

ATLANTIC RICHFIELD CO.
WEST ELK COAL CO.

IBLA 87-46

Decided November 30, 1989

Appeal from a decision of the Montrose District Office, Bureau of Land Management, establishing recoverable coal reserves for Federal coal leases D-044569, C-0117192, and C-1362.

Affirmed in part and reversed in part.

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

A determination by the Department of the Interior of recoverable coal reserves within a lease may be adjusted as new information becomes available or to more adequately reflect existing information.

2. Coal Leases and Permits: Diligence--Coal Leases and Permits: Leases--
Words and Phrases

"Not permissible." As used in 43 CFR 3480.0-5(a)(23), the exclusion of other areas where mining is "not permissible" from the minable reserve base does not encompass areas in which no permit has been obtained, absent a showing that no permit can be obtained.

3. Coal Leases and Permits: Diligence--Coal Leases and Permits: Leases

Where the applicable policy directive provides that a 40-percent recovery factor will be applied for multiple seam mining, application of a 50-percent factor will be reversed absent a showing that, under the specific facts of record, the higher recovery rate could be reasonably predicted.

APPEARANCES: Lary D. Milner, Esq., and Charles L. Kaiser, Esq., Denver, Colorado, for appellants; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Atlantic Richfield Company and West Elk Coal Company have appealed from that part of the decision of the Montrose District Office, Bureau of Land Management (BLM), dated August 22, 1986, which established recoverable coal reserves for three Federal coal leases, D-044569, C-0117192, and C-1362.

The three leases involved herein comprise the Mt. Gunnison mine, which is presently operating on the "F" seam. Two issues are presented by this appeal. The first issue is whether recoverable reserve calculations must be based solely on the "F" seam or should include recoverable coal in the "E" and "B" seams as well. BLM contends that all minable coal in each of these seams must be included in the recoverable reserve computation while appellants contend that only "F" seam coal is properly considered. The second issue involves use by BLM of a 50-percent recoverability factor. Appellants contend that if the "E" and "B" seams are included in the recoverable reserve basis, BLM should only use a 40-percent recoverability factor. Before examining these varying contentions, it is helpful to briefly review the statutory and regulatory framework in which this controversy arises.

Prior to 1976, coal leasing had been accomplished either pursuant to preference-right lease applications or competitive leasing of known coal deposits under the aegis of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. § 201 (1970). Until 1960, the number of coal leases issued never exceeded more than 40 annually. Beginning in 1960, however, the number of coal leases rose sharply, averaging more than 150 per year for the 5-year period between 1960-65. This increase in the number of leases issued was matched by a similar growth in the size of the leases being issued. By 1971, the total tonnage of recoverable coal under lease was estimated to approximate 8.6 billion tons, a figure which rose to 17.3 billion tons by the end of 1976. See Senate Committee on Energy and Natural Resources, 95th Cong., 2d Sess., Federal Coal Leasing Policies & Regulations 6 (Comm. Print 1978). Yet, despite the large amount of coal under lease, the amount of coal actually produced from Federal leases was minimal, amounting to only 20.6 million tons in 1974, or approximately 3 percent of total national production. See H.R. Rep. No. 681, 94th Cong., 1st Sess., reprinted in 1976 U.S. Code Cong. & Admin. News 1943, 1945. Indeed, a BLM report published in 1970, entitled "Holdings and Development of Federal Coal Leases," pointed out that, even though the applicable statutory language expressly provided that "leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine" (30 U.S.C. § 207 (1970) (emphasis supplied)), a total of 91.5 percent of all existing leases were not then producing coal. Id. at 1947. 1/

Concerned that large amounts of coal lands were being tied up for speculative purposes, the Department of the Interior informally suspended issuance of coal leases commencing in May 1971. In February 1973, the Secretary formally suspended issuance of coal prospecting permits. See

1/ As the House Report noted, it was not until 1974 that regulations were finally proposed to define "diligent drilling" and "continuous operation." Id. at 1948; see 39 FR 43228 (Dec. 11, 1974).

Sec. Order No. 2952 (Feb. 13, 1973). Four days later, on February 17, 1973, the Secretary announced a new policy limiting the issuance of new coal leases to those situations in which the coal was needed to maintain an existing operation or would be needed as a reserve for production in the near future. Federal Coal Leasing Policies and Regulations, *supra* at 139. These policies remained in effect until passage of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1083.

In adopting FCLAA, Congress took note of the concerns which had animated the Department's actions in suspending issuance of coal prospecting permits and limiting issuance of competitive leases. Congress pointed out that, with 45 percent of all Federal leases having been issued pursuant to preference-right lease applications without competitive bidding, a large number of holding companies and energy resource speculators had entered the coal leasing field. Thus, coal lands were being tied up for speculative purposes at the same time that a major energy shortage loomed. Congress took a number of steps to address this problem.

