

LODESTAR ENERGY, INC.

IBLA 98-376, 2000-52

Decided July 31, 2001

Appeals from separate decisions of the Utah State Office, Bureau of Land Management, rejecting logical mining unit application, UTU-73344, and holding that coal leases, U-47974, U-47975, and U-67498 terminated for failure to meet diligent development requirements.

Set aside and remanded.

1. Coal Leases and Permits: Generally

Section 5(b) of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 202a (1994), authorizes the consolidation of coal leases into logical mining units for development when this would facilitate development of the coal reserves in a logical and efficient manner designed to achieve maximum economic recovery and avoid bypassing coal deposits which could not be economically recovered in a subsequent operation.

2. Coal Leases and Permits: Generally

A logical mining unit is defined as an area of contiguous lands under the effective control of a single operator in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of the coal reserves and other resources.

3. Coal Leases and Permits: Generally

Effective control for purposes of a logical mining unit requires that the operator establish the right to enter and mine all recoverable coal reserves. A decision to reject a logical mining unit for lack of effective control of contiguous lands based on the operator's lack of coal rights in a tract of land in which the operator has secured the right to use the surface of the land for coal mining operations will be set aside and remanded when the record does not establish the existence of recoverable coal reserves in the tract.

4. Coal Leases and Permits: Generally

When certain coal leases described in a logical mining unit application are found not to qualify for inclusion in a logical mining unit, rejection of the application as to other leases which may qualify for a logical mining unit without providing a basis for rejection of those leases is arbitrary and capricious and cannot be sustained on appeal.

APPEARANCES: Patricia J. Winmill, Esq., and Elizabeth Kitchens, Esq., Salt Lake City, Utah, for appellant; John W. Steiger, Esq., Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The White Oak Mining & Construction Co., Inc. (White Oak), appealed from a May 19, 1998, decision, as amended May 22, 1998, of the State Director, Utah, Bureau of Land Management (BLM), rejecting its Logical Mining Unit (LMU) application, UTU-73344, and terminating two coal leases, U-47974 and U-47975, for failure to achieve diligent development. This appeal has been docketed as IBLA 98-376.

With a cover letter dated October 25, 1991, Valley Camp of Utah, Inc. (Valley Camp), White Oak's predecessor-in-interest, filed application UTU-73344, <sup>1/</sup> seeking approval of an LMU including public lands in five Federal coal leases (U-17354, U-20305, U-67498, U-47974, and U-47975) and adjoining private lands, totalling approximately 12,000 acres. <sup>2/</sup> Valley Camp estimated that, as of January 1, 1991, the proposed LMU contained over 65.5 million tons of recoverable coal reserves. It asserted:

Combining the various leases covered by this application into one LMU will permit [Valley Camp] to continue coal production in a logical, systematic fashion. We believe that approval of

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<sup>1/</sup> White Oak asserts, on appeal, that the application was filed on Oct. 25, 1991. (Statement of Reasons for Appeal (SOR) at 2.) However, BLM contends in its answer that Nov. 6, 1991, is the correct filing date, because that is when the application was filed in the "correct office of the BLM." (Answer at 1; Letter to BLM from White Oak, dated Aug. 15, 1996, at 2.) It appears from the case file that the application was initially mailed to the Moab District Office of BLM and subsequently forwarded to the State Office for adjudication.

<sup>2/</sup> Valley Camp excluded from the LMU application part of the public lands subject to Federal coal lease U-20305 which was separated by a fault line and contained in a different pending LMU application. The portion of lease U-20305 contained in the Valley Camp LMU application was later segregated into a new lease (UTU-70018), effective June 30, 1993. (Exhibit A to Letter of Sept. 5, 1997, from counsel for Valley Camp to BLM; 43 CFR 3487.1(f)(3).)

this LMU will maximize coal recovery from the various [F]ederal coal leases.

(Letter to BLM, dated Oct. 25, 1991.)

The subject Federal leases encompassed contiguous public lands in two discrete blocks. Leases U-70018, U-17354, and U-67498 form one contiguous block of public lands in Ts. 13 and 14 S., R. 6 E., and Ts. 13 and 14 S., R. 7 E., Salt Lake Meridian, Utah. Public lands in Federal leases U-47974 and U-47975 are located in another contiguous block to the north and east of the first block. (Map 1 and Map 2 (updated Sept. 5, 1997) submitted in support of the LMU application.) These blocks are linked by several tracts of non-Federal lands. Appellant holds both the coal rights and the surface rights in most of the non-Federal tracts, but the Federal lease blocks and associated non-Federal lands in which appellant holds the coal development rights are physically separated by a tract in which BLM found that appellant held the surface rights and not the coal rights.

The May 1998 BLM decisions appealed in IBLA 98-376 held that for an LMU application to be approved under the relevant regulations the applicant must have effective control over all lands in the application and such lands must be contiguous. (May 19, 1998, BLM Decision at 1.) Further, BLM found White Oak did not establish that it had control of the subsurface coal held by Canyon Fuel Company in a tract of land bridging the gap between the otherwise disconnected blocks of lands encompassing applicant's Federal coal leases and fee tracts controlled by applicant as shown on Map 1 delineating the effective control of the lands in the original application. Id. at 2. Accordingly, the application was rejected by BLM.

Finding that lands in the LMU application determined not to be contiguous included Federal coal leases U-47974 and U-47975, BLM noted these leases issued effective December 1, 1981. Because coal leases issued subsequent to August 4, 1976, shall be terminated if the lessee does not meet diligent development requirements for production of coal within 10 years and production had not occurred on these leases, BLM held these requirements were not met for the leases and, consequently, they terminated effective December 1, 1991. Id.

The amended BLM decision of May 22, 1998, clarified the basis for finding that White Oak lacked title to the coal resources in issue. The latter decision rejected the evidence filed by White Oak in support of its contention that the letter agreement of July 27, 1989, between Coastal States Energy Company (Canyon Fuel's predecessor-in-interest) and Valley Camp (White Oak's predecessor) granted the applicant effective control of the coal resources in certain lands within the LMU application in which White Oak held the surface interest. 3/ Having granted White Oak 30 days

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3/ The lands specifically cited by BLM included sec. 13, E1/2, in T. 13 S., R. 6 E., and sec. 17, S1/2SW1/4; sec. 18, S1/2S1/2; and sec. 19, NW1/4NE1/4, NE1/4NW1/4, in T. 13 S., R. 7 E., Salt Lake Meridian. These lands are shown as "Applicant surface rights-Canyon Fuel coal rights" and colored maroon on Map 1 and Map 2 (updated Sept. 5, 1997) submitted in support of the LMU application.

to provide acknowledgment from Canyon Fuel that White Oak held the right to develop the coal resources in the lands, BLM rejected White Oak's evidence that it had been granted effective control of the coal resource in the lands, noting that the letter filed with BLM acknowledged that Canyon Fuel and White Oak were still in negotiations. <sup>4/</sup> As a result, BLM found that the lands within the LMU over which White Oak had effective control are not contiguous, thus disqualifying them from inclusion in a single LMU.

By Joint Stipulation filed with the Board on July 13, 1998, counsel for White Oak and counsel for BLM requested a stay of the effect of the BLM decision pending administrative review. A stay was granted by Order of the Board dated July 23, 1998.

During the pendency of this appeal, Lodestar Energy, Inc.(Lodestar), successor-in-interest to White Oak, brought an appeal (docketed as IBLA 2000-52) from a related decision of BLM dated October 12, 1999. The latter decision held that another lease (U-67498) embraced in the rejected LMU application terminated January 1, 1994, for failure of the lessee to meet diligent development requirements. <sup>5/</sup> Appellant indicates that the October 12, 1999, decision was the first indication it had from BLM that rejection of the LMU application because of lack of contiguity with respect to leases U-47974 and U-47975, which were separated from the other Federal leases by the tract in which appellant had the surface title, would be considered to be a rejection of the LMU as to the other leases, including U-67498, for which contiguity was not an issue. The BLM decision acknowledged that two other Federal leases (U-17354 and U-70018) had met their diligent development requirements.

In an Order dated February 22, 2000, we granted the motions of Lodestar to consolidate these two appeals for purposes of review. We also granted a motion to substitute Lodestar as the appellant in these cases.

In the statement of reasons for appeal (SOR) from the May 1998 BLM decisions rejecting the LMU application, appellant contends that the criteria for approval of an LMU requires that all "lands" in the LMU shall be under the effective control of a single operator/lessee, but that the statute and regulations do not require that the proponent hold the coal development rights in all of the contiguous lands. Appellant argues that BLM errs by interpreting the statute and regulations to require effective control of the coal resources in the LMU lands. Further, appellant contends it has shown that it has effective control of the coal resources, citing a July 27, 1989, letter agreement in which Coastal States Energy Company agreed to act to preserve the rights of appellant's predecessor- in-interest in the lands at issue. Appellant asserts that BLM errs in

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<sup>4/</sup> The May 22, 1998, BLM decision also denied appellant's request for a further extension of 30 days in which to complete its negotiation of a lease of the coal in the lands at issue.

<sup>5/</sup> This finding was expressly conditioned upon the assumption that the BLM decision rejecting the LMU is affirmed upon appeal.

limiting the meaning of the term effective control to the owner or lessee of the coal.

Additionally, appellant contends that if the Board upholds the BLM decision requiring appellant to establish control of the coal resource in the LMU lands and finding that the 1989 agreement to preserve appellant's rights to be insufficient to establish control, the Board should reverse BLM's refusal to grant a 30-day extension to allow appellant "to effectuate its control" over the coal. Finally, appellant argues that BLM prejudiced it by delaying adjudication of the LMU application from the time it was filed in October 1991 to May 1998 after the deadline for diligent development of the leases U-47974 and U-47975 had passed. It is contended that BLM's unreasonable delay caused the expiration of the diligent development period and the resulting termination of the leases, constituting a taking of property for which BLM should be directed to compensate appellant.

An answer to the SOR has been filed by BLM. The definition of an LMU, BLM notes, is an area of land in which the recoverable coal reserves can be developed in an efficient, economical, and orderly manner with due regard to conservation of the coal reserves and other resources. Citing the response to comments regarding the criteria for determining effective control found in the preamble to the regulations, BLM notes that the rule makers called for legal documentation conferring the right to enter and extract recoverable coal reserves from lands in the LMU. Further, BLM asserts that while rights in the surface of the land such as a right-of-way may not disrupt the contiguity of tracts in which the coal reserves are effectively controlled, a right-of-way may not be used to establish contiguity between non-contiguous coal leases, citing BLM's Logical Mining Unit Application and Processing Guidelines. 50 FR 35145 (August 29, 1985). Additionally, BLM argues that appellant can claim no prejudice or taking of property based on the delay in adjudication of the LMU application when it was not filed with BLM until the month prior to the end of the due diligence period for leases U-47974 and U-47975.

In a reply brief, appellant contends that the BLM decision and answer ignore the evidence in the record that appellant is using the surface estate of the lands in issue for coal mining purposes and that any coal underlying the surface estate is unrecoverable. Appellant also cites language from the preamble to the promulgation of the final regulations to the effect that if the land contains no recoverable coal the right to use the surface for coal mining purposes constitutes effective control. 44 FR 33177 (July 30, 1982.)<sup>6/</sup> Appellant contends that the Resource Recovery and Protection Plan (R2P2) submitted to BLM in 1984 and updated

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<sup>6/</sup> These regulations were initially promulgated by Minerals Management Service (MMS). Responsibility for all MMS onshore minerals management functions (other than royalty) was subsequently transferred to BLM. Secretarial Order No. 3087, 48 FR 8983 (Mar. 2, 1983).

in 1991 <sup>7/</sup> confirms that the coal underlying the bridge area is not recoverable. Further, appellant contends that it currently uses these surface lands for its load out facility and its general mine offices. Additionally, appellant argues in its reply that under the regulations in effect at the time the application was filed BLM was required, except for good cause, to approve an LMU if it met the relevant criteria. To the extent that revised regulations promulgated since the application was filed grant BLM more discretion to reject an LMU application, appellant asserts in its reply that these regulations cannot be given retroactive effect to deny the previously-filed application.

In the SOR filed in response to the October 12, 1999, decision of BLM, appellant notes that approval of the LMU application as of the date filed would preclude termination of lease U-67498 since production from lease U-17354 which was also included in the application would have held all leases included in the application under the regulations at 43 CFR 3483.6. Appellant contends that even if rejection of the LMU application is upheld on the grounds of lack of contiguity as to leases U-47974 and U-47975, this cannot justify rejection of the application as to the clearly contiguous parcels. Asserting that formation of an LMU is designed to achieve MER of Federal coal by promoting a logical mining sequence based on the coal deposit without regard to individual lease boundaries, appellant argues that suitability of lands for inclusion in an LMU must be analyzed on a lease by lease basis and that rejection of the LMU as to the clearly contiguous leases including U-67498 without such an analysis is inconsistent with the relevant regulations.

In its answer, BLM asserts that nothing in the regulations requires BLM to adjudicate an LMU embracing a part of the lands applied for when it finds that some of the parcels do not qualify for inclusion in an LMU. Rather, BLM contends that the regulations grant BLM the discretion to reject an LMU application even when all of the criteria are met. Further, BLM argues that it should not be required to consider an LMU embracing a portion of the lands because this may not be consistent with the intent of the applicant and BLM "may have other priorities demanding the attention of the pertinent staff." (Answer in IBLA 2000-52 at 3.) In response to appellant's reply in IBLA 98-376, BLM contends that the record (Map 1 and Map 2 in support of the LMU application) discloses that the lands over which appellant lacked control of the coal resource separating the two Federal lease blocks included more than those tracts specifically identified in the BLM decision (colored in maroon on the maps). Referring to

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<sup>7/</sup> An R2P2 is required to be submitted to BLM prior to any development or mining operations on Federal coal leases. 43 CFR 3482.1(b). An R2P2 is also required for an LMU. 43 CFR 3487.1(e)(1). The R2P2 requires the operator to provide detailed information regarding the method and sequence of mining proposed, the recoverable coal reserves on all lands, maps showing coal outcrops (including dip and strike) on all tracts, and an explanation of how maximum economic recovery (MER) of the coal will be achieved, and justification for any coal bed or portion thereof which is not to be mined. 43 CFR 3482.1(b).

tracts colored in green on the maps, BLM notes that appellant indicates control of the coal reserves in these lands was acquired in 1993, after the LMU application was filed. Further, BLM contends that the record does not support a finding that these lands do not include coal reserves as the coal outcrop is shown by the maps to exist on these lands.

In a reply brief, appellant asserts that the discretion vested in BLM in adjudicating an LMU application under the revised regulations (1997) will not support rejection of an application as to lands in Federal coal leases which are clearly contiguous and under the effective control of the lessee/operator as such a decision is unreasonable and arbitrary. Further, appellant contends that both the regulations and the BLM Guidelines for processing LMU applications contemplate a lease by lease analysis to determine whether each lease satisfies the LMU criteria.

With regard to the existence of recoverable coal reserves in the bridge tract, appellant argues that BLM should not be allowed to assert the presence of coal reserves on appeal because BLM did not previously challenge its predecessor's contentions that the lands were non coal-bearing. Appellant contends that any coal in these lands is not recoverable and hence they were not included in the R2P2, citing Letter of March 12, 1998, to BLM, Ex. B to SOR in IBLA 98-376. Appellant has provided an affidavit by a mining engineer employed as business manager for appellant's White Oak No. 1 and No. 2 Mines in which he explains that the minable coal seams lie west and east of the bridge tract, as reflected by the outcrop of the coal seams, and that the bridge tract consists of canyon and valley lands from which the coal eroded away long ago. (Affidavit of David B. Miller attached to appellant's reply.) Thus, no known coal reserves exist within the valley area comprising the bridge tract. Id. The affidavit is supported by a detailed topographic map (Map 200a) submitted in support of appellants mining and reclamation permit application which shows the location of the coal outcrops in relation to the bridge tract with greater clarity than other maps in the record. (Attachment 1 to appellant's reply.) With regard to the additional tract colored in green on Map 1 and Map 2, appellant indicates that while its deed to the coal resources was dated 1993, the coal interest was previously held by Valley Camp, its predecessor-in-interest, which initially filed the LMU application.

Accordingly, two fundamental issues are raised by these appeals. The appeal in IBLA 2000-52 presents the question whether an LMU application is properly rejected as to contiguous lands in Federal coal leases under the effective control of the applicant which would otherwise qualify for inclusion in an LMU when the application also includes noncontiguous coal leases separated by a tract in which the applicant is found not to have effective control of the coal rights. The critical issue in the other appeal, IBLA 98-376, is whether an LMU application is properly rejected as to applicant's coal leases which are separated from the contiguous coal leases on which the applicant operates a coal mine by a tract lacking recoverable coal reserves in which the applicant has the right to and does use the surface for coal mining purposes.

[1] An understanding of the issues is aided by recognition that the problems of widespread holdings of Federal coal leases which were acquired for speculative purposes but not developed were addressed by Congress with passage of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. See Atlantic Richfield Co., 112 IBLA 115, 116-17 (1989). Section 6 of FCLAA, 90 Stat. 1087, provides diligent development requirements and specifies that any coal lease "which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. § 207(a) (1994). Statutory language in FCLAA also encouraged coal development in a logical and efficient manner designed to promote MER and avoid mining operations which isolated or bypassed deposits which could not be economically recovered subsequently. Thus, Section 5(b) of FCLAA, 90 Stat. 1086, provides that the Secretary of the Interior may approve the consolidation of Federal coal leases into a "logical mining unit" upon determining that the "maximum economic recovery of the underlying coal deposit or deposits is served thereby." 30 U.S.C. § 202a(1) (1994). Approval of an LMU has the consequence that diligent development anywhere within the LMU is deemed diligent development on the Federal coal leases included in the LMU. 30 U.S.C. § 202a(3) (1994); 43 CFR 3483.1(c) and 3483.6(a).

[2, 3] An LMU is defined by statute as

an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources. [It] may consist of one or more Federal leaseholds, and may include intervening or adjacent lands in which the United States does not own the coal resources, but all the lands in a logical mining unit must be under the effective control of a single operator, be able to be developed and operated as a single operation and be contiguous.

30 U.S.C. § 202a(1) (1994) (Emphasis added.) In order to qualify for approval, a proposed LMU must meet the definition set forth at 43 CFR 3480.0-5(a)(19) which essentially mirrors the statutory definition. 43 CFR 3487.1(f). <sup>8/</sup> In response to comments in the rulemaking regarding the requirement of "effective control," MMS (BLM's predecessor in administering these regulations) indicated "[t]he rules of this Part are intended to require the operator/lessee to demonstrate his right to enter and mine all recoverable coal reserves contained in the proposed LMU." 47 FR 33177 (July 30, 1982). Further, the preamble stated that:

Legal documentation conferring upon the operator/lessee the right to enter and extract recoverable coal reserves from the proposed LMU, or if the land contains no coal, to use the surface for coal mining purposes, constitutes effective

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<sup>8/</sup> A similar requirement is found in the former regulations. 43 CFR 3487.1(f)(1) (1996). The Department amended existing regulations concerning the approval of LMU applications (43 CFR Subpart 3487), effective Sept. 19, 1997. 62 FR 44353, 44370-71 (Aug. 20, 1997).

control. The determination of sufficient property interest for establishment of effective control will be made on a case-by-case basis.

Id. Similarly, the preamble to the Logical Mining Unit Application and Processing Guidelines noted that the requirement for effective control "ensures that all recoverable coal reserves within the LMU can be mined." 50 FR 35146 (August 29, 1985). Thus, it appears that effective control may be established when the applicant has the right to use the surface estate for coal mining purposes if there is no economically recoverable coal within the tract.

The May 1998 BLM decisions rejected the LMU application because appellant had not established that it had effective control of the coal reserves in the bridge lands separating the block of tracts containing Federal coal leases U-70018, U-17354, and U-67498 and the block of lands containing Federal coal leases U-47974 and U-47975. Appellant has tendered evidence of the lack of recoverable coal reserves within the bridge lands. The mining engineer and Business Manager with responsibility for the White Oak No. 1 and No. 2 Mines has submitted an affidavit to this effect. This affidavit is supported by reference to Map 200a, a topographic map of the mine area which shows the coal outcrops. The map reveals that the bridge lands occupy a canyon and valley and are crossed by a road leading from the Belina or White Oak Mine to the mine offices and the coal loadout facility. The location of the coal outcrops shown on this map appears to support appellant's contention that the bridge lands lack recoverable coal reserves. The R2P2 which might help to further clarify the location of recoverable coal deposits has not been provided by BLM as part of the administrative record. Thus, the apparent lack of such reserves within the bridge tract does not support the reason given by the BLM decision to reject the LMU application.

It appears from the record that coal deposit proposed for mining on leases U-47974 and U-47975 is discrete from and separated by a valley or canyon approximately a mile wide from the coal deposit on leases U-70018, U-17354, and U-67498 which is currently being mined. A different mine, the Utah No. 3, will be used to develop the deposit found on leases U-47974 and U-47975. (LMU Application at 5 and as updated at Ex. A attached to Letter of Denise Dragoo, counsel for appellant, to BLM, dated September 5, 1997). Thus, appellant's lack of ownership of the coal estate in the bridge lands is not disqualifying and the BLM decision rejecting the LMU application on this basis must be set aside.

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(fn. 8 continued)

Appellant argues that BLM errs to the extent it applies the regulations as amended in 1997 to support its decision to reject the LMU application, since the earlier regulations provided that BLM "shall" approve an LMU application that meets the relevant criteria except for good cause stated in a BLM decision. 43 CFR 3487.1(f) (1996). We find no prejudice in application of the revised regulations as applicants have always been required to establish that the LMU qualifies under the statutory and regulatory definition (which has not changed) and any exercise of discretion to reject an LMU application under the new regulations still requires a rational basis which constitutes good cause for rejection.

The mile-wide gap between the distinct coal reserves in the two lease blocks raises the issue that these are two large and entirely discontinuous coal deposits even though they involve the same formation. All lands in an LMU must be susceptible to development and be operated as a single operation. 43 CFR 3480.0-5(a)(19). In determining whether the proposed LMU will facilitate development of the coal reserves in an efficient, economical, and orderly manner as required by definition to establish an LMU, 43 CFR 3480.0-5(a)(19), BLM may consider the potential for inclusion of the leases in question in another LMU. 43 CFR 3487.1(f)(ii)(B). As this issue has neither been adjudicated by BLM nor argued by the parties on appeal, we set aside the May 1998 BLM decisions and remand the LMU application (IBLA 98-376) for further consideration.

[4] The remaining issue presented by the appeal in IBLA 2000-52 is whether, assuming that the LMU application is rejected for some of the lands applied for, the LMU is properly rejected as to other Federal coal leases which may be appropriate for inclusion in an LMU. The purpose of LMU's is to promote MER generally, and to ensure "coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources." Even when rejection of an LMU application as to certain tracts is appropriate, application of that same rationale to reject the LMU as to other lands clearly contiguous to a producing Federal coal lease and embracing a continuous deposit under the effective control of the same operator would be unsupported by a rational basis and thus arbitrary and capricious. Such an "all or nothing" approach to adjudication of an LMU application cannot be sustained. Thus, in the guidelines for adjudication of LMU applications BLM noted that: "If any conditions exist that cause the land in the proposed LMU to not constitute a single operation, the proposed LMU must be reconfigured so that the LMU would constitute a single operation. Otherwise, the LMU cannot be approved." 50 FR 35149 (August 29, 1985). Accordingly, the October 1999 decision terminating lease U-67498 for failure to achieve diligent development based on rejection of the LMU application is set aside and remanded as premature. In further considering the LMU application on remand, if BLM finds that all of the Federal leases do not qualify for inclusion in an LMU, then it must consider whether those leases contiguous to the White Oak Mine should be included in an LMU.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases are remanded to BLM for further consideration.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

