

UTAH POWER & LIGHT CO.

IBLA 88-446

Decided March 6, 1991

Appeal from a decision of the Moab District Office, Bureau of Land Management, stating in part that Utah Power & Light Company must pay royalties for coal that was not mined in accordance with its mine plan. SL-070645, U-1358, U-040151 et al.

Reversed in part and remanded.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

Under 43 CFR 3482.2(c)(2), a proposal to modify a mine plan must be submitted in writing, with a justification, by the operator or lessee. It is not effective until it has been approved in writing by the authorized officer.

2. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases

The Bureau of Land Management does not have authority to require payment of royalties for coal that was not mined in accordance with a resource recovery and protection plan, in violation of 43 CFR 3481.1(b), before it is mined later in accordance with an approved modification of the plan.

APPEARANCES: Denise A. Dragoo, Esq., and Paul Proctor, Esq., Salt Lake City, Utah, for appellant; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

We are asked to decide whether the Bureau of Land Management (BLM) may require a coal lessee to pay royalties now for a block of coal it did not mine in 1986, contrary to its then-current mine plan, and will not mine until 2015 in accordance with an approved modification of the mine plan. Utah Power & Light Company (UP&L) has appealed the part of an April 18, 1988, decision of the Moab District Manager, BLM, requiring such royalties; it does not object to the part of the decision approving its proposal to modify its mine plan to delay mining this coal, among other things.

I. Factual and Procedural Background

The original mine plan (now, formally, a "resource recovery and protection plan," see 43 CFR 3480.0-5(a)(34), 30 U.S.C. § 207(c) (1988)) for UP&L's Deer Creek Mine, located in Emery County, northwest of Huntington, Utah, was approved in January 1978. A March 1981 modification of this plan called for mining the 2-1/2 South block of coal, located in the Blind Canyon Seam on leases U-1358 and U-040151, in 1984 and 1985; a 1983 modification postponed this to 1986 (Statement of Reasons (SOR) at 3, and Exh. E).

In 1985 the company removed the continuous mining equipment and the shuttle cars from this area of the mine. Nevertheless, in several 1985-86 conversations with the mine manager and the chief mining engineer, BLM inspector James Ward was assured they wanted to mine the 2-1/2 South block; "but the Technical Service Division [of UP&L] in the Huntington office was

directly responsible for the mining sequence. These were the people that said mine or not" (Aug. 26, 1987, BLM Staff Report entitled "Leaving 2 1/2 South Block, Deer Creek Mine, Unmined" (Staff Report) at 2).

On August 15, 1986, BLM's Area Manager wrote UP&L's chief mining engineer:

[W]e encourage you to mine and recover as much as possible [of the 2 1/2 South block] with regard for safety and standard mining practices. The trend of the mine is moving towards the north, and we do not want to by-pass this coal if it is possible to mine it. According to [43 CFR] Section 3480.0-5 [(a)(21)], maximum economic recovery means that, based on standard industry operating practices, all profitable portions of a leased federal coal deposit must be mined.

In April 1987, BLM discovered that UP&L had removed the conveyor belt drives from this area of the mine. In response to the BLM inspector's expression of concern about the 2-1/2 South block, UP&L wrote the BLM Area Manager on May 8, 1987. UP&L provided several reasons why "the mine plan * * * is now in the process of being changed" in ways that would postpone the mining of the 2-1/2 South block and concluded: "Trust that this modification of our mining plan is acceptable to you." BLM representatives inspected the mine and discussed this proposal and alternatives with UP&L personnel on July 8, 1987. On July 17, 1987, BLM wrote the company, asking "exactly how" and when the block would be mined. This letter stated: "BLM also has a major concern as to why the coal in the 2 1/2 [South] block was not mined when continuous miners were in the area." BLM asked UP&L to provide a "conceptual mine plan on the recovery of the 2 1/2 South block * * * and the date in which this mining will occur" and to provide "scheduling and

location of all continuous miners and longwall sections between the dates of June 1983 and December 1985."