Thus, FCLAA eliminated the issuance of coal prospecting permits and, subject to valid existing rights, preference-right leases, providing instead for issuance of exploration licenses which expressly gave the holder no right to a lease. See section 4 of FCLAA, 90 Stat. 1085, 30 U.S.C. § 201(b) (1982). FCLAA also amended 30 U.S.C. § 207 (1970) to provide for an initial lease term of 20 years with the right of subsequent renewals for 10 years and added a provision that any lease which was not producing in commercial quantities at the end of 10 years would be terminated. See section 6 of FCLAA, 90 Stat. 1087, 30 U.S.C. § 207(a) (1982). Further, while section 207 retained the requirement of diligent development and continuous operations, provisions were added to permit the Secretary to suspend the obligation of continued operation upon payment of advanced royalties, to be computed on the basis of a fixed reserve to production ratio. 30 U.S.C. § 207(b) (1982). While these provisions were not automatically applicable to existing leases, the Department, in the course of readjusting pre-FCLAA leases, routinely subjected these pre-FCLAA leases to the terms and conditions delineated in FCLAA. Challenges to this practice were rejected in FMC Wyoming Corp. v. Hodel, 816 F.2d 496, 501 (10th Cir. 1987); Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987); and Peabody Coal Co. v. Hodel, Civ. No. 87-1359 (D.D.C. Oct. 11, 1988).

In one particular aspect, however, FCLAA did directly affect pre-existing leases. Thus, section 3 of FCLAA amended the MLA to prohibit the issuance of any new mineral lease or transfer of any interest in a mineral lease to any company which had held a coal lease for a 10-year period, which lease was not producing coal in commercial quantities. This prohibition on issuance of new leases applied not merely to coal leases but to any leases issued under the authority of the MLA. See Conoco, Inc. v. Hodel, 626 F. Supp. 287 (D. Del. 1986); Veola Rasmussen, 109 IBLA 106 (1989). For pre-FCLAA leases, this 10-year period expired on December 31, 1986. ^{2/}

^{2/} Under the original terms of FCLAA, the 10 years would have expired for pre-FCLAA leases on Aug. 4, 1976, the date of FCLAA's enactment. However, under section 101(d) of P.L. 99-190, 99 Stat. 1266, the effective date was

FCLAA did not, however, define either commercial quantities or diligent development. In implementing the requirements of FCLAA, it was necessary for the Department to flesh out the statutory skeleton. Accordingly, the Department developed a number of definitions critical to adjudication of the instant appeal. ^{3/}

Thus, the regulations defined "diligent development" as production of recoverable coal reserves in commercial quantities (43 CFR 3480.0-5(a)(12)), while "commercial quantities" was defined as "1 percent of the recoverable coal reserves." 43 CFR 3480.0-5(a)(6). As is readily apparent, the determination of "recoverable coal reserves" is the focal point for establishing compliance with both the diligent development and production in commercial quantities requirements. ^{4/}

In order to determine "recoverable coal reserves," the regulatory scheme required the initial determination of the "coal reserve base." As defined in 43 CFR 3480.0-5(a)(5), the coal reserve base is simply the estimated tonnage of Federal coal in place in beds of various thickness on the lease. ^{5/} After the coal reserve base has been determined, the next step

fn. 2 (continued)

extended to Dec. 31, 1986. Thus, all prior coal leases were required to be producing in commercial quantities prior to Dec. 31, 1986, or the holders of such leases would be prohibited from obtaining any new Federal mineral leases. We note that, contrary to the foregoing, the decision under appeal gave various dates, beyond Dec. 31, 1986, in which each of these pre-FCLAA leases were required to produce commercial quantities to avoid the proscriptions of 30 U.S.C. § 201(a)(2)(A) (1982). We are unable to discern the basis for these assertions in the decision.

^{3/} While the regulations were, indeed, ultimately promulgated by the Department of the Interior, the draft regulations on diligent development were actually issued by the Department of Energy (DOE) as a proposed amendment to 10 CFR Part 378. See 46 FR 62226 (Dec. 22, 1981). When, upon enactment of P.L. 97-100, 95 Stat. 1391, authority for issuance of the regulations reverted to Interior, Minerals Management Service subsequently adopted and received all public comments. The final rules were issued on July 30, 1982, as amendments to 30 CFR Part 211. See 47 FR 33154. Shortly thereafter, when authority over the administration of the MLA for coal mining purposes, including resource recovery and protection operations, was vested in BLM, these rules were redesignated as 43 CFR Part 3480. See 48 FR 41589 (Sept. 16, 1983). The citations in the text will be to the present regulations appearing at 43 CFR Part 3480.

^{4/} Moreover, it is also directly related to the determination of "continued operation." Thus, "continued operation" is defined as "the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and an average amount of not less than commercial quantities of recoverable coal reserves per continued operation year thereafter." 43 CFR 3480.0-5(a)(8).

^{5/} The definition of "coal reserve base" was derived from General Mining Order No. 1. See 44 FR 53808, 53811-12 (Sept. 17, 1979). General Mining Order No. 1 was revoked on Feb. 9, 1983. See 48 FR 5902.

is to ascertain the "minable reserve base." The minable coal base means all of the coal (including pillars and property barriers) which is commercially minable, excluding, however, all areas in which mining is "not permissible," such as lands classified as unsuitable for coal mining operations. See 43 CFR 3480.0-5(a)(23). Recoverable coal reserves consist of the minable reserve base minus the coal which will be left for pillars, property barriers, etc. See 43 CFR 3480.0-5(a)(32).

In the decision under appeal, the District Office determined that in addition to minable coal reserves in the "F" seam, minable coal reserves in the "E" and "B" seams must be considered in determining the recoverable coal reserves for the three leases. The effect of this determination was to dramatically increase the amount of recoverable coal reserves for leases C-1362 and D-044569. ^{6/} As a result, of course, the amount of coal which must be produced on an annualized basis in order to achieve and continue production of commercial quantities similarly increased. This amount, it should be remembered, was required to be mined annually in order not only to avoid termination of the lease but also to avoid disqualification from receiving any other mineral leases, either by issuance or assignment.

In challenging this determination, appellants assert that the Mt. Gunnison mine has been producing since 1982 and that over 2 million tons of coal from the "F" seam have already been mined. They note that, pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), the mining operation obtained a surface mining permit on July 12, 1981, from the Office of Surface Mining Reclamation and Enforcement (OSMRE) which entailed the submission of a mining and reclamation plan. See generally National Resources Defense Council v. OSMRE, 89 IBLA 1, 92 I.D. 389 (1985), appeal dismissed as moot, National Resources Defense Council v. Hodel, Civ. No. 86-F-2535 (D. Colo. June 30, 1988). They point out that, under the applicable regulations, the Department was required to evaluate the plan for compliance with the MLA on issues such as the determination of recoverable coal reserves and whether mining by a method consistent with the plan would meet diligence, continued operations, and maximum economic recovery (MER) requirements of the MLA. They assert that all operations were predicated solely on mining the "F" seam. The ultimate issuance of the surface mining permit, they further argue, constitutes Department agreement that appellant's recoverable coal reserves consisted only of "F" seam coal (Statement of Reasons (SOR) at 4-5).

Appellants recognize that, thereafter, the Department published final coal program regulations under the MLA. See note 3, supra. However, appellants contend that these regulations were consistent with those policies which had been set forth in General Mining Order (GMO) No. 1, 44 FR 53808 (Sept. 17, 1979), and, therefore, did not alter the proper determination of recoverable coal reserves for the Mt. Gunnison mine.

^{6/} Since apparently neither the "E" nor "B" seam extended beneath lease C-0117192 in minable quantities, this decision did not increase the amount of recoverable coal reserves for that lease above the level agreed to by appellants.

Appellants note that in 1986, the Director, BLM, determined that steps needed to be taken to assure that accurate data was being utilized in determining recoverable coal reserves and that Instruction Memorandum (IM) No. 86-323 was issued to provide uniform criteria for this determination. They argue, however, that, under IM No. 86-323, recoverable coal reserves determinations were to be verified by referring to an approved Recoverable Reserve Protection Plan (R2P2) if such a plan existed. ^{7/} While appellants admit that an actual R2P2 plan was not approved, such a plan, in essence, did exist, appellants contend, and that plan did not include any recoverable coal from the "E" or "B" seams. ^{8/}

All of this, appellants argue, supports their contention that the coal in seams "E" and "B" is not properly included in the "minable reserve base" and is therefore properly excluded from "recoverable coal reserves." This argument is based on the fact that, as noted above, "minable reserve base" is defined to exclude all areas in which mining is "not permissible." Appellants point out that their mining permit only authorizes mining of the "F" seam. Therefore, appellants conclude, mining of the "E" and "B" seams is not "permissible" and, hence, the "coal reserve base" present in those seams cannot be included in the determination of the "minable reserve base" or in the determination of "recoverable coal reserves."

For its part, BLM notes that, pursuant to 43 CFR 3482.1(c)(3)(iii), an R2P2 is required to include an estimate of the minable reserve base and the recoverable coal reserves for each lease included therein. But, BLM continues, the mere existence of an approved R2P2 is not conclusively determinative of the amount of recoverable coal reserves within a lease. Rather, IM No. 86-323 expressly provides that "any coal not addressed as part of the R2P2 approval is to be included as part of the determination of recoverable coal reserves."

BLM assails appellants' argument that, because they had no outstanding surface mining permit authorizing them to mine the coal, the coal in the "E" and "B" seams was properly excluded from the "minable reserve base." Thus, BLM notes that it did not do the permitting and that nothing in either the R2P2 requirements or IM No. 86-323 "made any reference to the idea of permitted coal" (Memorandum dated March 24, 1987, from District Manager, Montrose District, to Regional Office of the Solicitor, at 1). BLM concludes that the "E" and "B" seams were properly included in the minable reserve base.

It is apparent that appellants are attacking the decision below from two independent yet interrelated positions. First, they are arguing that,

^{7/} Appellants also noted that IM No. 86-323 provided that, in the Lower Green River-Hams Fork area in Colorado in which the Mt. Gunnison mine is located, a recoverability factor of 40 percent was to be utilized for leases embracing multiple coal seams. They note that even though the effect of the District Manager's decision was to require multiple seam recovery on leases C-1362 and D-044569, a recoverability factor of 50 percent was used. Appellants' challenge to this aspect of the decision below is examined *infra*. ^{8/} Thus, appellants argue that the mining plan which was approved in 1981 "is the equivalent of a Resource Recovery Protection Plan" (Reply at 3).

by approval of their surface mining permit, the Department necessarily agreed that only "F" seam coal was properly included in the determination of "recoverable coal reserves" for the leases at issue. Second, appellants also contend that, under the regulations as they presently exist, the lack of a surface coal mining permit authorizing development of the coal in the "E" and "B" seams renders mining of that coal "impermissible" within the meaning of 43 CFR 3480.0-5(a)(23), thereby necessitating its exclusion from "recoverable coal reserves." To the extent that appellants' first argument raises an estoppel question, it is independent of the second argument. ^{9/} To the extent, however, that appellants assert that the prior actions of the Department underscore the proper interpretation of 43 CFR 3480.0-5(a)(23), the first argument is directly related to their second contention. We will examine both propositions seriatim.

[1] Insofar as appellants seek to estop the Department from requiring inclusion of the recoverable coal from the "E" and "B" seams in determining total recoverable coal reserves under the two leases involved herein, their argument must be rejected. In the first place, even assuming that the Department had issued a prior determination that recoverable coal reserves were correctly computed using only "F" seam coal, it is clear that such a determination would not preclude a subsequent change in this decision. In this regard, it is important to emphasize the point that determination of recoverable coal reserves is a dynamic rather than static process. Indeed, this was expressly adverted to in the promulgation of the regulations now appearing at 43 CFR Part 3480. Therein, in rejecting comments suggesting that the Department be prohibited from recomputing recoverable coal reserves once an initial determination had been made, the Department noted that "[i]n order to ensure that an operation is in compliance with MLA, the District Mining Supervisor must be able to adjust the recoverable coal reserves figures as new information becomes available." 47 FR 33154, 33160 (July 30, 1982). Thus, because the determination of recoverable coal reserves is necessarily subject to change as new information becomes available, the Department can never be estopped to alter or emend such a determination, so long as the new determination is in accord with the statutory and regulatory mandate.

Moreover, as a factual matter, appellants are simply wrong in their assertion that the approval of the mine plan under the surface mining permit issued by OSMRE constituted a de facto R2P2 determination of recoverable coal reserves for the purpose of MLA compliance. It is true, as appellants contend, that the surface coal mining permit which was issued was premised solely on recovery of coal from the "F" seam and that the Geological Survey, prior to issuance of the permit, indicated that appellants were in compliance with GMO No. 1. But an understanding of the statutory scheme envisioned by SMCRA, coupled with an analysis of the data submitted and accepted by the Geological Survey, sharply undercuts any possible reliance on approval of the surface mining permit as validating appellants' recoverable

^{9/} While it is, admittedly, unclear whether appellants are making an independent estoppel argument, the Board will nevertheless treat it as such for the purposes of this decision in order to fully explicate the basis of the determinations reached herein.

reserve computations or supporting their present position that "E" and "B" seam coal is properly excluded because mining is not permissible.

Initially, it is important to remember that the main thrust of SMCRA is directed to analyzing and regulating the environmental effects of the development and reclamation of surface coal mining operations. Thus, with minor exceptions not relevant herein, all surface coal mining activities ^{10/} must be permitted by the appropriate regulatory authority. Pursuant to section 506(b) of SMCRA, 30 U.S.C. § 1256(b) (1982), surface mining permits are limited to a period of time not to exceed 5 years, though permits may be renewed in accordance with the statutory provisions, 30 U.S.C. § 1256(d) (1982). As a result, however, the primary focus of the permitting process is directed toward analysis of activities scheduled for performance within the 5-year term of the permit under review. Thus, since it is undisputed that, with respect to the Mt. Gunnison mine, the requirements of MER could only be met by sequential mining of the higher seams first (i.e. from the "F" seam downward to the "A" seam), and it is equally clear that the "F" seam would not be sufficiently mined to permit economic development of lower seams during the initial 5-year term of the SMCRA permit, the failure of appellants to include any of the lower seams in the recoverable reserve base would, for purposes of OSMRE review, not generally be a matter of concern.

While a number of the permitting provisions do require consideration of life-of-the-mine impacts, even here, the process does not necessarily result in a rigorous analysis of the total chronology of development in the context of approval of the initial 5-year permit. Thus, in affirming issuance of the SMCRA permit to appellants, this Board noted, in reference to the West-Coast Colorado Environmental Statement which had devoted 96 pages to the Mt. Gunnison site, that even though "many impacts are discussed only through 1990, * * * a majority of these are impacts which will peak by 1990 and are not likely to change appreciably during the remainder of the life of the mine." Natural Resources Defense Council v. OSMRE, supra at 42, 92 I.D. at 409 (footnote omitted). It is obvious that OSMRE approval of the permit application was premised on its determination that SMCRA requirements had been met. MLA compliance was simply not the subject of OSMRE review. See 30 CFR 741.4(c) (1981). Thus, the mere fact that appellants obtained a SMCRA permit does not give any factual patina to a claim of estoppel.

Moreover, insofar as the approval by the Geological Survey of appellants' compliance with MLA requirements is concerned, the documents of record raise substantial questions as to both the scope of review under-taken by Geological Survey as well as to the correctness of its conclusions. Thus, in February 1980, ARCO Coal Company (ARCO), a division of Atlantic Richfield, submitted, as it was required to by GMO No. 1, individual lease computations of the coal reserve base, the minable reserve base, and the recoverable reserve base. In all three submissions, ARCO showed a coal

^{10/} Since "surface coal mining operations" is defined to include, inter alia, "surface impacts incident to an underground mine," 30 U.S.C. § 1291(28)(A) (1982), the conduct of underground operations such as the Mt. Gunnison mine require obtaining a surface coal mining permit. See also 30 U.S.C. § 1266 (1982).

reserve base in all seams "F" through "A." In calculating minable reserve base, however, each submission only included coal reserves from the "F" seam. The accompanying narrative declared that the other seams

are all non-commercial and are not considered to be mineable. The overlying F seam must be mined prior to extraction of any of the underlying seams in order to maximize recovery and minimize waste and damage to all seams. Mining in any of the lower seams before or concurrently with the F seam would introduce stresses into the F seam and adjacent strata that would produce difficult and hazardous mining conditions, resulting in reduced recovery of the F seam. Moreover, recovery in the underlying seams would be reduced because of the need to leave more coal in the ground for additional support for any existing mining operation in the F seam. The additional costs due to inefficiencies and the need for additional safety measures would more than offset any increase in production from concurrently mining two or more seams.

Once mining of the overlying F seam is completed, recovery of the successively lower seams could proceed using normal mining techniques with less concern for damaging or wasting any coal reserves.

(Report of Recoverable Coal Reserves of Federal Coal Lease No. C-1362, dated February 1980, at 5). Thus, ARCO argued to Geological Survey that, since the lower seams could not be mined until extraction of the "F" seam, these seams were noncommercial for the purposes of determining minable reserve base.

The record before the Board indicates that these submissions were subsequently reviewed by a Physical Science Technician, Central Rocky Mountain Area (CRMA), who expressly noted that minable reserve base and recoverable reserve base were not reviewed by his office (Memorandum dated Apr. 21, 1980, from Toby Manzanares to the Area Mining Supervisor, CRMA). However, in transmitting this report to the Area Mining Supervisor, CRMA, a mining engineer stated that the "Recoverable and Movable tonnage calculations are correct" (Memorandum dated May 5, 1980, from Shannon DeAun Hoefeler-Plate to Area Mining Supervisor).

There is, therefore, some support in the record to buttress appellants' assertion that their recoverable and minable reserve computations were approved by the Department. The problem, however, is that, to the extent that this approval was contingent upon the assertion that the lower seams were not commercial, this approval was clearly erroneous. The term "commercially minable" was not defined in GMO No. 1. However, in implementing GMO No. 1, the Area Mining Supervisor, CRMA, sent all lessees, including Atlantic Richfield, a memorandum, dated December 17, 1979, entitled "Instructions and Definitions for General Mining Order No. 1." Paragraph 9 of that memorandum provided:

Starting in Part C.2.a and used throughout the remainder of the order, the wording "can be commercially mined" or "commercially minable" is used. Coal that can be commercially mined is

coal that is of minable thickness, by itself or in combination with other seams, and of marketable quality, by itself or after blending, and could be produced at a profit at current market prices if buyers were available. The lack of a buyer of a contract to sell the coal does not make the coal noncommercial for the purposes of this order. A seam(s) that will not be mined until a much later date because of normal mining sequences is considered commercial. [Emphasis supplied.]

Id. at 2. Clearly, given the express instructions provided in this memorandum, the determination of the District Engineer that the lower seams need not be included in the minable and recoverable reserve base because they were noncommercial was in error at the time it was rendered. And, as the Board has held on numerous instances in the past, reliance on the unauthorized or erroneous advice from a Government official affords a party no rights nor can it provide a basis for estopping the Government from ultimately correcting an erroneous determination. Thus, to the extent that appellants may be presenting a claim of estoppel, such a claim must be rejected. See, e.g., Jeffrey Ranches, Inc. v. Bureau of Land Management, 102 IBLA 379 (1988); Ward Petroleum Corp., 93 IBLA 267 (1986).

Appellants strenuously argue that prior Departmental actions support their present interpretation of 43 CFR 3480.0-5(a)(23). But, as is clear from the analysis of the original acceptance by the Geological Survey of the minable and recoverable reserve computations set forth above, the lower seams were excluded not because mining of those seams was "not permissible," as appellants now contend. Rather, the lower seams were excluded by ARCO because ARCO contended that they were not commercially minable. Thus, even ignoring the fact that the Geological Survey erroneously agreed that the lower seams were not commercially minable, past practice in the Department does not support appellants' present assertion that the seams below the "F" seam were ever excluded because mining was "not permissible."

[2] The ultimate question, of course, is whether or not the "E" and "B" seams should be excluded from the minable reserve base because mining is "not permissible" within the meaning of 43 CFR 3480.0-5(a)(23). That regulation provides:

Minable reserve base means that portion of the coal reserve base which is commercially minable and includes all coal that will be left, such as pillars, fenders, or property barriers. Other areas where mining is not permissible (including, but not limited to, areas classified as unsuitable for coal mining operations) shall be excluded from the minable reserve base.

Appellants argue that "[b]ecause ARCO and West Elk have not been granted permits or received plan approval authorizing them to mine "E" or "B" seam coal, these seams are, in the words of the regulations, "[o]ther areas where the mining is not permissible" (SOR at 10). We do not agree.

Initially, we would note that the regulation does not refer to areas "where mining is not permitted," it speaks of areas "where mining is not permissible." The difference between what is "permitted" and what is "permissible" is substantial. The former refers to something that has been

allowed, whereas the latter refers to something that can be allowed. See Webster's II New Riverside Dictionary (1984) at 1005 and Funk & Wagnalls Standard College Dictionary (1973) at 1005, both defining "permissible" as "that can be permitted." Thus, that which is not permissible is that which cannot be permitted. The mere fact that something has not yet been permitted does not establish that it cannot be permitted.

Further support for this distinction can be gleaned from the regulatory history of the language now appearing at 43 CFR 3480.0-5(a)(23). Under the reporting scheme adopted in GMO No. 1, "minable reserve base" was calculated by determining the coal in place which was commercially minable. However, unlike the present regulatory definition, GMO No. 1 expressly provided that, in calculating "minable reserve base," there were to be

no deductions for * * * areas where mining is not permissible such as (1) coal under land determined to be prime farmland, (2) coal under certain alluvial valley floors, (3) land classified as unsuitable for coal mining under OSM regulations, (4) land designated as containing historic, cultural, or archaeological sites protected under provisions of 36 CFR 800, (5) lands in the proximity of or containing the habitat of certain endangered species, and (6) lands with zoning restrictions. [Emphasis supplied.]

GMO No. 1(C)(2)(b), 44 FR 53811-12 (Sept. 17, 1979). However, deductions for areas where mining was not permissible were allowed in computing "recoverable reserve base." 11/ GMO No. 1(C)(2)(c), 44 FR 53812.

All of the examples set forth in describing the scope of the phrase "not permissible" deal with instances in which mining could not be permitted. Thus, for example, a surface coal mining permit may not be issued for lands designated as unsuitable for mining (30 U.S.C. § 1260(b)(4) (1982)), nor may a permit issue for mining operations under certain alluvial valley floors (30 U.S.C. § 1260(b)(5) (1982)). The one factor which all of the enumerated examples have in common is not a lack of authorization to mine. Rather, in all cases, mining cannot, as a matter of law, be authorized. 12/

In promulgating the present regulations, the Department revised the definition of "minable reserve base" to permit deductions for areas where

11/ This facet of GMO No. 1 underlines the fact that, in making its initial submission to Geological Survey, ARCO was asserting that the lower seam coal should be excluded because it was not commercially minable rather than because mining was not permissible. ARCO's submissions deducted the lower seam coal from the determination of both minable reserve base and recoverable reserve base. Had ARCO been contending that the coal should be excluded because it was in an area in which mining was "not permissible," the coal would have been deducted only from the recoverable reserve base.

12/ Admittedly, there are circumstances in which mining beneath prime farmland can be permitted. See 30 U.S.C. § 1260(d) (1982). It is clear, however, that the exclusion contemplated by GMO No. 1 applied only to those areas of prime farmland which could not meet the requirements of the statute and which, therefore, could not be permitted. See generally Hodel v. Indiana, 452 U.S. 314 (1981).

mining was "not permissible." MMS noted that this change had been made in response to suggestions that "coal which is not recoverable due to legal or regulatory constraints" should be excluded from the definition of minable reserve base, particularly since the determination of the efficiency of an operation and the ascertainment of whether a proposed operation would achieve MER would be based on a comparison of the recoverable coal reserves with the minable reserve base. See 47 FR 33160 (July 30, 1982). There was no indication, however, that the scope of this exclusion was to vary in any way from the exclusion which GMO No. 1 had directed in the computation of recoverable reserves. Indeed, the revised regulatory definition retained, as an example of an area in which mining was not permissible, "areas classified as unsuitable for coal mining operations." Thus, the regulatory history of this provision also shows the error of appellants' attempts to equate lack of a permit with something that is not permissible.

Finally, exclusion of minable coal from the minable coal base merely because it is not yet permitted would be inconsistent with considerations which impelled Congress to enact FCLAA. Thus, in addition to concern over widespread speculative holding of coal deposits, Congress was also troubled by the practice of high-grading coal deposits, leaving behind less profitable deposits which might ultimately never be recovered once the more profitable coal had been extracted and the mine operations abandoned. To forestall recurrence of this problem, Congress directed that the Department work to achieve MER of all commercial coal deposits. In implementing this directive, the Department has established regulations which provide that "[n]o resource recovery and protection plan or modification thereto shall be approved which * * * is not found to achieve MER of the Federal coal within an LMU or Federal lease issued or readjusted after August 4, 1976." 43 CFR 3482.2(a)(2). While all three of the leases are pre-FCLAA leases, all have become subject to MLA diligence requirements. 13/

11/ This facet of GMO No. 1 underlines the fact that, in making its initial submission to Geological Survey, ARCO was asserting that the lower seam coal should be excluded because it was not commercially minable rather than because mining was not permissible. ARCO's submissions deducted the lower seam coal from the determination of both minable reserve base and recoverable reserve base. Had ARCO been contending that the coal should be excluded because it was in an area in which mining was "not permissible," the coal would have been deducted only from the recoverable reserve base.

12/ Admittedly, there are circumstances in which mining beneath prime farmland can be permitted. See 30 U.S.C. § 1260(d) (1982). It is clear, however, that the exclusion contemplated by GMO No. 1 applied only to those areas of prime farmland which could not meet the requirements of the statute and which, therefore, could not be permitted. See generally Hodel v. Indiana, 452 U.S. 314 (1981).

13/ Thus, the readjustments of leases C-0117192 and C-1362 were approved by the Board, though both cases were remanded for reconsideration of the 8-percent royalty rate therein imposed. See IBLA 86-211, Order of Aug. 30, 1988, and IBLA 87-687, Order of July 26, 1988, respectively. While a general readjustment of lease D-044569 was rejected by the Board as untimely (see Atlantic Richfield Co., 99 IBLA 179 (1987)), this lease became subject to the due diligence requirements of FCLAA on May 1, 1983, upon approval of

MER requires that all profitable portions of a leased Federal coal deposit be mined. 43 CFR 3480.0-5(a)(21). Appellants do not argue that the coal in the "E" and "B" seams will not be mined. On the contrary, they affirmatively assert that the coal is needed as a reserve for future bidding. ^{14/} To the extent that appellants intend to ultimately mine the coal in the "E" or "B" seams, that coal must be considered as part of the minable reserve base if for no other reason than to assure that MER will be accomplished. In view of all that we have said, it seems clear that appellants' objections to inclusion of the coal in seams "E" and "B" in the minable and recoverable reserve base must be rejected.

[3] Alternatively to their challenge of the inclusion of the "E" and "B" coal seams in the minable and recoverable base, appellants also attack the use of a 50-percent recovery factor to determine the recoverable reserves. They note that IM No. 86-323 provided that where multiseam recovery was projected to occur, the recovery factor to be applied was 40 percent in the Lower Green River-Hamms Fork area in which the Mt. Gunnison mine is located. As appellants point out, rather than using the 40-percent recoverability factor called for in the IM in computing recoverable reserves on leases D-044569 and C-1362, the District Manager applied a 50-percent recovery factor. This, they assert, was both improper and contrary to reasonable expectations of total recovery from the three seams.

On this point, we think that appellants' objections are well-taken. As we have noted in the past, internal policy directives, issued by the BLM Directorate, while binding neither on this Board nor on the general public, are binding upon the State Offices. *See, e.g., Raymond A. Berry*, 35 IBLA 386 (1978); *Margaret A. Ruggerio*, 34 IBLA 171 (1978). Even where the nature of the directive is merely the provision of guidelines, we have noted that "where a variance between the guidelines and the action contemplated exists it is incumbent upon the decision-maker to clearly delineate the area of the conflict and expressly justify any variance from the [guidelines]." *The Wilderness Society*, 106 IBLA 46, 55 (1988).

In the instant case, the District Manager justified the use of the 50-percent recovery factor by noting that "ARCO's own submittals suggested that a recovery rate between 50% and 89% would be appropriate and the fact that literature and standard industry practice within the area suggest a

fn. 13 (continued)

a lease modification adding more land to the lease. *See* 43 U.S.C. § 203 (1982); 43 CFR 3432.3.

^{14/} Thus, appellants argued that

"the E and B seams, to the extent practical, need to be retained so that [West Elk] has the coal resources to bid on future coal sales. Utilities require that adequate coal be available to bid on coal supply contracts. Inasmuch as these contracts may be years in the future, the coal must be available for any bids that would be tendered now or in the near future" (Letter of Apr. 8, 1986, from President, West Elk, to Montrose District Manager, Attachment at 5).

recovery rate between 50 and 70%." Neither of these arguments provides a sustainable basis for the use of the 50-percent recovery factor for multiple seam development herein.

In the first place, contrary to the assertion of the District Manager, the documents on which he relied consistently showed a recovery rate for the "F" seam of 50 percent, assuming room and pillar mining. The single reference to 89 percent occurred in the context of possible longwall mining. Since appellants have abandoned plans for longwall mining, reliance on the percentage of recovery which could be expected for that type of mining is clearly unwarranted.

Moreover, the fact that appellants' submissions indicated a 50-percent recovery for mining of the "F" seam does nothing to support the decision of the District Manager, because appellants' submissions envisioned only single seam mining. IM No. 86-323 noted that, for single seam mining, a recovery of 50 percent should be assumed. Thus, in point of fact, the expectations of appellants fully accorded with the IM. But, the fact that a recovery of 50 percent can be hypothesized when only a single seam is being considered does not establish that 50 percent will be recovered when multiple seams are being developed. Indeed, the IM is clearly premised on an expectation that total percentage recovery declines when multiple seam mining occurs. It is, therefore, totally inconsistent with this assumption to use recovery figures generated for single seam mining and simply project that these recovery rates will be maintained for multiple seam mining.

With respect to the District Manager's contention that the literature and standard industry practice show a recovery of 50 to 70 percent for single seam mining in the Lower Green River - Hamms Fork area, this is clearly an attempt to substitute the District Manager's judgment for that of the BLM Directorate. While a District Manager may be able to justify a failure to follow an IM on the ground that it is contrary to law, it is beyond his or her province to invalidate it on the ground that it is factually wrong. In other words, while a District Manager may be able to alter the general recovery factors by arguing that factors intrinsic to the specific coal deposit justify a variance, the District Manager may not assert that the general recovery factors, themselves, are erroneous. ^{15/} Accordingly, we conclude that a recovery factor of 40 percent is properly applied to the multiple seam recovery at the Mt. Gunnison mine, and the decision below is reversed to the extent that it contemplated application of a 50-percent recovery factor.

^{15/} While the IM did, indeed, suggest that variations in the standard criteria could be based on "standard industry practice," the IM noted that "[v]ariation will occur primarily in the verification of underground recoverable coal reserves where seam thickness plays the major role in equipment selection" (IM No. 86-232 at 4). It would be totally inconsistent with the entire purpose of the IM to "ensure consistency of enforcement" if individual District Managers could each determine whether or not the criteria would be applicable at all within their Districts.

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 in part and reversed in part as delineated above.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge