

U.S. CAPITAL INSURANCE CO.

IBLA 94-591

Decided April 3, 1997

Appeal from a Decision by the New Mexico State Office, Bureau of Land Management, requiring payment of reclamation costs under Performance Bond No. 91-00001916-L, covering coal lease OKBLM 017612.

Reversed.

1. Coal Leases and Permits: Assignments and Transfers—Regulations: Interpretation

Under 43 C.F.R. § 3453.2-4 (1993), approval by BLM of an assignment of a Federal coal lease, without written consent of a surety for the transferor to continuation of a performance bond, released the surety from obligation under the bond; BLM could not thereafter require the former surety to underwrite reclamation, even for work required by mining done before the assignment was approved.

APPEARANCES: G. Patrick Garrett, Esq., Oklahoma City, Oklahoma, for Appellant; Arthur Arguedas, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

U.S. Capital Insurance Company (USCIC) has appealed from a May 9, 1994, Decision of the Chief, Mining Unit, New Mexico State Office, Bureau of Land Management (BLM), requiring USCIC to pay reclamation costs under a surety obligation established by Performance Bond No. 91-00001916-L. The Decision informs USCIC that the New Mexico State Office was notified by the Tulsa District Office on September 17, 1993, of reclamation pending on "certain properties where test burns for Federal Coal Lease OKBLM 017612 (Sunset Corners), were conducted [by] Delta Contracting, Inc. (Delta), the bonded party." The BLM Decision states that Delta (a subsidiary of Evans Coal Company) was informed by decision dated October 26, 1993, of the required reclamation, but did not undertake compliance. The BLM concludes that "because Delta has not complied with our request, and * * * [USCIC] is the surety for the bond guaranteeing compliance with the terms and conditions of Federal Coal Lease OKBLM 017612, USCIC must [underwrite costs of reclamation]."

On appeal, USCIC claims that it is no longer obligated under the bond after BLM approved assignment of the lease by Delta to KMF Mineral Resources, Inc. (KMF), without the knowledge or consent of USCIC, a fact that operates to discharge USCIC from liability under the bond pursuant to both 43 C.F.R. § 3453.2-4 (1993) and principles of surety law.

Beginning in 1956, Evans Coal Company (Evans) obtained what is now coal lease OKBLM 017612 on public lands in secs. 24 and 25 of T. 9 N., R. 24 E., and secs. 17, 18, 19, 20, and 30 of T. 9 N., R. 25 E., Indian Meridian, LeFlore County, Oklahoma. Between August 1987 and March 1991, approximately 216,000 tons of coal were produced from the lease at surface mining activities known as the "Sunset Corners operation." Effective April 1, 1991, BLM granted a lease suspension upon application of Evans, to facilitate an attempt to obtain financing for underground mining on the lease. It was then noted that "[t]he last surface mined coal was sold in March, 1991, and reclamation was begun." Memorandum of Tulsa District Manager to New Mexico State Director dated March 5, 1992.

On November 14, 1991, USCIC became a surety on replacement bonds binding Evans and Delta on several \$125,000 performance bonds, including No. 91-00001916-L. Meanwhile, Evans began underpaying royalties; in January 1992, Evans entered into an installment agreement with Minerals Management Service (MMS) for royalty payment. On April 27, 1993, BLM rescinded a prior approval of a modification to Evans' exploration plan because royalties were unpaid, and prohibited mining or exploration activities on the lease until a new lease application should be approved. On April 20, 1993, MMS found that, as a result of transfers between Evans and Delta, Evans' royalties were underpaid by approximately \$182,000.

On August 25, 1993, Evans, under the name Sunset Sales, Inc., filed in United States Bankruptcy Court for the Western District of Oklahoma for protection under Chapter 11 of the Bankruptcy Code. By Order dated October 8, 1993, the Bankruptcy Judge ordered a sale of the lease to KMF and directed the bankruptcy trustee to pay royalties owing to the United States from sale proceeds. The Judge also ordered BLM to permit mining on the lease under conditions specified in the Order, one of which was that KMF would obtain a \$75,000 reclamation bond for "that portion of the * * * lease area to be affected by its exploratory activities." (Order dated Oct. 8, 1993, at 7.)

About 3 weeks earlier, on September 14, 1993, the Tulsa District Manager, BLM, had notified BLM's New Mexico State Director that three of the surface owners on Evans' lease were complaining reclamation was not complete "under the approved test burn" at Sunset Corners. The District Manager recommended the "lessee's exploration bonds be attached to fund the work required." The required work included reclamation on the Anglen property, mined in 1987-88 and located "south of the highway in the S 1/2 SE sec. 24, T. 9 N., R. 24 E.," the Strain property, mined in 1989-90 and located in sec. 19, T. 9 N., R. 25 E., and the Bridges property, mined in

1990-91 and located in sec. 18, T. 9 N., R. 25 E. On October 26, 1993, 2 weeks after the bankruptcy ruling, the New Mexico State Office issued an order to Evans requiring reclamation, and notifying Evans that USCIC would be requested to surrender reclamation bonds if reclamation was not commenced within 30 days. Evans responded by letter dated November 2, 1993, stating that:

Pursuant to 43 CFR 3453, the transferee, KMF should have delivered a written statement that KMF is bound as to any interest obtained, and new bonds with KMF as principal will cover the transferred lease. EVANS and its sureties continue to be responsible for performance of any obligation under the Lease until the closing. After the closing, the transferee, KMF, and its sureties shall be responsible for all Lease obligations, notwithstanding any terms of the transfer to the contrary.

Despite this statement of Evans' position concerning the effect of lease assignment on existing rights, on December 16, 1993, BLM approved an assignment of the lease from Evans to KMF. The assignment contains the following language:

Certain exploration bonds have been in force and effect in favor of the USBLM with respect to the lands subject to the Lease. Prior to execution hereof, the Assignee secured the release of all bonds affecting the Lease wherein Assignor was named as principal. The current designated operator, Delta Contracting, Inc., shall retain all responsibility for reclamation under Delta's plan of reclamation and the bonds on which it is the named principal shall remain in effect to assure performance of surface reclamation, if necessary. Following execution and delivery of this Assignment, said exploration bonds shall remain in full force and effect and the Assignee shall not by this Assignment assume any liability for reclamation of lands previously mined in the leasehold area, save and except as to the 84-acre tract owned by Dow Anglen * * *. Assignee recognizes that in connection with the exploration plan to be submitted by the Assignee, the USBLM may require posting of bonds to assure performance of reclamation obligation arising from Assignee's future mining activities on the Lease.

Also on December 16, BLM approved the lease assignment and set bonding requirements; BLM's Decision states:

In accordance with the regulations in 43 CFR 3453.2-4(b), after the effective date of approval of the assignment, the assignee, including any sublessee, and the assignee's surety shall be responsible for all lease obligations, notwithstanding any terms of the transfer to the contrary, with the following exception:

The transfer of Federal Coal Lease OKBLM 017612 to KMF does not involve the transfer of any previously approved exploration

plan. Accordingly, responsibility for reclamation of lands within the leasehold area which were previously strip-mined under an exploration plan conducted by Delta Contracting, Inc., shall be the responsibility of Delta Contract, Inc., save and except as to * * * [the Anglen tract].

A copy of this Decision together with a copy of the record title assignment were sent by certified mail to USCIC, who receipted for the documents on December 27, 1993.

In a Statement of Reasons on Appeal (SOR), USCIC argues, (SOR at 4), that, given the facts stated above, a Departmental regulation governing assignment and other transfers of coal lease interests, 43 C.F.R. § 3453.2-4 (1993), operated to terminate USCIC's liability as surety under the bond "on the effective date of BLM's approval of the transfer of the lease from Evans to KMF." The USCIC further argues, (SOR at 7), that "the substitution of KMF for Evans as obligor under the lease without the knowledge or consent of USCIC operated to discharge USCIC from liability under the bond" under common law principles of suretyship.

Counsel for BLM answers these arguments by pointing out that USCIC knew of the bankruptcy proceedings and was notified of the terms of the assignment resulting therefrom. He argues that USCIC now seeks to avoid responsibility for actions occurring before assignment of the lease from Evans to KMF was approved, by the simple expedient of standing silently by, while the details of a court-supervised transfer were carried out.

The record is clear, as BLM contends, that payment under the bond was demanded as a result of Delta's default, which occurred prior to the lease transfer ordered by the Bankruptcy Court. It is also correct that the Court's order speaks to the question of KMF's reclamation liability by requiring KMF to "obtain and maintain a reclamation bond in connection with that portion of the * * * lease area to be affected by its exploratory activities which * * * shall be in place prior to any surface disturbance in the lease area." (Order dated Oct. 8, 1993, at 7.) The USCIC has not asserted that it had no notice or knowledge of the bankruptcy proceedings, and the record establishes that USCIC knew BLM expected Bond No. 91-00001916-L would cover reclamation at the Sunset Corners location for mine operations run by Evans before 1993.

[1] Regulations found at 43 C.F.R. Part 3400 govern management of coal resources found on the public lands. Subpart 3453 pertains to transfers of coal lease interests. Departmental regulation 43 C.F.R. § 3453.2-4 (1993) terminates liability under a surety bond when BLM approves an assignment unless an affected surety agrees to bind the transferee thereafter. The regulation states, in pertinent part:

(a) If a bond is required, it shall be furnished before a lease, preference right lease application or exploration license may be approved for transfer. If the original lease

*** required the maintenance of a bond, the transferee shall submit either a written consent from the surety to the substitution of the transferee as principal or a new bond with the transferee as principal. *
 ** Before any transfer of part of a lease or license is approved, the transferee shall submit: (1) A written statement from the surety that it agrees to the transfer and that it agrees to remain bound as to the interest retained by the lessee or licensee; and (2) a new bond with the transferee as principal covering the portion transferred.

(b) The transferor and the surety shall continue to be responsible for the performance of any obligation under the lease *** until the effective date of the approval of the transfer. *** After the effective date of approval, the transferee *** and the transferee's surety shall be responsible for all lease *** obligations, notwithstanding any terms of the transfer to the contrary.

43 C.F.R. § 3453.2-4(a) and (b) (1993).

It is true this rule provides that private agreements between a transferee and transferor shall not bind the transferee's surety without its written consent. It is clear that USCIC, while it knew that BLM proposed to continue the guarantee of Bond No. 91-00001916-L past approval of lease transfer, did not consent in writing to any such action. Any attempt to continue the bond past the transfer was inconsistent with the quoted rule; consequently, USCIC's liability under the bond ended when BLM approved transfer of the lease from Evans to KMF, pursuant to 43 C.F.R. § 3453.2-4 (1993). In Alaska Statebank, 111 IBLA 300, 310 (1989), also a case involving assignment of a coal lease, it was determined that approval of an assignment of a coal lease by BLM terminated all obligations of the assignor, even those that arose prior to the assignment. Although the Alaska Statebank decision does not cite the regulation relied upon by USCIC, the Alaska Statebank case cannot reasonably be distinguished from this appeal; it lends further support to the position stated by USCIC, and is consistent with 43 C.F.R. § 3453.2-4 (1993), which is controlling here.

The Board may interpret a regulation to determine whether it applies to the facts before it. In doing so here, we cannot ignore the clear requirement of 43 C.F.R. § 3453.2-4 (1993), that BLM must dispose of all pending surety matters before approving a lease transfer or accept the consequence of that action. While BLM points to circumstances tending to show it should be excused in this case from failure to comply with requirements imposed by 43 C.F.R. § 3453.2-4 (1993), it is apparent that the regulatory requirement governing treatment of sureties was not followed in this case, and that, as a consequence of BLM's failure to follow the rule, USCIC may not now be required, under Bond No. OKBLM 91-00001916-L, to underwrite reclamation work that was left unfinished by Evans.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is reversed.

Franklin D. Amess
Administrative Judge

I concur.

Will A. Irwin
Administrative Judge