UP&L's July 27, 1987, answer stated that the continuous miners were moved from the 2-1/2 South block because the company had encountered areas of high-ash coal, decided to change the location and direction of mining, and needed the equipment for new set-up entries. In addition, UP&L stated, a newly purchased block of coal caused a change in strategy for mining reserves elsewhere, and a continuous miner was needed for that operation. UP&L provided the conceptual mine plan and stated: "As far as the dat[e] for recov-ering the 2 1/2 South block of coal * * * [c]urrently, this is scheduled for 1996."

BLM responded on December 7, 1987, by issuing a notice of noncompliance. "In our analysis of this [mine plan modification] proposal, we have identified a noncompliance which must be resolved before the modification is approved," the notice read. It continued:

UP&L is in noncompliance with the approved mine plan in that BLM was not notified when mining crews and equipment were pulled out of the area, leaving the 2 1/2 South block unmined with no new planned sequencing. No modification to the approved mine plan was submitted until well after the fact. This is in violation of the regulations governing [sic] the Mineral Leasing Act of 1920 codified in 43 CFR 3482.1(b), 43 CFR 3482.2(2), and 43 CFR 3481.1(b), (c) which state that mine operators on Federal coal leases will submit and follow mine plans; also, operations will be conducted efficiently and in a manner that will achieve maximum economic recovery of coal. [1]

(Notice of Noncompliance at 1).

1/ This notice was modified by a letter dated May 7, 1988, which replaces the first two regulations cited above with 43 CFR 3482.2(c)(2) and 43 CFR

BLM explained its concern that the 2-1/2 South block of coal would be difficult to recover in the future:

Because UP&L did not follow the mine plan and vacated the area, we feel that the recovery of coal from the 2 1/2 South block is questionable. With conveyor belts, power, roadways, and mining equipment in a current section in nearby 9th East E, the 2 1/2 South block was the most logical and efficient panel to mine next. At the present time, we feel the cost to rehabilitate and reestablish access for both men and material (i.e. conveyor belts, etc.) is economically prohibitive for the limited amount of coal in the 2 1/2 South block. Also, future mining of additional entries parallel to 2nd South and the 2 1/2 South block may be difficult due to surrounding abutment pressures. It is our experience that coal blocks surrounded by mined out areas and left for a period of time exhibit increased pressures that may prohibit mining or substantially reduce recovery due to safety problems.

Id. at 2.

The notice concluded that the modification proposed by UP&L was "a reasonable approach to mine the 2 1/2 South block under the present circumstances."

However, because UP&L did not follow the mine plan and there is some question as to the future recoverability of the coal, in order to satisfy this noncompliance we need insurance from UP&L that will guarantee this coal is recovered and the Federal government is compensated.

fn. 1 (continued)

3484.1(b) and (c), respectively, (while retaining 43 CFR 3481.1(b) and (c)) and then adds:

"The pertinent regulations that were violated are 43 CFR 3484.1(b)(1) and (4), 43 CFR 3484.1(c), and 43 CFR 3484.1(c)(7). These regulations state that underground mining operations will be conducted efficiently and in a manner so as to achieve maximum economic recovery and prevent wasting of coal. Also, the abandonment of a mining area shall require the approval of the BLM."

Please contact this office within 15 days to arrange a meeting to discuss how this matter can be settled.

Id. at 2.

Meetings were held on January 5 and 8, 1988. In a February 2, 1988, letter BLM summarized the preliminary mine plan modification proposals suggested at those meetings by UP&L, asked several questions about them, and requested "details and justifications" in response. "Additionally, we require a statement as to why this block of coal was not mined as scheduled," the letter stated. UP&L's March 1, 1988, reply answered BLM's questions, repeated the previously stated reasons for not mining the coal as scheduled, and concluded: "In hindsight, the delays in mining 2 1/2 South block are going to be very beneficial from a ground control standpoint. * * * Based on our estimate at the current rate of production it is projected that this block will be mined between the year 2015 and 2018."

BLM's April 12, 1988, decision described the technical reasons for UP&L's mine plan modification proposal and approved it as "prudent * * * under present circumstances." It accepted UP&L's explanation for the removal of the continuous miner from the area but stated that "the miner could have returned at some time to mine the 2 1/2 South block before the conveyor belt drives were removed" (Decision at 2). BLM repeated its reasons for believing that it would have been "most logical and efficient to mine [the 2-1/2 South block] according to the original mine plan sequencing," and that it will be "more difficult or impossible" to mine the coal in 30 years, and concluded:

Considering all factors, we conclude that the recovery of the 2 1/2 South block has been jeopardized. Because UP&L did not follow the mine plan and the feasibility of recovering the 2 1/2 South block has been jeopardized, it is our decision that UP&L must pay royalties to the U.S. Government at the 1986 rate on the recoverable reserves in the 2 1/2 South block.

Id. BLM calculated these reserves at 86,000 tons and explained the basis for its calculations. Payment of the royalty would exempt UP&L from paying royalty in the future if the 2-1/2 South block is mined, BLM stated. "However, if at any time the BLM determines that the 2 1/2 South block is unrecoverable for any reason (technical, economic, or safety), we will consider further action which would involve assessing UP&L for the full value of the coal" (Decision at 3).

BLM provided UP&L 30 days to show it had paid the royalty and "30 days from the 30 day compliance period to appeal to the Board of Land Appeals." Although UP&L's Notice of Appeal may have been filed within the 30-day compliance period (the record does not indicate when it received BLM's decision), we think it would be pointless for us to return the case to BLM with directions to treat the matter as a protest. See Robert C. LeFaivre, 95 IBLA 26, 28 (1986).

II. Arguments of the Parties

A. Arguments of Utah Power & Light Co.

In its SOR, UP&L challenges BLM's view that it abandoned the 2-1/2 South block, as permanent abandonment is defined in 43 CFR 3480.0-5(a)(8)(B). IBLA 187

thus violating 43 CFR 3484.1(c)(1) and (7); rather, UP&L says, removal of that block has been delayed, with the approval of BLM (SOR at 6-7). UP&L argues that it is in compliance with its mine plan, as approved in the April 1988 decision, and that BLM's assessment of royalties as a penalty for noncompliance is inconsistent with BLM's approval of UP&L's proposal to modify its mine plan to provide for mining of the 2-1/2 South block later (SOR at 9-10, 16).

UP&L notes that BLM cites no authority for requiring payment of royalty for coal in advance of its production and points out that its leases provide for royalty payment based only upon coal that is mined or produced (SOR at 10). Under 30 U.S.C. § 207(b) (1988), 43 CFR 3483.4, and the lease terms, "advance royalties" are authorized only in lieu of continued operation of a mine, and the Deer Creek Mine is clearly in operation, UP&L states (SOR at 11).

UP&L offers several other arguments. BLM may not unilaterally amend the terms of the lease by a decision requiring payment of advance production royalties (SOR at 12-14). BLM's decision is arbitrary and capricious because there is no statutory, regulatory, or contractual basis for it (SOR at 15-16). Assessing production royalties in advance of mining and threatening to forfeit UP&L's bond and cancel its lease if they are not paid is unfair and constitutes an unconstitutional taking of its property (SOR at 17). BLM's April 1988 decision approving UP&L's proposed modification that would delay mining the 2-1/2 South block estops BLM from assessing advance royalties (SOR at 17-19). Finally, UP&L argues that BLM's assumed

44-percent coal recovery rate in 2015 (used as the basis for the royalties) is speculative and therefore arbitrary and capricious (SOR at 20-21).

[1] UP&L also states that it understood that BLM had agreed to the modification it proposed on July 27, 1987 (calling for mining of the 2-1/2 South block in 1996), during the July 8, 1987, inspection of the mine by personnel from BLM and UP&L and their subsequent meeting (SOR at 8-9). Although the August 26, 1987, Staff Report, supra at 4, indicates there was an agreement that such a modification would be acceptable, the modification was not effective on July 8. The regulations require that proposals for mine plan modifications must be submitted in writing by an operator or lessee, with a justification, and approved in writing by the authorized officer. 43 CFR 3482.2(c)(2). UP&L submitted this proposed modification in writing in its July 27, 1987, letter, in response to BLM's July 17, 1987, letter requesting further information "[p]rior to the approval of your minor modification." Later UP&L amended its proposed modification in its March 1, 1988, letter. The authorized officer did not approve the modification until the April 18, 1988, decision, so the modification was not effective until then.

B. Arguments of the Bureau of Land Management

BLM initially responded to UP&L's arguments by filing an April 12, 1989, memorandum from the Area Manager to the District Manager, BLM;

later, the Regional Solicitor filed additional arguments on BLM's behalf. 2/ The Area Manager's memorandum explained that its decision did not impose advance royalties: "Obviously 'advance royalties' can only be paid in lieu of continued operation" 3/ (Apr. 12, 1989, Memorandum at 1). Rather, says BLM:

Our assessment of royalties for 2 1/2 South is to protect the interests of the government for jeopardized coal reserves, and not for advance royalties with regard to the diligence laws. We believe the Bureau has discretion to assure maximum economic recovery and the prevention of wasting of coal. Though we approved UP&L's modification to the mine plan for the 2 1/2 South area, we charged royalties for the recoverable coal of this block to assure the government's interest in the coal. * * * If, after not paying royalties on 2 1/2 South, UP&L were to find it could not mine the section as planned in 2015, the government's charge to prevent wasting of coal and to ensure the public's interests would be for naught. Charging royalties for unmined and wasted coal is not a new precedent. UP&L's predecessors at the Deer Creek Mine were charged royalties by the Area Mining Supervisor, USGS [Geological Survey], in 1976 for coal left unmined when an approved barrier pillar of 200 feet was increased without authorization to 300 feet.

(Apr. 12, 1989, Memorandum at 2).

BLM responded to UP&L's argument that it had not abandoned the coal, stating that BLM did not mean permanent abandonment of a whole _____
2/ BLM filed its Apr. 12, 1989, memorandum ex parte, so by order dated Aug. 20, 1990, we provided UP&L a copy in accordance with 43 CFR 4.27(b) and requested BLM to provide, within 30 days, the letter referred to in the memorandum as well as an explanation of its authority to impose royalties. The Regional Solicitor's response on behalf of BLM was not filed until Oct. 9, 1990. Nevertheless, UP&L's motion to strike the Solicitor's filing is denied. UP&L was not prejudiced by the delay in responding to our order of Aug. 20, 1990. UP&L's reply to the Solicitor's response is accordingly accepted.
3/ UP&L agrees and so do we. See Western Slope Carbon, Inc., 98 IBLA 198 (1987).

mine operation under a mine plan, as UP&L suggested by referring to the definition in 43 CFR 3480.0-5(a)(29), but rather "abandonment of a mining area" under 43 CFR 3484.1(c)(7) when UP&L

moved the production crew and machinery that was in the [2-1/2 South block] area to another area of the mine, pulled the conveyor belt, removed electrical power sources, and reduced the required operational ventilation amounts. * * * The actions are judged by industry practices as abandoning a section and will jeopardize any future mining of this coal.

Id. at 1.

To UP&L's argument that BLM had approved its proposal to mine the 2-1/2 South block in 2015 and it was therefore not consistent to impose royalties for the coal, BLM responded:

We approved the modification because it also included other mine plan items besides 2 1/2 South such as the transfer raises to Wilberg Mine, etc. This does not change our opinion that the 2 1/2 South recovery was jeopardized. * * * The Federal government needs to have some assurance of its interest. There are options other than to charge up-front royalties which could be explored, such as, increase the bond on the subject lease by the amount of royalties due. Also, a lease stipulation could be added to state that if 2 1/2 South is never mined, royalties would be due at the end of the lease term. However, the option that was chosen gives the BLM some credibility that its interest in the public coal reserve is important.

Id. at 3.

The Regional Solicitor argues that UP&L's removal of equipment was a unilateral, unauthorized deviation from its mine plan. BLM's April 1988

approval of a modification simply "recognized the reality of the situation * * * and allowed the company to continue its formerly unauthorized activity" (Response at 1). BLM's requirement that royalties for the unmined coal be paid immediately "shift[ed] the burden of risk that this coal might never be mined from the United States Government to UP&L which had caused the problem in the first place" (Response at 2). Although there is no explicit authority for such a requirement, BLM asserts that it is a reasonable way to fulfill its responsibility under 30 U.S.C. § 209 (1988) to conserve the natural resource when a company chooses to by-pass coal that may consequently not be mined. "The action of UP&L in abandoning the 2 1/2 South block without approval was clearly in violation of its mining plan and of the regulation at 43 CFR § 3484.2(c)(7) [sic] which states: 'The abandonment of a mining area shall require the approval of the authorized officer'" (Response at 2). Although the law relating to coal leases does not provide authority to impose fines for noncompliance with a lease, as it does for violations of oil and gas leases, BLM does have authority under 43 CFR 3486.3 to suspend a lessee's operations for violating its mine plan or the regulations, or to cancel its lease, the Regional Solicitor argues. "Or BLM could order UP&L to comply with its original mining plan if it will not pay its advance royalty," the Regional Solicitor suggests (Response at 3).

The Regional Solicitor elaborates on the reference in BLM's April 12, 1989, memorandum to a precedent for its decision. He states that in 1976 the Geological Survey (GS) Area Mining Supervisor allowed UP&L's predecessor

to abandon a coal seam in favor of another on the agreement that the coal company would pay in advance the royalty for the coal

which it was abandoning. * * * The only difference between the 1976 Peabody Coal situation and the current case is that Peabody Coal had the decency to come to the USGS and request approval. * * * However, in the current situation UP&L unilaterally picked up its equipment and abandoned the site in violation of its min-ing plan and of the regulation.

(Response at 3).

The Regional Solicitor concluded:

If the Board finds that the authority of the BLM to require the advance payment of royalties for the unauthorized abandonment of the coal seam cannot be implied from BLM's authority to suspend UP&L's current operation or to seek cancellation of UP&L's lease, then it is suggested that the Board should remand the matter to BLM for it to determine whether its allowance of UP&L's unilateral and illegal action in abandoning the 2 1/2 South Block of the Deer Creek Mine should be the subject of BLM's more Draconian powers to suspend its current operation and require UP&L to recover the 2 1/2 South block seam, or to seek cancellation of its lease.

(Response at 3-4).

In reply, UP&L notes the Regional Solicitor "admits there is no explicit regulation or lease term authorizing BLM to require a lessee to pay production royalty in advance of mining" and argues that the "negotiated settlement" between its predecessor, Peabody Coal Company (Peabody), and GS in 1976 is not binding on UP&L. UP&L also repeats its argument that it has not "abandoned" the 2-1/2 South block within the meaning of 43 CFR 3480.0-5(a)(29) or 3484.1(c)(1).

III. The Regulatory Context

BLM is responsible for inspecting coal mining operations on feder-ally leased lands and for ensuring compliance with "all provisions of applicable laws, rules, and orders, all terms and conditions of Federal leases and licenses under MLA [Mineral Leasing Act of 1920] requirements, and approved exploration or resource recovery and protection plans." 43 CFR 3480.0-6(d)(4) and (5). It is also responsible for issuing "Gen-eral Mining Orders and other orders for enforcement * * * as necessary to implement or ensure compliance with the rules of [43 CFR Part 3480]." 43 CFR 3480.0-6(d)(12).

A lessee or operator is to conduct its operations in accordance with the rules in Part 3480, the terms of its lease, its approved mine plan, and any orders of an authorized officer. It is also required to prevent wasting of coal during production and to protect recoverable reserves upon abandonment. 43 CFR 3481.1(b) and (c).

The general performance standards require a lessee or operator to conduct operations to achieve maximum economic recovery of Federal coal. 43 CFR 3484.1(b)(1). 43 CFR 3480.0-5(a)(21) defines maximum economic recovery (MER) as meaning

that, based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined. At the times of MER determinations, consideration will be given to: existing proven technology; commercially available and economically feasible equipment; coal quality, quantity, and marketability; safety, exploration, operating, processing, and transportation costs; and compliance with applicable laws and regulations.

The general performance standards also require a lessee or operator to conduct efficient operations to recover the recoverable coal reserves, prevent wasting and conserve those reserves and other resources. 43 CFR 3484.1(b)(4).

The performance standards for underground mines also provide that operations are to be conducted so as to prevent wasting of coal and to conserve recoverable coal reserves and that "[n]o entry, room, or panel workings in which the pillars have not been completely mined within safe limits shall be permanently abandoned or rendered inaccessible, except with the prior written approval of the authorized officer." 43 CFR 3484.1(c)(1). An authorized officer must approve the conditions under which an underground mine, or portions of it, may be temporarily abandoned, as well as the abandonment of a mining area. 43 CFR 3484.1(c)(5) and (7). An authorized officer will also require that unmined recoverable coal reserves and other resources are adequately protected "[u]pon permanent abandonment of mining operations." 43 CFR 3484.2(b); see 43 CFR 3480.0-5(a)(29).

If an authorized officer determines an operator or lessee has failed to comply with the rules in 43 CFR Part 3480, the terms of its lease, the requirements of its mine plan, or an authorized officer's order, and the noncompliance does not threaten "immediate and serious damage" to the mine or its resources or affect the royalty provisions of Part 3480, the authorized officer "shall serve a notice of noncompliance" on the operator or lessee. 43 CFR 3486.3(a). ^{4/} The notice shall specify "in what respect(s)

^{4/} If, in the judgment of the authorized officer, the operator or lessee is conducting activities that do not comply and do threaten immediate and

the operator/lessee has failed to comply" and "the action that must be taken to correct such noncompliance and the time limits" for doing so. 43 CFR 3486.3(b). If the operator or lessee fails to take action in accordance with the notice, that "shall be grounds for cessation of operations upon notice by the authorized officer." 43 CFR 3486.3(a). The authorized officer may also recommend initiation of action to cancel the lease and forfeit the lease bonds. Id.

IV. Discussion

BLM argues that UP&L "abandoned" the area of the mine that contained the 2-1/2 South block in violation of 43 CFR 3484.1(c)(7):

[T]he area was abandoned when UP&L moved the production crew and machinery that was in the area to another area of the mine, pulled the conveyor belt, removed electrical power sources, and reduced the required operational ventilation amounts. All this was done without prior approval. These actions are judged by standard industry practices as abandoning a section.

(Apr. 12, 1989, Memorandum at 1; see Regional Solicitor's Response at 2). There are several difficulties with this argument. It is first of all not clear when BLM believes the violation occurred. The Staff Report, supra at 4, states that "[i]n 1985, the company removed all the continuous miners and shuttle cars from this east area in the mine and this left 2 1/2 South as the only block of coal that was mineable, but left abandoned." In the April 12, 1988, decision, however, BLM acknowledged the reasons UP&L offered for removing the equipment, but said "the miner could have returned

fn. 4 (continued)

serious damage, he "shall order the immediate cessation of such activities without prior notice of noncompliance." 43 CFR 3486.3(c).

at some time to mine the 2 1/2 South block before the conveyor belt drives were removed" (Decision at 2). This appears to indicate BLM did not believe the coal was abandoned until the conveyor belt drives were removed. However, it is not clear from the record when UP&L removed the conveyor belt drives from the 2-1/2 South block area of the mine. The BLM inspector's quarterly inspection reports for May 1986 (the first inspection after UP&L took over the operation), September 1986, November 1986, January 1987, and April 1987 reported no "condition of noncompliance." Not until the August 1987 inspection report is there a mention of the 2-1/2 South block and that report also states there is no condition of noncompliance, apparently because "there has been a minor modification ask[ed] for by the company to change the mining date." There is an observation in the November 1986 report that the mine had been idle during the week before the inspection "to clean and rock dust some of the belts in the mine," so perhaps the conveyor belt drives were removed during that project. But we do not know. The April 12, 1988, decision says BLM discovered that UP&L had removed the conveyor belt drives in April 1987.

Secondly, as the parties' arguments indicate, the drafting of the regulations leaves unclear what constitutes "abandonment." The definition in 43 CFR 3480.0-5(a)(29) speaks of "permanent abandonment of mining operations." This term corresponds to 43 CFR 3484.2(b) relating to the permanent abandonment of mining operations. Any entry, room, or panel workings in which the pillars have not been completely mined may not be "permanently abandoned" without prior written approval of the authorized officer according to 43 CFR 3484.1(c)(1), one of the performance standards

for underground mines. Another of these performance standards, cited in BLM's revised Notice of Noncompliance, says the approval (not the prior written approval) of the authorized officer is required for "the abandon-ment of a mining area." 43 CFR 3484.1(c)(7). Neither "mining operations" nor "mining area" nor "abandonment" nor "abandoned" is defined, however. The lack of these definitions might be less troublesome if another underground mining performance standard did not call for an authorized officer to approve the conditions under which an underground mine, or "portions thereof, will be temporarily abandoned." 43 CFR 3484.1(c)(5). Unfortunately, the preambles to these regulations provide no guidance on these questions. See 47 FR 33154 (July 30, 1982); 46 FR 61424-61427 (Dec. 16, 1981); 45 FR 32715 (May 19, 1980); 41 FR 20252 (May 17, 1976); 40 FR 41122, 41123 (Sept. 5, 1975).

Third, BLM says that UP&L's actions "are judged by standard industry practices as abandoning a section." That may well be so, but nothing is offered as proof of a standard industry practice and we cannot take offi-cial notice of such a matter.

Finally, it does not appear that UP&L intended to abandon the 2-1/2 South block. By April 1987, BLM's inspector learned from the mine manager that the 2-1/2 South block "was included in an economic study [by UP&L], but it seemed very doubtful the coal would be mined right then" (Staff Report, supra at 2). In May 1987 UP&L's chief of technical services felt that "because of economics * * * UP&L should pay the royalty for the coal

and then mine the coal at their [sic] discretion" (Staff Report, supra at 2). UP&L did not choose that course, however, and instead requested a mine plan modification that would permit it to delay mining the 2-1/2 South block.

For all these reasons, we do not think BLM has demonstrated a violation of 43 CFR 3484.1(c)(7).

BLM's April 12, 1988, decision states: "To reiterate, the noncompliance involves the fact that UP&L did not follow the mine plan in that all equipment was removed and the 2 1/2 South block area was vacated without an approved mine plan modification" (Decision at 2). BLM's Notice of Noncompliance cites 43 CFR 3481.1(b) as one of the regulations violated. That regulation requires an operator to conduct its operations "in accordance with * * * the approved resource recovery and protection plan." UP&L acknowledges it did not follow its mine plan, both in its May 8, 1987, letter to BLM's Area Manager and in its SOR. In its letter UP&L states: "Your local inspector has recently voiced, rightly so, some concern over the [2-1/2 South] block of coal. * * * The submitted mine plan indicates that we would mine the coal in this 2 1/2 South block this year. However, our long-term commitment to the longwall mining system * * * has caused us * * * to modify this plan." In its SOR, UP&L states: "For a short duration during 1987, UP&L may have inadvertently conducted operations in a manner technically inconsistent with its 1983 mine plan" (SOR at 7). We think it

clear that by May 1987 UP&L had been in violation of 43 CFR 3481.1(b) for 4 months. 5/

There is, however, no authority for BLM to impose a monetary penalty on UP&L for deviating from its mine plan, as may be done for violations of regulations by lessees on Indian lands. Cf. 25 CFR 211.22.

[2] Nor can we find that the authority for requiring UP&L to pay royalty now for the portion of the coal BLM calculates it may be able to mine in the future can be inferred from the fact that under the Mineral Leasing Act BLM has authority to order cessation or initiate action to cancel the lease and forfeit the bond of a lessee if the lessee does not comply with a notice of noncompliance within the time limits it specifies. See 43 CFR 3486.3. UP&L failed to comply with its mine plan; it did not, however, fail to take action in accordance with BLM's December 7, 1987, notice of noncompliance. That notice required UP&L to contact BLM within 15 days to discuss how the matter could be settled. It did so, and the settlement was UP&L's March 1, 1988, proposed modification of its mine plan which BLM approved in its April 1988 decision.

