has failed, as required, to bring his lease into good standing at the time of approval of the assignment and cancel an assignment, thus returning the assignor to the status of lessee of record, BLM may, in its discretion, continue to recognize the assignment as effective. Cf. Hill v. Williams, 59 I.D. 370, 381-82 (1947) (approval of assignment of oil and gas lease subject to revocation); Joseph Alstad, 19 IBLA 104, 110-11 (1975); Newton Oil Co., A-30774 (Sept. 29, 1967) (BLM may approve assignment despite failure to comply with regulation). 8/

BLM has taken no action to vacate its approval of the assignment to Statebank. Therefore, since the assignment was voidable, but was never

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8/ In arguing that BLM's approval of the assignment to Statebank was void, appellants rely largely on the doctrine enunciated by the Supreme Court that action taken in violation of an agency's regulation is of "no effect." See Kelly v. Railroad Retirement Board, 625 F.2d 486, 491-92 (3d Cir. 1980), and cases cited therein. However, as noted above, the regulation in this case is for the benefit of the government, not third parties. Further, as BLM points out, the Supreme Court has also stated that "[i]t is rarely that things are wholly void and without force and effect as to all persons and for all purposes \* \* \*. Things are voidable which are valid and effectual until they are avoided by some act." Weeks v. Bridgman, 159 U.S. 541, 547 (1895). In the absence of any indication in the applicable regulation that BLM's approval of the assignment of a lease which is not in good standing renders the approval void or some compelling reason for holding that to be the case, as is the situation here, we are not persuaded that BLM's approval should be regarded as of "no effect."

voided by BLM, it remains in effect, and Statebank is the lessee of record for the lease.

Appellants also contend that they are not liable for payment of the unpaid rental and reclamation costs because the assignment to Statebank did not effect a transfer of the lessee's obligations. Appellants argue that, because there was no contract between Statebank, as the assignee, and the United States, as the lessor, Statebank's liability "must be founded upon privity of estate" (Statement of Reasons at 9). Appellants contend that there was no such privity where the lease was assigned to Statebank "solely as security for repayment of an obligation owing by the lessees to the bank," and that it was never intended that the "bank take any possessory or operating interest in the leasehold," as evidenced by the "Assignment of Lease." Id.

[2] Because a lease constitutes both a conveyance of an interest in real property and a contract, it is well established under the common law that the obligations of an assignee of a lessee arise by virtue of privity of estate and/or contract. Acceptance by an assignee of an assignment such that he acquires ownership of and has the right to enjoy the benefits of the leasehold gives rise to privity of estate between the lessor and the assignee, even though the assignee does not enter into possession of the leasehold. Such privity binds the assignee to perform only those covenants running with the land during such time as privity obtains. See 3A Thompson on Real Property, §§ 1216, 1217 (1959).

Where, in conjunction with an assignment of a lease, an assignee also expressly agrees to assume the obligations of the lessee, there arises both privity of estate and privity of contract between the lessor and the assignee. Privity of contract binds the assignee to perform all contractual obligations imposed on the lessee, including those obligations which remain to be performed by the lessee, even where the assignee has not entered into possession of the leasehold. See 3A Thompson on Real Property, § 1217 (1959). In the present case, we conclude that the assignment to Statebank gave rise to both privity of estate and privity of contract between the United States and Statebank.

The "Assignment of Lease," to which appellants refer, unequivocally states that the assignors are conveying to Statebank "all of the Lessee's right, title and interest" in the subject lease. This clearly was intended to and did effect the transfer of the lessees' ownership of the subject lease to Statebank. <sup>9/</sup> See Ray Sorrell, 59 I.D. 278, 279-80 (1946) (oil

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<sup>9/</sup> It is inaccurate to say, as appellants do, that Statebank acquired only a "security interest" in the subject lease as a result of the assignment. Rather, it is clear that the language of the assignment effected a transfer of the record title interest in the lease, which transfer was for security "purpose[s]." In this respect, the present case is clearly distinguishable from Bonfils v. McDonald, 270 P. 650 (Colo. 1928), cited by appellants. The court concluded in Bonfils v. McDonald, supra at 652, that the lessor was not entitled to collect unpaid royalties from an assignee of the lessee

and gas lease). Statebank affirmatively sought BLM's approval of the assignment and raised no protest upon receipt of such approval. It is in this light that we must construe the subsequent statement in the instrument of assignment that the assignment was made for the sole purpose of "securing the repayment of a loan" to the assignors. Such enunciated purpose did not alter the effect of the assignment. See D.J. Simmons, 64 I.D. 413, 418 (1957) (oil and gas lease assignment effective even though filed untimely for approval; assignment of record title effected despite private purposes of parties in executing assignment "for collateral security purposes").

In judging whether to approve an assignment, the Department's inquiry concerns in considerable measure "[whether it] has \* \* \* been satisfactorily shown that the right, title and interest in the lease has been transferred to the [assignee]." Rainbow Pinnacle Coal Co., 53 I.D. 184, 186 (1930). The evidence in the present case leaves no doubt that a transfer occurred. 10/ Compare Harry L. Bigbee, 2 IBLA 23 (1971) (construing agreement as operating agreement rather than assignment of record title). Thus, we conclude that there arose privity of estate between the United States and Statebank.

We, therefore, turn to the question of whether there arose privity of contract between the United States and Statebank. Under the "Assignment of Lease," Statebank purported not to assume the obligations of the lessee. Indeed, the portion of the instrument of assignment entitled "Lessor's Consent to Assignment of Lease" indicates that the party drafting the document (whether Ringstad and Burnett or Statebank) intended that the United States agree that the assignee not assume such obligations so long as it did not enter into possession of the leasehold. However, that portion of the document was never executed by the United States. Indeed, execution would have been directly contrary to the applicable regulation, 43 CFR 3506.2-3(b)

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fn. 9 (continued)

who had been assigned the lease "as security for the payment of the money loaned" by the assignee. The court intimated that there was no privity of contract between the lessor and the assignee because of "limitations in the security assignments." Id. at 654. Indeed, the court later noted that the assignee's interest was "security only, no absolute estate." Id. at 655; see also Calvert v. Bradley, 16 How. (57 U.S.) 580, 595 (1853); 3A Thompson on Real Property, §§ 1217, 1218 (1959) (especially distinguishing "transfers by way of security" and "absolute assignments" at page 109). In the present case, there is nothing in the assignment document which could be construed as "limitations." Rather, the assignment was an unrestricted transfer of the record title interest in the subject lease. As noted above, Statebank's April 24, 1972, application for the assignment stated that it would hold "the entire interest" in the lease if the assignment were approved. 10/ We note that, in Rainbow Pinnacle, the Assistant Secretary affirmed the Commissioner's denial of a request for approval of an assignment largely because "there is no instrument furnished transferring the interest [in the coal lease]." Rainbow Pinnacle Coal Co., supra at 187. The present case suffers from no such infirmity.

(1972), which provided that, "[a]fter the effective date of approval the transferee \* \* \* and his surety will be responsible for the performance of all \* \* \* lease obligations notwithstanding any terms in the transfer to the contrary." The Department's approval of an assignment of record title may not be construed as giving approval by the United States to any terms in the agreement which are inconsistent with the regulations. See A.W. Rutter, Jr., 18 IBLA 153, 154 n.1 (1974).

Thus, in the absence of execution of the "Lessor's Consent" and in view of the clear dictates of the applicable regulation, it is clear that Statebank agreed to assume the obligations of the lessee upon acceptance of the assignment of the subject lease. 11/ By accepting the assignment, Statebank agreed to be bound by Article X of the lease, which provides that "each obligation hereunder shall extend to and be binding upon \* \* \* [the] assigns of the respective parties hereto." Acceptance of a lease assignment where the lease contains such a provision has long been held by the Department to constitute an assumption by the assignee of the obligations of the lessee. Weyland U. Ewing, A-27286 (May 7, 1956); D.C. Jones, 61 I.D. 340, 341-42 (1954), and cases cited.

Moreover, the assumption of lease obligations extends to the "payment of rental and royalty charges which had accrued prior to the assignment," even where the delinquency was not discovered until after approval of the assignment. D.C. Jones, supra at 342. 12/ The assumption by an assignee of the covenants of the original lessee broadens the assignee's liability which arises merely as a result of the privity of estate between the lessor and the assignee. Pan American Petroleum Corp. v. Gibbons, 168 F. Supp. 867, 873 (D. Utah 1958), aff'd, 262 F.2d 852 (10th Cir. 1958). Accordingly, BLM properly held Statebank liable to pay the costs of reclaiming the minesite even though, as discussed below, the obligation to pay such costs arose prior to the assignment as a result of the abandonment of mining operations. 13/

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11/ That the Secretary has the authority to establish the legal relationship between the United States and the assignors and assignees upon approval of an assignment is beyond question where such an assignment can be made only with the Secretary's consent. Cf. C.W. Grier, 58 I.D. 712, 715 (1944) (oil and gas lease).

12/ That is also regarded as the general rule under the common law. As stated in 3A Thompson on Real Property, § 1217 (1959), at page 103:

"It would be a species of fraud to hold [an assignee of the lessee] responsible for the past neglect or breaches of covenant of the original lessee; but if the assignee, by express covenant with the assignor, binds himself to pay the rents and perform all the covenants in the lease contained and required to be done and performed on the part of the lessee, such a covenant not only binds the assignee to fulfil the covenants during his own time, but makes him liable for breaches before his time"  
(footnotes omitted).

13/ The issue of whether Statebank might also be held liable for the \$8,094.90 in production royalties which became due prior to the assignment of the subject lease to it, where that debt remained outstanding after BLM's approval of the assignment, is not presented by BLM's decision.

While we recognize that BLM could have required Ringstad and Burnett to bring the lease account into good standing by paying all unpaid royalties and reclamation costs as a prerequisite to BLM's approval of the assignment to Statebank, where Statebank assumed the obligations of the lessee and thus became equally liable for such royalties and reclamation costs, BLM cannot be said to have waived its right to payment from Statebank. There was never any intentional relinquishment by BLM of its known rights to proceed against Statebank as successor to the original lessee, which relinquishment is required for invocation of the doctrine of waiver against BLM. United States v. Johnson, 23 IBLA 349, 356 (1976); see Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In fact, BLM lacked authority to waive payment of the rentals and royalties required by section 9 of the Act of October 20, 1914. See Article VII, Section 3 of the September 18, 1947 Lease; White Ash Coal Mining Co., 53 I.D. 560, 562 (1931).

Statebank clearly had options prior to and after BLM's approval of the assignment. Prior to BLM's approval of the assignment, Statebank could have withdrawn its request for approval; while, at any time after such approval, it could have relinquished the lease. See 43 CFR 70.17 (1954). However, whatever the motivation for Statebank's decision not to avoid the assignment or relinquish the lease, the fact of the matter is that Statebank assumed the obligations of the lessee by accepting the assignment of the subject lease, even though it never entered into possession of or conducted operations on the leasehold.

Appellants also argue that BLM is barred by the statute of limitations contained in 28 U.S.C. § 2415(a) (1982) from seeking payment of the unpaid rentals and reclamation costs from Statebank because BLM's claim for them accrued or arose for the most part more than 6 years prior to the June 1987 BLM decision. Appellants note that BLM's claim for the reclamation costs arose after abandonment of mining operations in 1972, <sup>14/</sup> and that its claim for most of the annual rentals now deemed to be due accrued after each anniversary date of the lease starting in 1972, in both cases more than 6 years before the June 1987 BLM decision.

The statute of limitations to which appellants refer provides that "every action for money damages brought by the United States \* \* \* which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2415(a) (1982). We hold that this provision does not preclude BLM from administratively requiring such payment. Such requirement is not an action for money damages brought by the United States, but rather is administrative action not subject to the statute of limitations. S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 5

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<sup>14/</sup> According to the Aug. 6, 1987, affidavit of Margaret Hein, Senior Vice President of Special Credits, Statebank, submitted by appellants on appeal, at page 2, "[b]ank records show that Ringstad and Burnett had abandoned all mining operations by the end of March 1972." BLM has not challenged this assertion. Accordingly, for our purposes, we will presume that mining operations were abandoned in 1972.

(Fed. Cir. 1985). It is not within our authority to decide whether the statute of limitations would bar a judicial suit to collect royalty, rental, or reclamation fees deemed owing on a lease. Such determination would be made by the court before which any collection proceeding is brought. However, the question of whether money is owed on the lease is nevertheless relevant, as a decision by BLM to the effect that moneys are owed on a lease, if affirmed by this Board, would be an important element in establishing that a lease should be judicially canceled for failure to comply with mandatory lease terms.

Appellants also contend that BLM is barred by the doctrine of laches from seeking payment of the unpaid rentals and reclamation costs because BLM has failed since 1972 to seek payment of any unpaid rentals or the costs of reclaiming the abandoned mining operations. Appellants argue that they have been adversely affected by BLM's dilatory conduct:

Had the government brought suit promptly in 1972, the bank's rental obligations would have amounted to no more than \$1,800 and any labor done to reclaim the land subject to the lease would have been performed at 1972 rather than 1986 hourly rates, a significant difference. Moreover, witnesses and documentary evidence that might have supported defenses to liability have long since been scattered.

(Statement of Reasons at 17).

It is well established that the doctrine of laches cannot be used to preclude the United States from enforcing a public right or protecting a public interest. See 43 CFR 1810.3(a); United States v. State of California, 332 U.S. 19, 40 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); United States v. Wilson, 38 IBLA 305, 307-08 (1978). However, even were we to conclude that the doctrine may properly be applied against the United States, we conclude that it is not applicable here.

First, contrary to appellants' assertion that no action has been taken since 1972, BLM has made numerous efforts to recover the royalty and rental due on this lease. Further, we are not prepared to hold that the delay in seeking payment of the unpaid rentals and reclamation costs was unreasonable and inexcusable, considering the Geological Survey's and BLM's initial efforts to collect from Statebank the unpaid royalties and the annual rental due on the 1972 anniversary date of the lease and subsequent efforts by BLM to arrive at a legally defensible strategy for winding up lease affairs.

There has been delay. However, we cannot say that appellants have been prejudiced. All during the intervening years, Statebank has had whatever benefits the lease might provide without having paid any outstanding royalties, annual rentals or reclamation costs. We recognize that reclamation costs have undoubtedly escalated since abandonment of mining operations. However, Article VI, section 15 of the lease has throughout this time period provided that upon abandonment of workings the lessee shall "substantially

fence, fill in, cover, or close all surface openings or workings," and the Departmental regulations applicable to the operation of coal mines in Alaska have at all times provided that a lessee will be liable for the expenses of the district mining supervisor in protecting the minesite upon abandonment, including the costs of fencing, filling in, covering, or closing all surface openings or workings. See 30 CFR 211.5 and 211.99 (1958). The requirement to protect the minesite in the event of abandonment has been equally binding on Statebank since it assumed the lessee's obligations under the lease. Accordingly, since mining operations were abandoned at the time of the assignment to Statebank, it was then required to comply with this requirement. That Statebank has not done so, with the result that the cost of compliance has increased, cannot be laid at the doorstep of BLM. In these circumstances, BLM's forbearance in seeking to recover these costs from Statebank will not relieve appellants from the obligation to pay.

In any event, it is equally true that Statebank has benefitted from any delay, as it has avoided expending the funds needed to achieve reclamation and, thus, has gained the time value of the funds that were not spent. Appellants have also not demonstrated that they have been prejudiced in offering any "defenses" to liability for unpaid rentals and reclamation costs because of the lack of the availability of witnesses or documentary evidence. Indeed, they have not suggested any such defenses which cannot be adequately supported because of the passage of time. Accordingly, we conclude that BLM is not barred by the doctrine of laches from requiring the payment of unpaid rentals and reclamation costs.

Finally, appellants contend that BLM is equitably estopped to require the payment of unpaid rentals and reclamation costs. They explain that Statebank received an October 25, 1974, default notice from BLM which required it to pay the \$8,094.90 in delinquent royalties and stated: "Not having complied with the requirements of the bill heretofore sent you, you are in default. If such default continues for 30 days from receipt of this notice, your lease will be canceled without further notice." Appellants also point out that a box on the form indicating that proceedings would be initiated to collect the amount owed was not checked.

Appellants assert that, acting in reliance on this notice, which admittedly provided incorrect information, they presumed that the lease was duly canceled without notice when it made no payment in response within the time allowed. Appellants assert that such reliance has acted to its detriment because annual rentals have continued to accrue and reclamation costs have increased since that time, and that BLM should now be estopped to deny that the lease was not canceled and seek payment of these rentals and reclamation costs.

In order for estoppel to operate, (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped. See

United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). In addition to these traditional elements, courts have required that estoppel will only operate against the United States where there is affirmative misconduct in the form of either misrepresentation or concealment of a material fact. See United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978).

The record indicates that, as a factual matter, Statebank could not have justifiably concluded that the lease was canceled after the expiration of 30 days from receipt of the October 1974 default notice. The record indicates that BLM followed up that notice with letters to Statebank, dated December 9, 1974, and January 14, 1975, requiring payment. In its January 1975 letter, BLM stated that, unless payment was received by January 31, 1975, legal action would be taken to effect collection. No mention in either letter was made of the cancellation of the subject lease.

Any justifiable reliance on the misinformation in the October 1974 default notice would not have caused Statebank to miss any payments, as any misimpression created by the notice was corrected prior to the anniversary date of the lease. The misinformation in October 1974 came too late to have contributed to appellant's admitted failure to pay rental as required in September 1974. As of September 1975, the date rental was next due following the default notice, any misimpression had been reasonably dispelled by corrective actions taken by BLM.

Nevertheless, Statebank persisted in asserting that the lease had been canceled. In an October 3, 1975, letter, received by the office of the Area Mining Supervisor on October 6, counsel for Statebank stated that, relying on the October 1974 default notice, he had concluded that the subject lease "has been canceled, and there is no liability of any sort to any agency of the United States Government with respect to such lease." By letter dated December 19, 1975, the Area Mining Supervisor responded, stating: "This office has no record of the cancellation of the lease, such as you suggest." BLM further correctly advised that, according to the lease document, such action can be taken only in a court of competent jurisdiction. <sup>15/</sup> It is difficult to imagine a more direct refutation of the previous misinformation.

The inescapable conclusion from the correspondence from and with BLM was that BLM had elected not to attempt to administratively cancel the lease, despite the statement to the contrary on the default notice form. Moreover, it is clear that Statebank was expressly informed on at least one occasion by an agency of the Department that there was no record that the lease had been canceled despite Statebank's failure to pay the unpaid royalties in response to that notice.

Further, we find that Statebank could not justifiably have believed that the subject lease had been canceled following its receipt of the October 1974 default notice. Under section 14 of the Act of October 20, 1914, any lease issued pursuant to that statute "may be forfeited and

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<sup>15/</sup> The lease document so provides at Article VII, Section 6.

canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease" (emphasis supplied). Likewise, Departmental regulations provided only for cancellation by judicial proceedings. See 43 CFR 70.18 (1954). Statebank is charged with knowledge of this statute and these duly promulgated regulations and, thus, is properly held to have been aware at all times that

cancellation of the subject lease required appropriate judicial action, despite the erroneous statement to the contrary in the October 1974 default notice. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); Francis X. Furlong II, 73 IBLA 67, 71 (1973). Further, Statebank would have received notification of the initiation of any judicial action, so that, when none was received, it should have been aware that no cancellation had occurred.

Therefore, even assuming that the October 1974 default notice constituted affirmative misconduct which Statebank relied upon to its detriment, we conclude that such reliance was not made in ignorance of the true facts, i.e., that the October 1974 default notice could not alone be the basis for cancellation of the subject lease and that, since no judicial proceeding had been instituted, cancellation had not occurred. Accordingly, we conclude that BLM is not equitably estopped to require payment of unpaid rentals and reclamation costs from appellants because it had wrongly led Statebank to conclude that the subject lease had been canceled. See generally Chevron U.S.A. Inc., 108 IBLA 96, 100-01 (1989).

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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David L. Hughes  
Administrative Judge

I concur:

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Will A. Irwin  
Administrative Judge