

CHEVRON U.S.A. INC.

IBLA 98-19, 98-413

Decided December 18, 2000

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, readjusting the terms of Federal coal lease Nos. WYW-055246 and WYW-075207.

Dismissed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Leases--Rules of Practice:  
Appeals: Standing to Appeal

Where a coal lease readjustment stipulation merely informs the operator/lessee of Federal coal leases that at some time in the future the Department might seek to obtain damages on the basis of royalty that would have been payable on coal bypassed in violation of the operator/lessee's obligation to seek maximum economic recovery, but there is presently no alleged violation of that obligation nor any decision imposing royalty, a dispute does not exist and the case is not ripe for review.

APPEARANCES: John W. Paul, Esq., and Stephen R. Ellinwood, Esq., Englewood, Colorado, for appellant; Lyle K. Rising, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Chevron U.S.A. Inc., c/o The Pittsburg & Midway Coal Mining Company (appellant), has appealed the August 27, 1997, and June 23, 1998, decisions of the Wyoming State Office, Bureau of Land Management (BLM), readjusting the terms and conditions of Federal Coal lease Nos. WYW-055246 and WYW-075207, effective March 1, 1998, and January 2, 1999, respectively. Appellant objects to the inclusion of stipulation 15(e) in the readjusted leases. That stipulation provides:

RESOURCE RECOVERY AND PROTECTION - Notwithstanding the approval of a resource recovery and protection plan (R2P2) by the BLM, lessor reserves the right to seek damages against

the operator/lessee in the event (i) the operator/lessee fails to achieve maximum economic recovery (MER) (as defined at 43 C.F.R. § 3480.0-5(21)) of the recoverable coal reserves or (ii) the operator/lessee is determined to have caused a wasting of recoverable coal reserves. Damages shall be measured on the basis of the royalty that would have been payable on the wasted or unrecovered coal.

The parties recognize that under an approved R2P2, conditions may require a modification by the operator/lessee of that plan. In the event a coalbed or portion thereof is not to be mined or is rendered unmineable by the operation, the operator/lessee shall submit appropriate justification to obtain approval by the authorized officer (AO) to leave such reserves unmined. Upon approval by the AO, such coalbeds or portions thereof shall not be subject to damages as described above. Further, nothing in this section shall prevent the operator/lessee from exercising its right to relinquish all or [a] portion of the lease as authorized by statute and regulation.

In the event the AO determines that the R2P2, as approved, will not attain MER as the result of changed conditions, the AO will give proper notice to the operator/ lessee as required under applicable regulations. The AO will order a modification if necessary, identifying additional reserves to be mined in order to attain MER. Upon a final administrative or judicial ruling upholding such an ordered modification, any reserves left unmined (wasted) under that plan will be subject to damages as described in the first paragraph under this subsection.

Subject to the right of appeal hereinafter set forth, payment of the value of the royalty on such unmined recoverable coal reserves shall become due and payable upon a determination by the AO that the coal reserves have been rendered unmineable or at such time that the operator/lessee has demonstrated an unwillingness to extract the coal.

The BLM may enforce this provision either by issuing a written decision requiring payment of the MMS demand for such royalties, or by issuing a notice of non-compliance. A decision or notice of non-compliance issued by the lessor that payment is due under this stipulation is appealable as allowed by law.

Appellant asserts that the above stipulation authorizes BLM to seek monetary damages for alleged noncompliance with regulatory standards, which would be an arbitrary and capricious exercise of BLM's authority because there is no statutory or regulatory basis for such authority. (Statement of Reasons (SOR) at 2.)

Citing Amax Coal Co., 131 IBLA 324 (1994), appellant acknowledges that BLM's "assertion of a right to collect royalties in a Logical Mining Unit approval document was not a justiciable issue" in that case. (SOR at 4.) Appellant contends, however, that under Crescent Porter Hale Foundation, 108 IBLA 288 (1989), and Ark Land Co., 133 IBLA 31 (1995), a lessee must appeal readjusted lease terms to which it objects or else waives its rights regarding those matters. (SOR at 4.)

BLM asserts that the holding in Amax, *supra*, is clearly dispositive of the instant appeals. (Reply at 2.) The question in Amax was whether BLM has authority to assess royalty for Federal coal leased to the operator that was not mined, in violation of an approved R2P2. At the time Amax was before the Board, no coal had been bypassed in violation of an R2P2 and the Department had not sought to impose royalty on any bypassed coal. We concluded that what the parties sought in Amax was an advisory opinion from the Board on the Department's authority to collect royalty on bypassed coal. We dismissed the appeal for that reason. 131 IBLA at 327-28.

BLM contends, however, that the Board should consider the instant case ripe for decision, not for the reasons cited by appellant but because the Board has upheld the imposition of various stipulations in previous cases "with no evidence before it that there was ever was or would be an actual conflict." (Reply at 3.) BLM further argues that Stipulation 15(e) is a tool to achieve MER and that this tool was developed in response to the Board's decision in Cordero Mining Co., 121 IBLA 314 (1991). (Reply at 4.)

In Cordero Mining Co. we considered a lessee's responsibility for its unauthorized bypass of Federal coal and concluded that BLM lacked authority under the Mineral Leasing Act and its implementing regulations to charge royalty for the bypassed coal. Cordero, the lessee, had bypassed coal when it failed to reach an agreement with the holder of a preexisting oil and gas lease to facilitate removal of a block of coal that would otherwise be left unmined to protect an existing well. Cordero sought BLM's approval of a modified mine plan before bypassing the coal, but bypassed the coal before BLM responded. BLM subsequently sought royalties for the bypassed coal. The Board held that BLM has no statutory or regulatory authority to charge royalty for the coal that would have been recovered but for the bypass, even though the bypass was a clear violation of the regulations and lease terms. <sup>1/</sup>

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<sup>1/</sup> While BLM asserts that, because of factual differences, the Cordero holding is not controlling in the present appeals, BLM nevertheless requests the Board to overrule Cordero because, in its view, under that ruling "an operator may simply abandon or waste coal and never have to pay for it." (Reply at 6.) BLM's characterization of the Board's ruling in Cordero is inaccurate. BLM is correct that Cordero is not applicable here, and we decline to overrule it.

In Cyprus Shoshone Coal Corp., 143 IBLA 308, 324 (1998), we affirmed our ruling in Cordero and listed a number of courses of action available to BLM when coal is bypassed without BLM approval. For example, BLM may issue a notice of noncompliance pursuant to 43 C.F.R. § 3486.3(a) and (b). In the event of the failure of a lessee to comply with a notice of noncompliance, BLM could order the cessation of mining operations or take action to cancel the lease and seek forfeiture of the lease bond. BLM could also ask the Justice Department to institute an action in Federal court on behalf of the United States for waste, seeking recovery of all damages suffered as a result of the bypass. Alternatively, BLM has the authority to increase the bond on the lease subject to the mining plan. We also suggested that when the lease was next readjusted, BLM could add a stipulation to the lease providing that, if bypassed coal is not mined, the lessee would owe royalties on that coal. Id. at 324-25.

[1] As in Amax, supra, the stipulation in this case does not impose any damages on the operator/lessee. It merely provides notice that the operator/lessee is obliged to achieve MER and to avoid wastage. Stipulation 15(e) further provides that in the event of conditions requiring modifications of the R2P2, the operator/lessee must submit justification to the authorized officer for approval or disapproval; that failure to do so may result in the issuance of a notice of noncompliance, or a decision requiring payment "of the MMS demand for such royalties." Stipulation 15(e) fully preserves the right of appeal should the operator/lessee be adversely affected by any BLM action taken under the stipulation. Therefore, the case before us is unlike Crescent Porter Hale Foundation, supra, cited by appellant. <sup>2/</sup> In Crescent, the lessee challenged BLM's authority to readjust a lease, not individual lease terms. We concluded, based on the doctrine of administrative finality, that the lessee waived any objection it might have had to the readjustment by virtue of its failure to timely object to the readjustment. The case before us does not involve the foreclosure of rights by failure to act prior to a deadline. Stipulation 15(e) is a lease adjustment provision which attempts to delineate consequences which would be triggered by certain events. As noted, in the event of such consequences (and the issuance of a BLM decision adverse to the operator/lessee) the right of appeal is preserved.

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<sup>2/</sup> Nor is Ark Land Co., supra, also cited by appellant, pertinent. Ark Land Co. involved a lease stipulation providing that the operator was not to conduct activities within 200 feet of a reservoir. When the operator placed spoil in this buffer zone, BLM issued a notice of noncompliance. Ark appealed, raising as an issue the intent and meaning of the stipulation. The Board found that Ark had accepted the stipulation, whose meaning was clear, when it failed to appeal BLM's decision issuing the lease, and therefore could not appeal the notice of noncompliance with that stipulation and dispute BLM's authority to impose it. Id. at 37. Again, the case now before us is distinguishable in that stipulation 15(e) imposes no adverse effect on appellant. It simply provides notice of such an eventuality, as well as the right of appeal.

In the case before us there is no adverse effect on appellant. There is no dispute between the parties which is ripe for review and any action by the Board to rule on the issue raised would constitute an advisory opinion.

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 appeals are dismissed.

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Will A. Irwin  
Administrative Judge

I concur:

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John H. Kelly  
Acting Chief Administrative Judge

