

MORGAN COAL CO.

IBLA 86-1234

Decided jUNE 20, 1994

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving for interim conveyance to the Arctic Slope Regional Corporation lands proper for regional selection under applications F-19148-12 and F-19148-15, subject to the right of Morgan Coal Company to preference right coal leases F-029746 and F-033619.

Set aside and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third Party Interests--Coal Leases and Permits: Applications

Under sec. 14(g) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1613(g) (1988), which provides that "[w]here, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement \* \* \* has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him," BLM must issue coal preference right leases before granting regional selection applications covering the same lands.

APPEARANCES: Jerome C. Muys, Esq., and John F. Shepherd, Esq., Washington, D.C., for Morgan Coal Company; James Wickwire, Esq., Gregory M. O'Leary, Esq., Sarah B. Ignatius, Esq., and Steven T. Seward, Esq., Seattle, Washington, for the Arctic Slope Regional Corporation; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On April 30, 1986, the Alaska State Office, Bureau of Land Management (BLM), approved the interim conveyance of approximately 4,976 acres of land near Point Lay, Alaska, to the Arctic Slope Regional Corporation (ASRC) in accordance with section 14(e) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1613(e) (1988). ASRC had filed regional selection applications F-19148-12 and F-19148-15 for these lands in November

1974 and January 1975. Morgan Coal Company (Morgan) appeals from the part of the decision that provides that the grant of the land "shall be subject to \* \* \* [t]he right of [Morgan] to preference right coal leases F-029746 and F-033619" (Decision at 4). <sup>1/</sup>

In 1962 and 1965, BLM issued coal prospecting permits F-029746 and F-033619 to Miller E. Spears. Under 30 U.S.C. § 201(b) (1970), the holder of a coal prospecting permit was entitled to issuance of coal lease if within the 2-year period of the permit it showed that the land contains coal in commercial quantities. See Natural Resources Defense Council Inc. v. Berkland, 609 F.2d 553 (D.C. Cir. 1979). In 1966, Spears filed an application for two preference right coal leases covering the land within these prospecting permits. In December 1966, the Director of Geological Survey advised the manager of BLM's Fairbanks District Office that commercial quantities of coal had been discovered and recommended that the leases be issued, thus entitling Spears to leases. Issuance of the leases was delayed, however, because a regulation in effect at that time required a survey of the land prior to lease issuance. Later, this requirement was dropped. Spears assigned his interest in the leases to Morgan, but through administrative oversight the leases were never issued. ASRC selected the land covered by Morgan's preference right lease applications (PRLA's) as well as surrounding lands pursuant to the ANCSA. BLM conveyed the surrounding lands to ASRC in 1976 but sought the advice of the Office of the Solicitor on how to proceed with Morgan's applications.

The Associate Solicitor for Energy and Resources offered three options and recommended the third one, i.e., that BLM

convey title to the PRLA-encumbered lands to ASRC subject to Morgan's right to leases (and again waive administration of these rights). \* \* \* Under this option, the two parties in interest, Morgan and ASRC, would be able to establish mutually acceptable terms and conditions for the leases. The BLM would not need to examine environmental, subsistence, or coastal zone impacts, since conveyances under ANCSA are not subject to these requirements. <sup>[6/]</sup> Disputes between the

<sup>6/</sup> E.g., 43 U.S.C. § 1638 [1988] (NEPA); 16 U.S.C. § 1620(c) [1988] (subsistence).

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<sup>1/</sup> The State of Alaska appealed the part of the decision stating that because the lands involved were withdrawn by Public Land Order No. (PLO) 82 for military purposes when the Alaska Statehood Act was enacted the lands beneath navigable water bodies did not vest in the state pursuant to the Submerged Lands Act of May 22, 1953, 43 U.S.C. § 1313(a) (1988). On Dec. 20, 1988, Secretary Hodel directed us to stay our consideration of the case pending further guidance from the Solicitor on the effect of PLO 82, and we did so by order dated Dec. 22, 1988. On Dec. 9, 1992, we lifted the stay and dismissed the State of Alaska's appeal based on the Solicitor's Opinion, 100 I.D. 103 (1992).

two parties would be private contract matters which would not involve the BLM. \* \*  
\* If you choose [this option], the Alaska State Office may play the role of "honest broker" by bringing the two parties together to discuss appropriate lease terms. \* \* \* The only advantage to withholding conveyance to ASRC until agreement is reached is that this allows BLM to play the broker's role. If ASRC appears unreasonable in the negotiations, BLM may reconsider operating under option one or two and withhold conveyance until BLM has executed federal leases with Morgan. If Morgan appears unreasonable in the negotiations, BLM may propose to convey title without an ASRC-Morgan agreement on the leases, and terminate any role it may have in assuring Morgan a reasonable contract with ASRC. [7/]

In any event, once agreement has been reached between Morgan and ASRC, there is then no obstacle to title conveyance to ASRC, subject to the agreement. 43 U.S.C. § 1613(g) (198[8]); 43 C.F.R. § 2650.4-1 (1983).

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7/ Nelbro Packing Co., 88 I.D. 352, 358-59 (1981), does not prevent the Bureau from proceeding in this manner. There BLM noticed an interim conveyance to a village corporation without either reserving appellant Nelbro's pending right-of-way application, or granting or denying it. The Board said, "Where conveyance of land to a Native corporation under ANCSA would effectively deny a pending application . . . , the applicant is entitled to a decision expressly granting or denying the right-of-way and stating the reasons therefor." 88 I.D. at 359. Here, conveyance to ASRC subject to Morgan's right to a lease (determined in 1966) would not "effectively deny" an application. Morgan is entitled to a lease; only its terms are not formally fixed. We do not read Nelbro as prohibiting conveyance "subject to" with a waiver of administration. BLM's conveyance rules state the policy not to reserve administration. As [Nelbro] does not even refer to administration of interests in conveyed land, we construe it to apply only to cases where BLM proposes to convey without any reservation of the third-party interest pursuant to section 14(g) of ANCSA. [2/]

Based on this advice, the Director of BLM decided in December 1984 to convey title to the PLRA-encumbered lands to ASRC subject to Morgan's right to a lease or leases and waive administration of those rights. The State Director, BLM Alaska State Office, was authorized to act as arbiter between Morgan and ASRC or avoid the negotiations; he requested the BLM Fairbanks

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2/ Memorandum of Jan. 28, 1985, to Director, Bureau of Land Management, from Associate Solicitor, Energy and Resources, entitled "Morgan Coal Company Preference Right Coal Lease Applications in Alaska," at pages 4-6. A draft of this memorandum was available to BLM in Washington in December 1984.

District Office personnel to play the role of "honest broker." 3/ Accordingly, BLM Fairbanks advised Morgan and ASRC in February and March 1985 that the lands covered by the PRLA's would be conveyed to ASRC and administration of the leases transferred to ASRC. BLM requested Morgan and ASRC to determine the terms and conditions of the leases by May 15 and said it would be available to provide assistance.

Despite many attempts by Morgan and BLM to arrange one, no meeting between Morgan and ASRC took place until August 1, 1985, when ASRC's attorney "indicated it might be possible to negotiate a lease with ASRC that would be acceptable to Morgan (i.e., a lease containing essentially the same terms and conditions that would be in a BLM lease)" (Morgan Statement of Reasons (SOR) at 11). 4/ Both parties had conflicts for a meeting tentatively scheduled for September; an October meeting had to be cancelled because Morgan's senior partner had pneumonia. 5/ By March 1986 "there was mainly one point of conflict between the two parties. This conflict was over the length of the lease term -- ASRC wanted a 10 year term and Morgan wanted a 20 year term or a 10 year term with a 10 [sic] extension clause available." 6/ When the BLM Washington Office was informed of this disagreement, it expressed the view that the "agreement [would be] between 2 private parties and it would not be subject to Federal coal leasing regulations whatsoever" and the disagreement "was not our concern." 7/ On

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3/ Instruction Memorandum No. AK-85-128, dated Jan. 15, 1985, to DM-F, DSD (960), from State Director, Alaska, entitled "Morgan Coal PLRA Lease and ASRC Conveyance."

4/ BLM's memorandum to the files on its Aug. 7, 1985, telephone conversation with Morgan's Jim Eiteljorg about this meeting states: "Generally agreed that neither party wanted lease terms any stricter or lesser than gov't lease terms would have after Jan. 1987. Talked a little about due diligence. \* \* \* Jim said 'he was satisfied with their first meeting with ASRC.' He hopes to bring his entire crew for the Sept. meeting."

5/ Meanwhile, BLM Fairbanks wrote the Alaska State Office on Sept. 23, 1985, stating:

"Due to the technical nature of the discussions now being conducted between the two parties, we believe that the responsibility to insure adequate terms and conditions are developed should be transferred to the Division of Minerals in the State Office. We will remain available to assist or consult as needed. We recommend that both Morgan Coal and ASRC produce a mutually agreed upon document of terms and conditions for operations of the PRLA's prior to transfer of BLM's responsibility to ASRC."

6/ BLM Short Note Transmittal from Bill Hansen to Reed Smith dated Mar. 25, 1986, entitled "Morgan Coal's PRLA - Conversation between Reed Smith-Bill Hansen and Jim Eiteljorg of Morgan Coal." See Morgan SOR, Exh. 15. A BLM Short Note Transmittal from Chuck Joy to Reed Smith dated Feb. 21, 1986, states: "Received telephone call from Jim Eiteljorg (Morgan Coal)[;] he said that they have been negotiating with Jim Wickwire (ASRC attorney) on terms and conditions on their leases and [are] getting close to a settlement."

7/ BLM Short Note Transmittal from Bill Hansen to Reed Smith dated Mar. 25, 1986, entitled "Phone call to Walt Rewinski, WO, regarding Morgan Coal-ASRC agreement." See Morgan SOR, Exh. 15.

March 26, 1986, BLM informed Morgan that "since very little progress had been made in negotiations between Morgan & ASRC and [because] ASRC's terms do not appear to be unreasonable, BLM would proceed to convey the lands to ASRC subject to Morgan's right to a lease," as recommended by the Associate Solicitor's January 1985 memorandum. <sup>8/</sup> Although Morgan was reportedly upset <sup>9/</sup> and wrote BLM on April 21, 1986, suggesting that it issue the lease before turning the property over to ASRC <sup>10/</sup>, BLM proceeded to issue its April 30, 1986, decision granting the lands to ASRC "subject to \* \* \* [t]he right of Morgan Coal Company to preference right coal leases F-029746 and F-033619."

Morgan appealed. In its view, BLM's approach

might have worked out if the ASRC had agreed to grant Morgan coal leases containing substantially the same terms as the BLM would include (e.g., same lease term, rental and royalty). However, as the BLM well knows, ASRC has avoided meeting with Morgan to discuss lease terms. Morgan has only been able to have preliminary discussions with ASRC's attorney [who] indicated that ASRC would only agree to a ten year lease term instead of the twenty year lease term provided by the Mineral Leasing Act [30 U.S.C. § 207 (1988)]. The result of the BLM's decision is that it is giving ASRC the land, and giving Morgan a lawsuit with ASRC. That is not what Congress had in mind under section 14(g) of ANCSA, [43] U.S.C. § 1613(g). [<sup>11/</sup>]

(Morgan SOR at 12).

Morgan emphasizes the "complete enjoyment of all rights, privileges, and benefits" language in section 14(g), and suggests this means the provision that the United States shall continue administration of a lease, etc., unless it waives administration "may require that BLM continue to

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<sup>8/</sup> BLM Short Note Transmittal from Bill Hansen to Reed Smith dated Mar. 26, 1986, entitled "Conversation with Jim Eiteljorg regarding Morgan Coal PRLA's." See Morgan SOR, Exh. 15.

<sup>9/</sup> Id.

<sup>10/</sup> Letter from James S. Eiteljorg, Morgan Coal Company, to Reed Smith, BLM, dated Apr. 21, 1986. See Morgan SOR, Exh. 16.

<sup>11/</sup> 43 U.S.C. § 1613(g) (1988) provides in part:

"All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement \* \* \* has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. \* \* \* The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the \* \* \* United States, unless the agency responsible for administration waives administration."

administer such rights, rather than having an inexperienced (and possibly hostile) Regional Corporation administer the rights." Id. at 13. Morgan argues that ASRC's position it would not recognize Morgan's interests if the land were conveyed before the leases issued 12/ and the fact that "ASRC has steadfastly avoided meeting with Morgan" means either that ASRC would prefer not to be Morgan's lessor or "will insist upon onerous lease terms (such as only a ten year lease term)." Id. at 16.

Morgan argues BLM should implement section 14(g) and protect Morgan's lease rights either by issuing the leases before the land is conveyed or by retaining administration of the lease applications. Id. Noting that 43 CFR 2650.4-3 provides that administration shall be waived by an agency of the Department "unless there is a finding by the Secretary that the interest of the United States requires continuation of the administration," Morgan suggests that the interest of the United States is the protection of rights held by mineral developers when "[d]iscretionary decisions on the terms and conditions of the leases still need to be made." Id. at 17. One of its rights under section 14(g) "is to have BLM, not some hostile third party which may be opposed to development [because it is in competition with Morgan for development of the coal field], decide what the proper terms and conditions of the lease shall be," Morgan asserts. Id.

Because the terms and conditions demanded by ASRC could have the same effect as denial of Morgan's lease applications, Morgan argues Nelbro Packing Co., supra, requires that BLM adjudicate its applications and decide on the terms. Id. at 18. Further, Morgan observes, the Departmental Manual provides that "it is appropriate for BLM to determine in the first instance the validity of those interests created by federal laws, which are administered by BLM, other than unpatented mining claims under the Mining Law of 1872, 30 U.S.C. § 22 et seq., and rights-of-way under RS 2477 (repealed in 1976 by 90 Stat. 2793)." 601 DM 2, Appendix 2. 13/ In the case of coal preference right lease applications, "adjudicating the validity of third party rights protected by Section 14(g) includes issuance of the leases --

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12/ This position was reported in the Associate Solicitor's May 1983 memorandum to the Director of BLM concerning transfer of the lands covered by Morgan's preference right lease applications. See Morgan SOR, Exhs. 7-8.

13/ This language is a clarification of the Solicitor's Oct. 24, 1978, memorandum that was adopted in Secretarial Order No. 3029 (Nov. 20, 1979). The original language is contained in the last sentence below:

"Another issue for resolution is to what extent the law and regulations require the Department to identify and determine the validity of (adjudicate) third party valid existing rights. Clearly the administrative act of listing an interest as a valid existing right or of failing to list it does not create or extinguish the right. Because of this the ultimate validity of all interests may require court litigation. Nevertheless it is appropriate for BLM to determine in the first instance the validity of those interests which are created by federal law since BLM is in most cases the agency charged with the administration of those laws."

601 DM 2, Appendix 1, at 16.

with the appropriate terms and conditions -- so that the Regional Corporation, the lessee and any court called upon to decide a dispute between the two know what rights are protected," Morgan argues. *Id.* at 19. Morgan points out that the 1983 memorandum of the Associate Solicitor, footnote 12 *supra*, advised that Morgan's rights under *Nelbro*, *supra*, and ASRC's assertion that it did not recognize Morgan's rights would be a basis for retaining administration of the lease applications or leases or both under 43 CFR 2650.4-3.

Finally, Morgan argues that BLM should retain administration of the leases because ASRC's competitive interest in developing and marketing the coal in the lands surrounding those covered by Morgan's applications is inherently contrary to ASRC's even-handed administration of the lease terms. *Id.* at 21-22.

BLM's Answer to Morgan's SOR states that its decision does not violate section 14(g) of ANCSA or the Departmental Manual and is fully consistent with and implements the Associate Solicitor's January 28, 1985, memorandum, set forth above, which BLM incorporates by reference as its main argument. "It is \* \* \* apparent that appellant's rights have been sufficiently protected. \* \* \* There is no declaration or inference in BLM's Decision that casts even a shadow of invalidity on appellant's rights," BLM states (Answer at 2).

BLM adds that while its decision "does not officially or finally decide the question of administration of the coal leases, waiver of administration is both required and appropriate" because there has been no showing that the interest of the United States requires continuation of the administration (BLM Answer at 2, 4). "Morgan Coal's preference of administrators is not a legal barrier to waiver of continued federal administration," BLM states, citing *State of Alaska*, 86 IBLA 268, 272, 274 (1985). *Id.* at 4.

ASRC's Answer states that Morgan's assertions that ASRC will not issue leases or, if it does, will impose onerous terms

completely mischaracterize ASRC's position. ASRC has agreed to issue leases corresponding to Morgan's two preference right coal lease applications and has told this to Morgan's representatives in several recent discussions. ASRC has also told Morgan that it intends to impose the same terms required by the Mineral Leasing Act and regulations, such as a 10-year diligent development requirement. [14/]

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<sup>14/</sup> "ASRC intends to impose the same terms on Morgan's leases as those required by the Mineral Leasing Act[,] thus insuring the same type of diligent development, continued operation, and environmental protections that BLM would impose on federal lands" (ASRC's Answer at 4).

"[Morgan's] entire argument is premised on a position ASRC has not and does not assert, and mistakes ASRC's statements with respect to diligent development for statements with respect to lease duration. ASRC

(ASRC Answer at 2-3). ASRC argues the appeal should be dismissed as moot since there is no controversy and because Morgan does not show error in BLM's decision. Id. at 8-15. Alternatively, ASRC argues BLM's decision should be affirmed on its merits.

In January 1987 Morgan filed a reply brief stating that it had proposed terms for settlement of this appeal to ASRC on October 16, 1986, which ASRC was still considering. "While not abandoning its settlement proposal to ASRC, Morgan is filing its reply brief now rather than seeking another extension of time so that the Board can resolve this appeal without further delay" (Reply Brief at 1-2). Morgan's reply brief sets forth its reasons why ASRC's October 8, 1986, proposal is inadequate (Reply Brief at 10-12) and argues it is entitled to leases effective January 1, 1967. Id. at 13-17.

ASRC's supplemental memorandum in response to Morgan's reply brief disputes both Morgan's reasons and arguments. ASRC observes:

Although BLM has not set lease terms, ASRC's offer to impose the same terms required by the Mineral Leasing Act and the regulations is likely to approximate the terms BLM would have imposed if BLM had issued the leases. Presumably, BLM would have imposed standard terms required by the Mineral Leasing Act and regulations. See 43 C.F.R. § 3475.1.

(Supplemental Memorandum at 14).

Because of the passage of time since these briefs were filed (see note 1, supra) and uncertainty over what terms and conditions BLM would include in leases were it to issue them, we issued an order on October 28, 1993, requiring (1) BLM to file a copy of the leases it would issue Morgan if it were required to do so; (2) ASRC to certify that it is prepared to issue Morgan leases containing the same terms and conditions, or, if not, which terms and conditions it would not accept and why, and what alternatives it would propose, and (3) Morgan to state whether or not it is prepared to accept the leases ASRC is prepared to offer, and, if not, why.

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fn. 14 (continued)

insists, not on a 10-year lease term, but on a 10-year diligent development period for the lease. Although the Mineral Leasing Act allows 20-year lease terms (30 U.S.C. § 207(a); 43 C.F.R. 3475.2), it requires 'diligent development' of leases within a 10-year period and 'continued operation' thereafter. 30 U.S.C. § 207; 43 C.F.R. Subpart 3483; 43 C.F.R. §§ 3475.5, 3452.2 & .3, 3480.0-5(12), (13); Mountain States Resources Corp., 92 I.B.L.A. 184 (1986)." Id. at 10. "ASRC's letter of October 8, 1986, to Mr. Harrison Eiteljorg (attached hereto as Exhibit B) \* \* \* states ASRC's intention to impose the same lease terms as those required by the Mineral Leasing Act, terms which BLM would be obligated to impose on any new or readjusted coal lease." Id. at 12-13.

In response, BLM states it would issue the leases in the current coal lease form, with \$3/acre rental, surface mining production royalties at 12.5 percent of the value of the coal, and a bond of at least \$5,000, because the leases would have to be consistent with the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. §§ 201-209 (1988). BLM notes that it would have to comply with the National Environmental Policy Act and other applicable environmental laws before it issued the leases and that special stipulations could not be decided until after an environmental assessment (EA) was completed. BLM could also determine the amount of the bond should be higher than the \$5,000 minimum after completion of an EA.  
15/

ARSC certifies it is prepared to issue Morgan leases containing the same terms and conditions proposed by BLM, substituting only its name for the United States as lessor.

Morgan disagrees that FCLAA would apply to its leases. Its right to leases vested in 1967, Morgan states. Such leases could

only be modified to include FCLAA's requirements pursuant to the readjustment provisions of the lease it was entitled to in 1967 and should have received, *i.e.*, every 20 years. If a lease were now issued with that retroactive effective date, it is plain that BLM's right to readjust Morgan's putative lease has long since come and gone. Consequently, Morgan is entitled to a lease extending until 2007, at which point it will be subject to the statutory requirements in effect at that time.

(Response of Morgan Coal Company to Order of Oct. 28, 1993, at 1-2). Morgan states that although leases ARSC says it would issue would presumably include section 1 of the current BLM form, which states that the leases would be subject to the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1988), and to regulations and formal orders of the Secretary of the Interior, "this would not eliminate Morgan's concern about any discretionary authority ARSC would be exercising while standing in the Secretary's shoes because of its potential conflict of interest as a competitor of Morgan." (Emphasis in original). *Id.* at 3. For example, ARSC

would remain free to impose environmental requirements that might be so unreasonably onerous as to make development of the lease uneconomic. In such event Morgan would have no claim for a regulatory taking, as it would if the United States had issued the lease and retained administration, and Morgan is not willing to waive that potential claim.

*Id.* at 3-4. Morgan suggests we direct BLM to issue the leases. We could decide later what terms should apply if BLM and Morgan could not agree; BLM

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15/ See BLM's Response to Order of Oct. 28, 1993, Exhibits A & B, for Form 3400-12 (April 1986), and the memorandum setting forth the terms BLM would require.

could decide whether to waive administration of the leases after it issued them. Id. at 2.

BLM's and ARSC's replies to Morgan both dispute Morgan's claim that the leases would not have to be consistent with FCLAA.

[1] One of the options the Associate Solicitor for Energy and Resources suggested in his January 28, 1985, memorandum -- the second option -- was "to issue leases with an effective date in the near future, after environmental, coastal zone, and subsistence analyses have been completed. Morgan's leases would contain protective and environmental stipulations derived from these analyses" (Jan. 28, 1985, memorandum at 4). The memorandum stated that the third option, described above, was

legally preferable to the other two and your [BLM's] staff has indicated how it is also preferable from a practical, administrative point of view. \* \* \* The second option would, according to BLM's staff, raise practical problems of BLM expenditures to study impacts of proposed federal actions that might lead to coal mining on lands that will shortly pass (exempt from review under those same laws) into private hands.

Id. 16/

The third option avoided this practical problem, the Associate Solicitor stated, "while providing the added benefit of allowing the parties in interest to establish mutually agreeable lease terms at the outset." Id. The Associate Solicitor stated that BLM could reconsider option two "if ARSC appears unreasonable in the negotiations [over the lease terms]." Id. at 5. "Once agreement has been reached between Morgan and ASRC," he concluded, "there is then no obstacle to title conveyance to ASRC, subject to the agreement (emphasis supplied)," citing section 14(g) of ANCSA, 43 U.S.C. § 1613(g) (1988). Id. at 6.

We pass no judgment on whether ASRC or Morgan was "unreasonable in the negotiations." We agree it would have been "legally preferable" if an agreement had been reached between Morgan and ASRC. However, no agreement was reached. We believe BLM must issue the leases to which it acknowledges Morgan is entitled. Morgan cannot have "the complete enjoyment of all rights, privileges and benefits" which it is guaranteed by section 14(g), supra note 11, unless all terms of the leases are defined--especially ones

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16/ Morgan's characterization of BLM's decision is more candid:

"[I]t appears that BLM's decision not to process the leases and to waive administration, contrary to its lawyers' advice, is borne of a desire to 'wash its hands of this matter.' Simply stated, BLM does not want to spend time or money on an EIS for issuing these leases. However, a desire to avoid compliance with NEPA cannot be used to subject Morgan's coal rights to certain litigation with ASRC, and to the potential for perpetual disputes with a hostile lessor. That is contrary to Section 14(g) of ANCSA" (SOR at 20).

as essential as the "protective environmental stipulations derived from [environmental, coastal zone, and subsistence] analyses" and the amount of the bond that would depend on the environmental analysis, which may well determine the economic viability of the leases. It is BLM's responsibility to conduct these analyses and define these rights. Absent these essential provisions defining rights under the leases, the statements in BLM's Answer that section 14(g) has not been violated, "appellant's rights have been sufficiently protected," and "there is no declaration \* \* \* in BLM's Decision that casts even a shadow of invalidity on appellant's rights" are merely conclusory assertions.

We express no opinion on what the terms of the leases BLM must issue Morgan should be. We note that Morgan believes it holds valid existing rights recognized by section 4 of FCLAA (SOR at 4 n.2), and that the Associate Solicitor's January 28, 1985, memorandum states that Utah International v. Andrus, 488 F. Supp. 962 (D. Utah 1979), "did not resolve the issue of the terms that would govern the lease, those in effect at the time the BLM determined the entitlement, or those in effect at the time the contract was formally executed (emphasis in original)" (Jan. 28, 1985, Memorandum at 3). We note, too, that BLM's recent filings state that the leases it would issue would contain the terms required by FCLAA, citing more recent court decisions, e.g., Western Energy Co. v. Dept. of Interior, 932 F.2d 807 (9th Cir. 1991), and Trapper Mining, Inc. v. Lujan, 923 F.2d 774 (10th Cir. 1991). Even if that is so, BLM is required to issue leases that also include terms that are within its discretion, based on its environmental and other analyses, in order to meet its obligations under section 14(g) of ANCSA.

Nor do we express any opinion on whether administration of the leases should be waived. That was not decided in the decision under appeal and it would be premature to decide it before the leases are issued.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's April 30, 1986, decision granting regional selection applications F-19148-12 and F-19148-15 "subject to \* \* \* [t]he right of Morgan Coal Company to preference right coal leases F-029746 and F-033619" is set aside and remanded for BLM to issue the leases before granting the lands.

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Will A. Irwin  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge