

KMF MINERAL RESOURCES, INC.

IBLA 96-270, 97-480

Decided October 21 1999

Appeals from decisions of the Tulsa District Office, Bureau of Land Management, and the Royalty Valuation Division, Royalty Management Program, Minerals Management Service, assessing advance royalty in lieu of production for the first and second continued operation years under coal lease OKBLM 017612.

Decision in IBLA 96-270 affirmed; IBLA 97-480 dismissed.

1. Appeals: Jurisdiction--Minerals Management Service: Appeals to Director: Generally--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Jurisdiction

Since 30 C.F.R. Part 290 gives the Board jurisdiction only over appeals of decisions of the Director, MMS, a direct appeal to the Board of a decision of an MMS official will be dismissed for lack of jurisdiction where the appellant has not first obtained review of the decision by the Director, MMS.

2. Coal Leases and Permits: Royalties

A BLM decision assessing advance royalty in lieu of continued operation will be affirmed where the coal lessee has not shown error in the method used to determine the unit value of the recoverable coal reserves under 43 C.F.R. § 3483.4(c).

APPEARANCES: William J. Bullard, Esq., and Kimberly K. Blaylock, Esq., Oklahoma City, Oklahoma, for KMF Mineral Resources, Inc., and James M. Reed, Esq., Tulsa, Oklahoma, for KMF Mineral Resources, Inc., and/or Coal Creek Minerals, Inc.; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

KMF Mineral Resources, Inc. (KMF), has appealed the February 21, 1996, decision of the Tulsa District Office, Bureau of Land Management (BLM), assessing an advance royalty of \$79,437.80 in lieu of production for

the first continued operation year ending on January 31, 1996, for Federal coal lease OKBLM 017612. The Board docketed this appeal as IBLA 96-270.

KMF has also appealed a decision of the Royalty Valuation Division, Royalty Management Program, Minerals Management Service (MMS), that it received on June 3, 1997, requiring the payment of \$103,070.88 in advance royalty in lieu of production for the lease's second continued operation year which began on February 1, 1996. 1/ The Board docketed this appeal as IBLA 97-480. 2/

KMF obtained record title to Federal coal lease OKBLM 017612, effective December 1, 1993, through an assignment from Evans Coal Company approved by BLM on December 16, 1993, in accordance with an October 8, 1993, order of the U.S. Bankruptcy Court for the Western District of Oklahoma (Case No. 92-16745-BH (Chapter 11)). The lease, which embraces 1,868.65 acres of public land in secs. 24 and 25, T. 9 N., R. 24 E., and secs. 17, 18, 19, 20, and 30, T. 9 N., R. 25 E., Indian Meridian, Le Flore County, Oklahoma, had achieved diligent development in January 1991, thus subjecting it to the continued operation or advance royalty payment requirement (see 43 C.F.R. §§ 3483.1 and 3483.4), but had produced no coal since March 1991. In conformance with the Bankruptcy Court order, BLM waived the required payment of advance royalty in lieu of continued operation for the period February 1, 1991, through July 16, 1994, after which KMF was to produce the continued operation requirement of 48,200 tons of coal, minus the 4,051 tons of coal produced from the lease during February and March 1991, in order to fulfill the continued operation obligation for the year ending January 31, 1995. See May 31, 1995, BLM Decision at 1-2.

In response to a request by KMF, on July 3, 1995, BLM granted KMF an extension of time until February 1, 1996, to produce 39,608 tons of coal from the lease or pay advance royalty in lieu of production. BLM derived the 39,608-ton figure by subtracting the 4,051 tons of coal produced during February and March 1991 and the 4,541 tons of coal produced while developing the site for underground mining operations during February and March 1995 from the continued operation requirement of 48,200 tons of coal. See June 26, 1995, BLM Memorandum from Supervisory Geologist, Tulsa District Office, BLM, to Supervisor Land and Mineral Support Team, Tulsa District Office, BLM, at 2; see also Apr. 22, 1996, BLM Letter to KMF's counsel at 1.

1/ This appeal was filed by KMF "and/or its successor in interest Coal Creek Minerals, Inc. ('Coal Creek')." The record indicates that Coal Creek purchased all of KMF's assets, including Federal coal lease OKBLM 017612, at a nonjudicial foreclosure sale on June 27, 1997. For simplicity, we will refer to KMF and Coal Creek collectively as "KMF."

2/ KMF filed notices of appeal of the MMS decision with both MMS and BLM, stating in the July 2, 1997, letter transmitting the appeal to BLM that MMS had advised the company that appeals challenging the actual implementation of an advance royalty charge had to be filed with BLM. MMS docketed KMF's appeal as MMS-97-0148-MIN, but closed it on its records as being transferred to BLM. As discussed *infra*, MMS' advice was erroneous.

By letter dated October 4, 1995, BLM reminded KMF that it had until February 1, 1996, to produce 39,608 tons of coal or pay advance royalty in lieu of production for the first continued operation year ending on January 31, 1996, as required by 43 C.F.R. § 3483.4. BLM explained that advance royalty would be computed based on 8 percent of the fair market value of the 39,608 tons of coal and that a late payment charge might be added to any advance royalty payment. BLM also advised KMF that any request for suspension of the second continued operation year requirement and payment of advance royalty in lieu thereof had to be made no later than 30 days after the February 1, 1996, beginning of that continued operation year.

On February 21, 1996, BLM issued a decision directing KMF to pay \$79,437.80 in advance royalties within 60 days, citing KMF's failure to produce the required 39,608 tons of coal for the first continued operation year of the lease. BLM informed KMF that if it did not make the payment within the 60-day period, the agency would recommend cancellation of the lease. BLM based its advance royalty assessment on valuation information provided by MMS which indicated that the fair market unit value for advance royalty purposes was \$25.07 per ton. In reaching this unit value, MMS utilized sales tonnages and value data from five producing Federal coal leases in Oklahoma to calculate the weighted net average price per ton for the July 1995 through January 1996 period. See Feb. 27, 1996, Memorandum from Chief, Solid Minerals Valuation Branch, Valuation and Standards Division, MMS, to Geologic/Engineering and Mining Services Team, Tulsa District Office, BLM (Feb. 27, 1996, MMS Memorandum).

KMF appealed this decision to the Board, challenging only the estimated unit value of \$25.07 per ton. The Board granted KMF's petition for a stay of BLM's decision.

By memorandum dated March 27, 1997, BLM notified MMS that KMF had neither paid advance royalty in lieu of production for the second continued operation year nor produced the required coal tonnage for that year on or before February 1, 1997. BLM indicated that it planned to issue a decision requiring payment of delinquent royalty and that it needed a unit price upon which to base the royalty. BLM asked MMS to provide a unit price for coal sold to the AES Shady Point plant at Panama, Oklahoma, for the period February 1, 1996, through January 31, 1997, noting that the plant also purchased coal from leases held by Farrell-Cooper Mining Company and GCI Mining Company, Inc.

On April 15, 1997, BLM sent KMF a reminder that the third continued operation year for the lease had begun on February 1, 1997, and that the company had until February 1, 1998, to produce 48,200 tons of coal (1 percent of the recoverable reserves) from the lease or pay advance royalty in lieu of production.

On June 3, 1997, KMF received a decision from MMS directing KMF to pay \$103,070.88 in advance royalty for the lease's second continued operation year which began on February 1, 1996. MMS explained that it had

calculated the advance royalty pursuant to 43 C.F.R. § 3483.4(c), multiplying the recoverable coal unit value (\$26.73 per ton) by 1 percent of the recoverable coal reserves as provided by BLM (48,200 tons) by the mine type royalty rate (8 percent).

KMF appealed the MMS decision to the Board.

[1] As an initial matter, we must dismiss KMF's appeal of the MMS decision, docketed as IBLA 97-480. Under 30 C.F.R. § 290.2, final orders and decisions of MMS officers are appealable only to the Director, MMS. Decisions of the MMS Director are then appealable to this Board. 30 C.F.R. § 290.7. As stated in note 2, supra, KMF attempted to protect its interest by filing an appeal of the June 3, 1997, MMS decision with both MMS and BLM, following the receipt of incorrect advice from MMS. Thereafter, MMS erroneously closed out KMF's appeal of that decision. Nevertheless, MMS' error cannot vest this Board with jurisdiction over the MMS decision. Since this appeal was not taken from a decision issued by the Director, MMS, we have no jurisdiction to entertain the appeal and it must be dismissed. ^{3/} See Mobil Exploration & Producing U.S. Inc. (On Reconsideration), 148 IBLA 297, 298-299 (1999).

While we could remand the case to MMS with directions to reopen KMF's appeal of the June 3, 1997, decision, to do so would serve no useful purpose. The principal issue presented in that case is the same as in IBLA 96-270. Thus, our disposition of KMF's appeal in IBLA 96-270 establishes a controlling precedent.

[2] Section 7 of the Mineral Leasing Act, as amended by section 6 of the Federal Coal Leasing Act Amendments of 1976, 30 U.S.C. § 207(b) (1994), subjects coal leases "to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee," and provides that the Secretary may suspend the continued

^{3/} KMF also appears to be attempting to separately appeal the BLM estimate of 1 percent of the recoverable coal reserves included in the MMS decision. It states that BLM advised it of the 48,200 ton continued operation requirement in a notice dated Apr. 15, 1997. Any appeal of that requirement was therefore due within 30 days after service of that BLM decision. 43 C.F.R. § 4.411(a). We have no record of an appeal of that requirement, and, therefore, we have no jurisdiction to review its merits. See, e.g., King Broadcasting Co., 129 IBLA 265, 266 (1994). We note, however, that KMF erroneously relies on the first continued year production requirement of only 39,608 tons of coal as evidence of the excessiveness of the 48,200-ton second continued operation year production requirement. The record clearly demonstrates that BLM arrived at the lower tonnage for the first continued operation year by reducing the required 48,200 tons by the amount of coal KMF had previously produced from the lease in February and March 1991 and in February and March 1995. See June 26, 1995, BLM Memorandum from Supervisory Geologist to Supervisor Land and Mineral Support Team at 2; see also Apr. 22, 1996, BLM Letter to KMF's counsel at 1.

operation requirement upon payment of advance royalties if he determines that the suspension will serve the public interest. In order to achieve diligent development, a lessee must produce commercial quantities of coal, i.e., 1 percent of recoverable coal reserves, within 10 years after either the effective date of the lease or the effective date of the first lease readjustment after August 4, 1976. See 43 C.F.R. § 3480.0-5(a)(6), (12), and (13). Following diligent development, the lessee must continue operations by producing commercial quantities of recoverable coal reserves in each of the first 2 continued operation years immediately afterwards and an average amount of not less than commercial quantities of recoverable reserves per continued operation year thereafter computed on a 3-year basis. See 43 C.F.R. § 3480.0-5(a)(8). The continued operation requirement may be suspended by payment of advance royalty in lieu of production, in an amount equivalent to the production royalty that would be owed on 1 percent of the recoverable coal reserves. See 43 C.F.R. §§ 3480.0-5(a)(1), 3483.1(a)(2), 3483.3(a)(2), and 3483.4; Ark Land Co., 132 IBLA 235, 236 (1995); Coastal States Energy Co., 110 IBLA 179, 182 (1989); Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987).

KMF challenges only the estimated unit value ascribed to the coal. Under 43 C.F.R. § 3483.4(c),

[t]he unit value of the recoverable coal reserves for determining the advance royalty payment for a Federal lease or [logical mining unit (LMU)] shall be:

(1) The unit value for production royalty purposes of coal produced and sold under the Federal coal lease or LMU during the immediately preceding production royalty payment period; or

(2) Computed at the average unit price at which coal from other Federal leases in the same region was sold during such period, if no coal was produced and sold under the Federal coal lease or LMU during the immediately preceding royalty payment period, or if the authorized officer finds that there is an insufficient number of such sales to determine such value equitably; or

(3) Determined by the authorized officer, if there were no sales of Federal coal from such region during such period or if the authorized officer finds that there is an insufficient number of such sales to determine such value equitably.

MMS determined the unit value in this case in accordance with 43 C.F.R. § 3483.4(c)(2). MMS utilized sales tonnages and value data from five producing Federal coal leases in Oklahoma for the July 1, 1995, through January 31, 1996, period, to compute the weighted average net unit price per ton. MMS noted that the net unit prices per ton, which ranged from \$22.06 to \$26.90, and the net royalty values reflected approved washing or transportation allowances. Based on this data, MMS calculated the weighted average net unit price as \$25.07 per ton. See Feb. 27, 1996, MMS Memorandum.

KMF disputes MMS' unit value, asserting that its review of the 1995 market price to the three most readily accessible purchasers of its coal indicates that the appropriate unit value is \$18.19 per ton. KMF contends that the AES Shady Point plant, the Oklahoma Gas & Electric plant, and the Public Service Company of Oklahoma plant all utilize or have the ability to utilize Wyoming coal, the adjusted market price for which "ranges from \$21.77 to \$17.27 to \$16.27 per ton for these potential purchasers." (Statement of Reasons at 2.) Although AES also uses high sulfur, surface mined coal from sources in Oklahoma, which the other two plants do not, KMF states that AES' contractual arrangements with the suppliers of this coal are confidential so no market equivalent figures are available for 1995. KMF acknowledges that it sold 4,541 tons of coal in 1995 but argues that the price it received for that coal was based on unique factors and does not represent the average market price for 1995. KMF submits that the average unit value is \$18.19 per ton and that its advance royalty obligation for the first continued operation year is \$57,627.

In response, MMS disputes the relevancy of Wyoming coal prices. ^{4/} It further alleges that it did not rely on KMF's 1995 coal sale to establish value for advance royalty purposes; rather it used sales by other Oklahoma Federal leases providing coal to the AES Shady Point plant, the same plant to which the Red Bank No. 1 mine on KMF's lease provides fuel, to compute the advance royalty for the lease. MMS explains that all unit values utilized to determine the weighted average value properly reflected transportation and washing allowances and that it excluded from the value basis any payments made for the supply of limestone or the removal of ash required by AES' contracts with coal suppliers. MMS insists that, in accordance with 43 C.F.R. § 3483.4, its unit value determination was properly based on average prices of comparable coal sold at the same time in the same market.

KMF, as the party challenging MMS' unit valuation, has the burden of showing that MMS' calculation method is in error. See Seagull Energy Corp., 148 IBLA 300, 309 (1999), and cases cited. KMF has failed to meet that burden in this case. KMF relies solely on the price of Wyoming coal as the foundation for its claim that MMS' unit value is too high. The regulations, however, require that the unit value be "[c]omputed at the average unit price at which coal from other Federal leases in the same region was sold" during the relevant period. 43 C.F.R. § 3483.4(c)(2) (emphasis added). We find that MMS correctly based its unit valuation on the net unit prices per ton for coal from other Oklahoma Federal leases furnishing coal to the AES Shady Point plant. Accordingly, we conclude that BLM properly relied on that figure in its February 21, 1996, decision ordering KMF to pay advance royalties in lieu of production.

^{4/} As stated above, the BLM decision in question assessing advanced royalty was based on the fair market unit value computed by MMS. The appearance in this case by counsel for BLM was for the purpose of providing for the record a document prepared for BLM by MMS in support of its value determination.

Therefore, 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 in IBLA 96-270 is affirmed and the appeal docketed as IBLA 97-480 is dismissed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Burski
Administrative Judge