There is an important difference between this situation and the one involved in the October 21, 1976, letter from GS Area Mining Supervisor to Peabody concerning the Deer Creek Mine. In that case Peabody had submitted

5/ Because the principal issue in this case is whether BLM may require UP&L to pay royalties for the 2-1/2 South block now, we need not decide whether the other regulations it cited, see note 1 supra, were violated and we intimate no opinion on those issues.

a proposal to begin extraction of pillars. Its proposal showed it had left a 300-foot pillar rather than the 200-foot pillar required by the approved mining plan. Later it could not remove the excess coal because of mine safety requirements and roof pressure. Peabody told GS it "would rather pay royalty on the coal lost than attempt to mine it" and that was the condition for the approval of Peabody's proposal to begin extracting the pillars: "if you agree to a royalty charge of \$4,128 for the lost coal * * * you have our permission to begin extracting pillars in the 2nd Left section," the GS Area Mining Supervisor wrote. In this case UP&L has not conceded that the coal is lost or volunteered to pay royalty rather than mine it, although it could have done so. Without such a concession, we do not believe BLM has authority to require payment of royalty now, either as a condition of approving the proposed modification (see 43 CFR 3482.2(c)(2)) or afterwards in its decision approving it.

We cannot agree with the Regional Solicitor's suggestion that we should remand the entire April 1988 decision so that BLM can consider whether to require UP&L to suspend its current operations and return to the 2-1/2 South block now or whether to cancel the lease. As indicated above, issuing a notice for the cessation of operations and initiating proceedings to cancel a lease are sanctions for failure to take action in accordance with a notice of noncompliance, not for failure to comply with a mine plan or the regulations in 43 CFR Part 3480 in the first instance, as the Regional Solicitor suggests. 43 CFR 3486.3(a). UP&L has not failed to take such action, so these sanctions are not appropriate at this stage. We think the Regional Solicitor correctly acknowledges that BLM's April 1988 decision "recognized the reality of the situation." Presumably, BLM considered before making

the decision to approve UP&L's pending modification whether to require UP&L to return to mine the 2-1/2 South block and rejected the possibility as unreasonable. BLM's decision says "under the present circumstances * * *

it is prudent to delay mining of the 2-1/2 South block * * *" (Decision at 2-3). Presumably, too, before it approved the proposed modification, BLM determined that it would not violate the regulations or the terms of the leases or interfere with MER of the coal. See 43 CFR 3484.2(a)(2); 3480.0-5(a)(21). If BLM does determine that it should require UP&L to mine the 2-1/2 South block sooner than 2015, it has the authority to require a revision of the mine plan to accomplish that. 43 CFR 3482.2(b)(2). Indeed, without a revision, UP&L would not be in compliance with its current mine plan if it did mine the 2-1/2 South block before then.

V. Conclusion

It appears from the record that, by deciding not to mine the 2-1/2 South block as scheduled, removing the equipment, and then requesting to postpone mining it, first to 1996 and then until 2015 or later, UP&L has reduced the chances that it can recover as much of the coal as it could have before it took those actions. We agree with BLM that UP&L therefore appropriately bears the responsibility for compensating for the loss of the public's resource, if and to the extent it is lost.

Although we cannot find authority for BLM's imposition of royalty for the coal in the 2-1/2 South block before it has been mined, we think BLM could realize its objective of protecting the public's interest in

the resource by either or both of the two alternatives mentioned in its April 12, 1989, memorandum, i.e., increasing the bonds on the leases and adding a stipulation to the leases when they are next readjusted to provide that if the 2-1/2 South block is not mined the lessee will owe royalties for the coal that could have been recovered from it. See Coastal States Energy Co., 70 IBLA 386, 394 (1983). A lease bond is designed to assure payment of all obligations under a lease and that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining plan. 43 CFR 3400.0-5(s). A lease bond is to be conditioned upon compliance with all terms and conditions of the lease and shall be furnished in the amount determined by the authorized officer. 43 CFR 3474.2(a). The amount of a bond is not limited by statute or regulation. United States Fuel Co., 109 IBLA 398, 400 (1989). BLM may increase a lease bond to fulfill the purposes set forth in these regulations. Utah Power & Light Co., 104 IBLA 284, 286-87 (1988); Ark Land Co., 97 IBLA 241, 245 (1987).

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the part of the April 12, 1988, decision that requires Utah Power & Light Company to pay royalty for the 2-1/2 South block now is reversed and remanded.

Will A. Irwin
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge