

ATLANTIC RICHFIELD CO., ET AL.

IBLA 90-78

Decided December 19, 1991

Appeal from decisions of the Colorado State Office, Bureau of Land Management, setting royalty rate at lease readjustment for coal recovered by underground mining operations on Federal coal leases C-0117192 and C-1362.

Affirmed.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

A decision on lease readjustment pursuant to 30 U.S.C. § 207(a) (1988), and the implementing regulation at 43 CFR 3473.3-2(a)(3) (1987), setting the royalty rate for coal mined by underground operations at 8 percent and declining to reduce it to 5 percent on the basis

of lack of evidence of adverse geologic or engineering conditions which would justify a lower rate over the entire term of the lease will be affirmed where supported by the record. A distinction between long-term geologic and engineering conditions likely to continue for the term of the lease, on the one hand, and shorter-term economic conditions which may be addressed in the context of a petition for reduction in royalty under 30 U.S.C. § 209 (1988), on the other hand, will be upheld as a reasonable interpretation of the statute

and regulations governing readjustment of the royalty rates for coal leases.

2. Appeals: Generally--Rules of Practice: Appeals: Effect of

As a general rule, the effect of a decision is stayed pending an opportunity for administrative review of the decision pursuant to the appeal regulation at 43 CFR 4.21(a). An exception is recognized with respect to decisions regarding the readjusted terms (including royalty rate) of coal leases where the relevant regulation provides that the decision shall be effective as of the lease anniversary date regardless of whether an appeal is filed.

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 GRANT

This is an appeal from two decisions of the Colorado State Office, Bureau of Land Management (BLM), setting royalty rates of 8 percent on readjustment of Federal coal leases C-1362 and C-0117192. The BLM decisions are dated July 13, 1989 (C-1362) and July 11, 1989 (C-0117192).

On August 11, 1989, Atlantic Richfield Company (ARCO) and West Elk Coal Company (West Elk) filed a notice of appeal to the Board. ^{1/} Both of these leases have been before the Board previously, at which time the appellants challenged the readjustment of the lease terms including the royalty rate of 8 percent on underground production set by BLM for each lease. In both cases the Board affirmed BLM's readjustment decision

^{1/} West Elk is a wholly owned subsidiary of ARCO and is lessee of record for both leases (Statement of Reasons at 2).

except as to the 8-percent royalty rate. The issue of the rate to be levied was remanded to BLM with instructions to determine what royalty rate was warranted for each lease and to prepare a record of that determination.

Federal coal lease C-0117192 was issued by BLM under the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287 (1988), effective June 1, 1965. BLM issued its notice of intent to readjust the lease on June 14, 1984. ARCO subsequently appealed the readjustment of the lease terms including the 8-percent royalty BLM set on coal mined by underground operations. By order of March 25, 1987, in the appeal docketed as IBLA 86-211, the Board affirmed BLM's readjustment of C-0117192. Subsequent to the Board's order, the Tenth Circuit Court of Appeals issued a relevant decision in a coal lease readjustment case, Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987). In Coastal States the Tenth Circuit held that it was error for the Department to automatically fix the readjusted royalty at 8 percent for all coal removed from underground mining operations because to do so ignored the proviso in the Departmental regulation at 43 CFR 3473.3-2(a)(3) (1987), that a lesser amount could be set "if conditions warrant." 816 F.2d at 507. ARCO sought reconsideration of the Board's order based on those decisions.

On August 30, 1988, the Board issued an order granting reconsideration and setting aside the BLM decision under review to the extent that it set an 8-percent royalty rate for coal removed by underground operations on Federal coal lease C-0117192. The matter was remanded to BLM to determine a royalty rate and establish on the record the basis for that determination.

On remand, BLM requested West Elk to supply information regarding any adverse geologic and/or engineering conditions that would make underground coal economically unrecoverable at an 8-percent royalty rate which conditions are projected to exist for the 10-year term of the readjusted lease.

On April 21, 1989, Arco responded on West Elk's behalf, submitting "certain data" and urging BLM to "undertake additional investigations so that it [could] establish reasonable royalties" for leases C-0117192 and C-1362. The response contained data concerning only adverse economic conditions, specifically increased mining and transportation costs that render the coal "barely competitive under present market conditions."

BLM issued its final readjustment decision for C-0117192 on July 11, 1989, setting the royalty rate at 8 percent. In its decision BLM stated that West Elk had not supplied any new geologic or engineering information in its April 21, 1989, submission and, therefore, BLM had based its decision on existing information and four factors it considered relevant.

These factors were that (1) the Federal underground coal was of sufficient quality to warrant mining at an 8-percent royalty, (2) areas of poor quality and conditions had already been eliminated from the reserve base, (3) mining height and roof conditions were adequate for a successful underground operation, and (4) economic concerns of the company were a result of current market conditions and transportation costs rather than a result of adverse geologic or engineering conditions.

Federal coal lease C-1362, which was also issued by BLM under the MLA, was effective on September 1, 1967, and, by its terms, was subject to readjustment on September 1, 1987. In an appeal docketed as IBLA 87-687, West Elk appealed the BLM decision of June 25, 1987, readjusting the terms and conditions of that coal lease.

On July 26, 1988, the Board issued its order in that appeal setting aside that part of the BLM readjustment decision establishing a royalty rate of 8 percent for the coal removed by underground operations on Federal coal lease C-1362. The matter was remanded to BLM to determine whether a royalty rate of less than 8 percent could be justified because conditions associated with the underground mining of the leasehold so warrant.

As

with the rate determination for C-0117192, BLM requested that West Elk provide information that would aid in determining whether conditions warranted a royalty rate between 5 and 8 percent. In that September 20,

1988, request, BLM advised West Elk that its determination would be based

on any adverse geologic and/or engineering conditions that existed in the underground operations which could be projected to continue for the entire 10-year readjustment period. West Elk submitted its information to BLM on April 21, 1989, as noted above.

On July 13, 1989, BLM issued its final decision setting the royalty rate for C-1362 at 8 percent. In that decision BLM stated that its determination was based upon existing information because West Elk's April 21 submission did not provide any additional specific geologic or engineering data. BLM also stated in its decision that it based its determination on

the same four factors BLM considered in finally setting the 8-percent royalty for C-0117192.

Appellants contend on appeal that BLM must consider all pertinent conditions in deciding what royalty rate to set and not limit its consideration to geologic or engineering conditions. They argue that by limiting its consideration to geologic and engineering conditions, BLM was inconsistent with the regulatory scheme for setting royalties, decisions of both the courts and the Board, and with the rationale pursuant to which Federal coal leases are readjusted. While recognizing that BLM was acting in accordance with Instruction Memorandum (IM) 88-148 in looking only at geologic and engineering conditions, appellants argue that the IM itself is contrary to the regulations, case law, and the rationale for readjustment. Finally, appellants argue that the market for coal is a condition pertinent to the establishment of a royalty rate which BLM should have considered.

[1] Section 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (1988), requires "payment of a royalty in such amount as the Secretary shall determine of not less than 12 1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." The Departmental regulation in effect at the time of readjustment for both leases here calls for a royalty rate at readjustment of not less than 8 percent for coal removed from an underground mine "except that the authorized officer may determine a lesser amount, but in no case less than

5 percent if conditions warrant." 43 CFR 3473.3-2(a)(3) (1987). 2/ The regulation does not define the phrase "conditions warrant" or identify what conditions the authorized officer will look at in making his determination. IM 88-148, issued by BLM on December 18, 1987, provides that if underground mining operations are being conducted, as they are on the leases at issue here, the authorized officer is to look at adverse geologic and engineering conditions that are projected to exist for the 10-year term of the readjusted lease which would make the underground coal economically unrecoverable at a royalty rate of 8 percent. The IM indicated that short-term conditions which could be addressed through a royalty rate reduction request pursuant to section 39 of the MLA 3/ would not form an appropriate basis for readjusting the lease terms to a royalty rate lower than 8 percent.

Appellants argue that the plain language of the regulations is determinative and, since the regulations do not state that BLM may impose

2/ The regulations governing royalty for coal removed from an underground mine have subsequently been amended. All references in this decision are to the regulations as they existed prior to this amendment. BLM has promulgated a new regulation providing for a flat royalty of 8 percent of the value of coal removed from an underground mine, without regard to conditions prevailing in the mining operation. 43 CFR 3473.3-2(a)(2) (55 FR 2664 (Jan. 26, 1990)). However, under the new regulations, the automatic 8-percent royalty rate is to be applied to previously issued leases only at the time "of the next scheduled readjustment of the lease." 43 CFR 3473.3-2(b) (55 FR 2664 (Jan. 26, 1990)). Thus, the question of the appropriate royalty rate for C-1362 and C-0117192, which were readjusted under the prior regulation, remains at issue. See Kanawha & Hocking Coal & Coke Co., 118 IBLA 364, 370 n.5 (1991).

3/ Section 39 of the MLA authorizes reduction of the royalty rate "in the interest of conservation of natural resources" whenever in the judgment of the Secretary of the Interior it is "necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein." 30 U.S.C. § 209 (1988).

royalties from 5 to 8 percent only if "geologic or engineering conditions warrant," it is clear that BLM must look at all conditions. Essentially, appellants are arguing that the phrase "conditions warrant" in 43 CFR 3473.3-2(a) (1987) should include current market conditions, while BLM is maintaining that IM 88-148 properly limits the conditions looked at to those geologic and engineering conditions which will exist during the entire term of the readjusted lease.

Instruction memoranda issued by BLM do not, as a general matter, have the force and effect of law and are not binding on the Board. Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986). As such, IM 88-148 does not have the force and effect of law which a duly promulgated regulation does, and the Board will decline to follow it where it is inconsistent with the terms of the relevant regulations. Conoco, Inc., 110 IBLA 232, 242-43 (1989), appealed, Conoco, Inc. v. United States, Civ. No. 653-89L (Cl. Ct., filed Nov. 29, 1989); see Black Butte Coal Co., 109 IBLA 254, 260 (1989) (declining to apply published guidelines for processing logical mining unit applications which were inconsistent with regulations); Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981) (declining to apply instruction memorandum which was inconsistent with the relevant regulation).

However, where BLM adopts by IM an agency-wide interpretation of a regulation that is reasonable and consistent with the law, the Board will not hesitate to follow it and uphold its enforcement. See Beard Oil Co., 105 IBLA 285, 288 (1988). Thus, the question before the Board is whether

the BLM decisions applying IM 88-148 constitute a reasonable application of the discretion vested in the Secretary by the statute and set forth in the implementing regulation, 43 CFR 3473.3-2 (1987). Reasonableness is properly measured in light of what the regulation is intended to accomplish. Since the regulation is intended to guide BLM in setting a royalty rate for the entire 10-year term of a readjusted coal lease, the pertinent conditions are reasonably considered to be those which are likely to exist for the entire term of the readjusted lease. In distinguishing short-term economic conditions from geologic and engineering conditions involved in the underground mining operation, the IM recognized that apart from establishing a lower royalty rate at lease issuance or readjustment, the Department may provide royalty rate relief after lease issuance upon application of the lessee under 30 U.S.C. § 209 (1988). On numerous occasions in the past this Board has recognized that economic conditions tend to be temporary and, therefore, may reasonably be treated differently than those conditions known to be permanent or at least likely to last the 10 years of the readjusted lease term. See Kanawha & Hocking Coal & Coke Co., 93 IBLA 179 (1986); Mid-Continent Coal & Coke Co., 83 IBLA 56 (1984); National King Coal, Inc., 76 IBLA 124 (1983). In Blackhawk Coal Co., 68 IBLA 96 (1982), we discussed the reason for BLM's general application of minimum royalties in coal leases upon readjustment. We noted: "If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment." Id. at 99. We further pointed out in Blackhawk that a lessee can obtain short-term royalty relief where it

can make the showing required under 43 CFR 3473.3-2(d) (1987). Id. The Board has held the BLM approach adequately protects both the interests of the Government in obtaining a fair return over the lifetime of the lease

and the interest of the lessee in gaining royalty relief where the lessee can establish it is warranted.

Ark Land Company (On Reconsideration), 96 IBLA 140 (1987).

Appellants refer to the Tenth Circuit decision in Coastal States Energy Co. v. Hodel, supra, to support their contention that case law reflects that BLM must consider all pertinent conditions in establishing royalties at the time of lease readjustment. The Tenth Circuit in Coastal States did hold that it was error for BLM to automatically set an 8-percent royalty and that BLM must obey its own regulations and determine if "conditions warrant" a royalty rate from 5 to 8 percent for a particular lease. 816 F.2d at 507. However, the court never defined what it believed the phrase "conditions warrant" encompasses. Since the court quoted the Board's decision in Blackhawk Coal Co., supra, it is fair to assume that the Tenth Circuit was aware of this Board's treatment of economic conditions as temporary conditions. In Blackhawk, the Board held that it was reasonable for BLM to establish an 8-percent royalty rate for the lease at issue because that rate could be temporarily reduced later if conditions changed, whereas if BLM had set a lower royalty rate and economic conditions changed favorably during the lease term there would be no opportunity to adjust the rate upward. Blackhawk Coal Co., 68 IBLA at 99.

BLM complied with IM 88-148 by allowing appellants the opportunity to provide data concerning adverse geologic and engineering conditions, but none was provided. ^{4/} Nor have appellants established that BLM erred as a matter of law by using the criteria adopted by that IM. Accordingly, appellant has failed to establish that BLM erred when it established an 8-percent royalty for underground coal production on the leases at issue.

Counsel for BLM has recently filed a motion in this case to vacate the stay of the BLM decisions under review pending completion of administrative review in this matter. ^{5/} In support of the motion, BLM has indicated that appellants have continued to pay royalty on the basis of the old, cents-per-ton royalty rate in effect prior to lease readjustment. BLM noted that the lowest royalty rate which could be included in the readjusted lease terms under the regulations in effect at the time of lease readjustment is 5 percent. Further, BLM has asserted that the automatic stay pending appeal provided by the regulation at 43 CFR 4.21(a) is not applicable where the relevant regulations provide that a decision will be in effect pending any administrative appeal. Such is the case, BLM notes, with respect to the regulation at 43 CFR 3451.2(e) which provides that pending an appeal of the

^{4/} Compare Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (1990) (remanding BLM decision establishing an 8-percent royalty rate for underground coal because BLM's determination concerning adverse geologic and engineering conditions was not based on data supplied by the lessee and was not supported by the record).

^{5/} By order dated Nov. 22, 1989, the Board responded to appellants' request for a stay of the BLM decisions without explicitly ruling on the stay request by noting that the Departmental appeal regulation at 43 CFR 4.21(a) provides, as a general rule, that a decision will not be effective during the time the matter is pending on appeal.

readjusted lease terms all of the readjusted terms, including the royalty rate, shall be effective on the anniversary date.

Appellants have responded to the motion, opposing any lifting of the stay pending appeal.

6/ Appellants contend that a bond has been posted

to secure the amount of the royalty obligation ultimately determined to be due. Appellants cite the Board decision in Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986), reversing an order rejecting a bond and demanding payment pending appeal under the pay-pending-appeal regulation at 30 CFR 243.2.

[2] It is expressly provided by the regulations governing administrative appeals that the automatic stay pending administrative review is subject to an exception where "otherwise provided by law or other pertinent regulation." 43 CFR 4.21(a); Sierra Club, 108 IBLA 381, 384 (1989). The regulations at 43 Subpart 3451 regarding readjusted coal leases clearly provide an exception to the stay pending appeal for implementation of the readjusted lease terms including payment of royalty. 43 CFR 3451.2. 7/ In this regard it is apparent that our prior order regarding the stay in this matter was, at the least, misleading. Accordingly, to the extent that order purported to recognize a stay of

implementation of the readjusted royalty _____

6/ Attached to appellants' response is a copy of a letter dated June 19, 1991, from the Minerals Management Service ordering payment of royalty at the 8-percent rate from the date of lease readjustment.

7/ Appellants' assertion that giving effect to this regulation promulgated in 1988 would be an improper retroactive application of the regulation issued after the time of the lease readjustment must be rejected.

This case involves administrative appeals from BLM decisions issued in 1989. This is not altered by the fact the royalty rate is effective on the lease anniversary date when the readjustment occurred. 43 CFR 3451.2(c).

terms pending administrative review, the motion to vacate the stay is well founded and we would grant the motion were the matter not rendered moot by our issuance of a final decision on the merits. We note, however, that this does not preclude an appellant from seeking to post a bond during an administrative appeal from an order to pay disputed royalty pending administrative review pursuant to the royalty management program regulations. 30 CFR 243.2; Marathon Oil Co., *supra*.

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.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge