

CARBON TECH FUELS, INC.

IBLA 2001-114

Decided April 13, 2004

Appeal from a decision of the Eastern States Office, Bureau of Land Management, denying an extension of a previously granted suspension of operations and production, denying a force majeure suspension of operations, and terminating logical mining unit KYES 47411 and Federal coal lease KYES 31464.

Affirmed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Diligence--Coal Leases and Permits: Termination

Sec. 7(a) of the Mineral Leasing Act, as amended by sec. 6(a) of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (2000), requires the termination of any Federal coal lease that has not produced “commercial quantities” of coal (defined as 1 percent of recoverable coal reserves) at the end of 10 years. Sec. 2(d) of the Mineral Leasing Act, as amended by sec. 5(b) of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 202a (2000), 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 or avoid bypassing coal deposits which could not be economically recovered in a subsequent operation.

2. Coal Leases and Permits: Suspension of Operations and Production--Mineral Leasing Act: Generally

A suspension of operations and production granted under sec. 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (2000), “in the interest of conservation” suspends

the requirement of sec. 7(a) and (b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 207(a) and (b) (2000), that diligent development of the lease occur within 10 years of the date of issuance of a Federal coal lease. A BLM decision denying an extension of a previously granted suspension of operations and production and a force majeure suspension will be affirmed where the lessee has not shown error in that decision. BLM properly refuses to grant a second suspension of operations and production in the interest of conservation where the applicant does not show how the suspension would further the interests of conservation.

3. Coal Leases and Permits: Generally--Coal Leases and Permits: Diligence

A BLM decision terminating a logical mining unit containing one Federal coal lease and one private tract and terminating the included Federal lease for failure to meet diligent development obligations will be affirmed where BLM has not credited pre-LMU production from the private tract to the LMU diligence requirement, and the lessee has not shown that this decision was an abuse of BLM's discretion.

APPEARANCES: Lawrence G. McBride, Esq., Washington, D.C., for appellant; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Carbon Tech Fuels, Inc. (Carbon Tech), appeals from an August 21, 2000, decision of the Eastern States Office, Bureau of Land Management (BLM), denying its request for an extension of a previously granted suspension of operations and production (SOP) and diligent development period and denying its alternative request for a 12-month force majeure suspension. The decision also terminated logical mining unit (LMU) KYES 47411 and Federal coal lease KYES 31464 for failure to meet requirements for diligent development.

The record indicates that, in 1982, Hot Rocks Coal Company, Inc. (Hot Rocks), submitted to BLM an undated application to lease Federal coal within the Daniel Boone National Forest, in Leslie County, Kentucky. In October 1983, Hot

Rocks applied for an “emergency bypass” lease, noting that it was mining coal by underground methods on a private parcel known as the Gilbert tract, that its mining operation was “progressing toward the [Forest Service] properties at a steady rate,” and that, without a lease, mining would cease at the private/Federal boundary and the only access point to the Federal coal would be abandoned. (Oct. 18, 1983, letter from Hot Rocks to BLM, seeking emergency bypass lease.)

BLM undertook an analysis of the subject Federal parcel, identifying it as the Bear Branch tract, for purposes of determining whether to offer the tract for leasing. BLM’s mineral examination concluded that the tract contained approximately 2,230,000 tons of recoverable coal that could be mined in 7.1 years at 312,500 tons annually. (Oct. 23, 1984, memorandum from District Manager to State Director, attachment.) BLM issued the tract for competitive lease bid and Hot Rocks was the only bidder.

On July 3, 1985, BLM issued to Hot Rocks Federal coal lease KYES 31464, for 831 acres located in the Daniel Boone National Forest. The lease was effective July 1, 1985. In accordance with section 7(a) of the Mineral Leasing Act, as amended by section 6(a) of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (2000), section 4 of the lease provided that the lease was subject to the conditions of diligent development and continued operation and that the lessee’s failure to produce coal in commercial quantities at the end of 10 years would terminate the lease. Section 4 also required the lessee to submit an operations and reclamation plan within 3 years of lease issuance. (Lease KYES 31464 at section 4.)

By the end of the 1986 calendar year, Hot Rocks ceased mining on the private Gilbert tract, production on which formed the basis for Hot Rock’s asserted need for an emergency bypass lease. It appears from the record that production has never resumed on the Gilbert tract. Despite the lease’s requirement that the lessee submit an operations plan within 3 years, Hot Rocks did not timely do so. Hot Rocks finally submitted such a plan in April 1992, after BLM twice threatened lease termination for failure to comply with that requirement of the lease. (Jan. 7, 1991, and Feb. 25, 1992, letters from BLM to Hot Rocks, demanding Resource Recovery and Protection Plan (R2P2) pursuant to BLM regulations at 43 CFR 3482.1.) To date, no coal has been mined from the Federal lease.

On May 11, 1995, Hot Rocks signed an assignment of the lease to Carbon Tech. Neither party submitted a request for approval of the assignment to BLM until Aug. 8, 1995. See Aug. 8, 1995, letter request for approval of lease assignment dated May 11, 1995.

On June 30, 1995, one day before the expiration of the 10-year diligent development period for the lease, Hot Rocks, as lessee, and Carbon Tech, as would-be assignee of the Federal lease, jointly filed an application for approval of the formation of an LMU comprised of Federal coal lease KYES 31464 and the private Gilbert tract. The application stated that development of the Federal lease in conjunction with the Gilbert tract had always been contemplated since the Federal coal could only be mined through underground mine workings initiated on the private tract. (June 30, 1995, cover letter to LMU application (June 30, 1995, letter) at 1.) The cover letter noted that, after issuance of the Federal lease in 1985, Hot Rocks had obtained a permit for and opened its Mine No. 1 (renamed by Carbon Tech as the Sweetwater Mine) on the Gilbert tract. *Id.*<sup>1/</sup> The letter asserted that between 1985 and 1988 Hot Rocks had produced about 39,000 tons of coal from the Hazard No. 4 seam, the seam also containing the recoverable leased Federal coal reserves. (June 30, 1995, letter at 1, 2.) The LMU application set forth a proposed mining plan and asserted that the lessee anticipated mining 2,850,000 tons of coal from the unit. (1995 LMU Application at 34, 36.) Elsewhere, the LMU application asserted that 2,850,000 tons of recoverable reserves were located on the Federal tract, with an additional 362,000 tons “on the private tract recoverable for a total of some 3,212,000 tons.” *Id.* at 4. Asserting that they had mined 39,000 tons from the Gilbert tract, the applicants alleged that they had produced 1% of the coal from the unit. *Id.*

This mathematical calculation was key to the LMU application. The applicants requested that

the production from Hots Rocks’ Mine No. 1 (from the Gilbert tract) during the life of federal coal lease KYES 31464 be credited to the LMU diligence obligations as of the effective date of LMU approval. As indicated above and as reflected in the lease file, the opening and operation of Hot Rocks Mine No. 1 was undertaken with both the intention and the long-term economic justification of mining the federal lease reserves as the logical continuation of the operation initiated on the Gilbert tract. Operations never reached the federal lease boundary, however, so there has been no production from the federal lease. Without this crediting of the non-federal production from the mine, the federal lease would be subject to termination, after June 30, 1995, for

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<sup>1/</sup> This letter conflicts with assertions Hot Rocks had made in order to obtain an emergency bypass, specifically that its mining operation on the Gilbert tract was already “progressing toward the [Bear Branch tract] at a steady rate.” (Oct. 18, 1983, letter from Hot Rocks to BLM.) In other documents, Carbon Tech asserts that mining operations took place from 1984-86. (Apr. 29, 1998, Request for Suspension of Operations and Productions for Federal coal lease KYES 31464 at 9.)



lack of production prior to the end of the tenth lease year. This LMU application is filed on the basis that it is appropriate under these circumstances and consistent with the Bureau's LMU regulations and guidelines to credit this mine production against the diligence obligations of the federal lease, as of the effective date of LMU approval. \* \* \*

With the crediting of this production from within the mine unit, LMU production will have exceeded 1% of the LMU recoverable coal reserves prior to the end of the tenth year of federal lease KYES 31464. Thus, as of the effective date of LMU approval the LMU will be entering its first continued operation year. \* \* \* While production is not occurring from Mine No. 1 right now, barring unforeseen permitting delays production could begin within a month or two, and Hot Rocks and Carbon Tech are confident that they will produce more than 1% of the LMU recoverable coal reserves within this continued operation year. Of course, if there are further delays in permitting (and those delays do not themselves justify a force majeure or "section 39" suspension of LMU operations and production requirements), then Carbon Tech will be prepared to apply for and pay advance royalties for this continued operation year consistent with 43 CFR 3483.4(b).

(June 30, 1995, letter at 2-3 (emphasis added).)

Notably, however, Carbon Tech subsequently amended several important facts asserted in the 1995 letter. First, Carbon Tech noted that the production from Mine No. 1 had ceased "around the end of 1986," instead of 1988. Second, it asserted that Hot Rocks had produced only 18,471 tons of coal which allegedly could be attributed to the LMU. (Carbon Tech Statement of Reasons (SOR) at 4, citing R2P2 Modification, Sept. 25, 1996, at 8.) According to the SOR, other tonnage, apparently a part of the originally cited 39,000 tons, was "mined from another, earlier entry driven on the adjacent private tract prior to the effective date of the federal Lease." (SOR at 4 n.1.)

Nonetheless, the record reveals that the question of whether pre-LMU production from the private tract could be credited towards LMU diligence requirements was a matter of some debate within BLM. Immediately after the LMU application was filed in July 1995, the Assistant District Manager for Mineral Resources, Jackson District Office, BLM, recommended its disapproval: "There is no implicit or explicit authority to allow production, which occurred on fee land prior to the LMU formulation, to be credited toward diligent development." (July 26, 1995, memorandum, from Assistant District Manager, Mineral Resources, Jackson District

Office, BLM, to the State Director, Eastern States Office, BLM, at 2.) Subsequently, in January of 1996, the State Director of Eastern States, BLM, recommended approval of the LMU. Without expressly stating whether pre-LMU private production should be credited to the LMU, the State Director acknowledged the issue and made clear that it should not be an impediment to approval of the unit. “Although the regulations set forth at 43 CFR 3487.1 do not specifically address situations of this type (i.e., pre-LMU private coal production’s being credited to Federal LMU diligence obligations), we found nothing to indicate that approval of such an LMU would be in violation of any of the provisions of this section.” (Jan. 25, 1996, memorandum from the State Director, Eastern States Office, BLM, to the Director, BLM, at 1.)

Despite the State Director’s recommendation that the application be decided immediately, BLM did not formally rule on the application; nor did it address the “crediting” issue. Accordingly, on April 29, 1998, Hot Rocks and Carbon Tech jointly filed a request for an SOP for Federal coal lease KYES 31464. See Apr. 29, 1998, Request for Suspension of Operations and Productions for Federal coal lease KYES 31464 (1998 SOP Request). In doing so, they explained that the SOP was requested because of BLM’s failure to credit the Gilbert tract production to the proposed LMU. “[BLM] advised us informally that BLM either would not or could not, for reasons not fully explained to us, credit the pre-LMU-formation production from the non-federal tract against the LMU diligent development obligation.” Id. at 2. Hot Rocks and Carbon Tech added: “We continue to disagree with your position that you will not or cannot credit that production, and preserve our rights to seek review of that dispute should it remain material.” Id. Nonetheless, Hot Rocks and Carbon Tech sought suspensions for two separate periods.

The first period was a 13-month portion of the original lease term from August 18, 1988, through September 19, 1989, when Hot Rocks had been prevented from exercising lease rights while it responded to an assertion by the Office of Surface Mining Reclamation and Enforcement (OSM) that Hot Rocks needed a permit to use a haul road over Forest Service land. (1998 SOP Request at 4.)<sup>2/</sup> The second period was the time during which BLM was considering the LMU application. Id. at 10. According to the SOP request, granting the suspension would give Hot Rocks and/or Carbon Tech 13 months from the date of the approval of both the SOP request and the LMU application in which to produce commercial quantities of coal from the LMU reserves and preserve the Federal coal lease’s life through the continued operation years. Id. at 1. The applicants asserted that this time would be

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<sup>2/</sup> The record also indicates that Hot Rocks was cited for mining violations by OSM during the last half of the 1980s, and that these citations may have directly corresponded to Hot Rocks’ lack of mining during particular periods. (1998 SOP Application at Ex. 5, 13, 14.)

sufficient in which to resume production and produce 1% of LMU coal. “That thirteen-month period \* \* \* should be sufficient to enable Carbon Tech to initiate operations under the approved LMU, and to produce the requisite 1% of LMU reserves by the end of the suspension-adjusted ten-year diligent development period for the LMU.” (1998 SOP Request at 5.)

On March 19, 1999, BLM approved both the LMU (KYES 47411) and the SOP. BLM combined its decision on the LMU application with its consideration of the SOP request, and concluded that the LMU could be approved as a consequence of the fact that the SOP should be granted. Ruling that the diligent development period remained open permitted BLM to grant the LMU without crediting pre-LMU production from the Gilbert tract to the LMU.

Addressing the LMU, BLM found that “combining the identified Federal and non-Federal resources into an LMU would promote the efficient, orderly and economical development of the coal resource; would encourage the maximum economic recovery of the coal resource; and [would] promote conservation of the coal reserves and other resources.” (Mar. 19, 1999, decision at 1.) BLM approved the LMU retroactively effective June 30, 1995.

Turning to the SOP, BLM approved both suspension periods requested by the applications. BLM approved a suspension for the period between the filing of the LMU application and the approval of the LMU because that period represented an administrative delay beyond the control of the lessee and because granting the suspension was in the interest of conservation in accordance with 43 CFR 3483.3(b). BLM also approved the SOP for the 13-month period during the initial term of the lease, finding that

[d]uring this period the lessee was prevented from using a surface haul road crossing United States Forest Service (USFS) land, until approval was obtained from [OSM]. The road had previously been used by approval from USFS. The haul road crossed USFS land and there was confusion as to the responsible regulatory authority.

(Mar. 19, 1999, decision at 2.) BLM concluded that approval of both suspensions was in the interest of conservation and the public interest since there was limited access to the Federal coal reserves and the applicant controlled private lands offering access. *Id.* As a result, BLM extended the term of Federal coal lease KYES 31464 to

the date of LMU approval and also for an additional 13 months from the date of the decision. Id.<sup>3/</sup>

On July 20, 1999, BLM issued an amended decision to Carbon Tech clarifying the effect of the March 19, 1999, decision on the terms and conditions of Federal coal lease KYES 31464.

Diligent Development: The subject decision became final 30 days from receipt since there was no appeal. The decision was received during the month of March 1999. Adding 30 days from receipt makes the decision final sometime in late April 1999. The diligent development period should end the last day of a month for simplification; therefore, the 13-month extended diligent development period expires on May 31, 2000. The lessee is required to mine one per cent of the recoverable reserves in LMU 47411, which is 17,590 tons, before June 1, 2000.

(Amended Decision at 1.) The source for the figure of 17,590 tons is absent from the record.

By the end of May 2000, Carbon Tech had not initiated production. The record reveals, and Carbon Tech argues, that the reason for its failure to reopen production on the Gilbert tract, which had at that juncture remained closed for almost 14 years, was that the price of coal had declined.

On May 26, 2000, Carbon Tech submitted a “Request for Force Majeure Suspension, or Extension of the presently granted Suspension of Operations and Production and Diligent Development Period, or both.” (2000 Suspension Request (emphasis in original).) Carbon Tech explained that, although it had tried to bring the project into production within the time frame granted by the 1999 SOP, low coal prices beyond its control had made it imprudent to bring the Sweetwater Mine into production under the mining and processing methods anticipated at the beginning of the 13-month extended diligent development period. Carbon Tech averred that conservation of the leased Federal coal resources, the broad public interest, and the interests of the local economy and people all justified a further extension of the diligent development period.

According to Carbon Tech, in light of the poor market conditions, it needed extra time to make the changes required for on-site coal processing, especially the

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<sup>3/</sup> On April 26, 1999, BLM issued a decision approving the assignment of the lease from Hot Rocks to Carbon Tech. This decision was effective May 1, 1999.

permit revision needed to locate processing equipment at the portal of the private mine property. Carbon Tech pointed out that

[t]his capital intensive and more time consuming change in processing coal “on site” instead of “off-site” was not seen as immediately necessary a year or more ago because of the then higher coal prices. It is only in the last months that it became more and more clear that the project can not succeed with “off-site” coal processing. Fortunately we have a modular plant easily moveable that can be taken from another of our jobs once the permit revision for the “on-site” washplant has been approved.

Because of the unpredictable changes now necessary to make this project viable under the circumstances described, we hereby request an extension of the “Diligent Development” period under our current “Suspension of Operations and Production” (or whatever combination of terms are appropriate here under 43 CFR 3483.3 and related regulations). Without the requested extension, we as Operator/Lessee are prevented from producing coal in commercial quantities for reasons beyond our control and consequently are prevented from achieving Diligent Development on our current LMU.

We request a 12-month Force Majeure Suspension. That period should be an adequate extension to add an on-site washplant permit and complete all requirements to achieve Diligent Development of the LMU before the end of this extended period. \* \* \*

(2000 Suspension Request at 1-2.)

BLM issued its decision on August 21, 2000, denying both the request for an extension of the previously granted SOP and also the request for a force majeure suspension. BLM determined that the conditions animating approval of the original SOP and extension of the lease term, i.e., the 13-month period during which use of the coal haul road across Federal lands was precluded and the administrative approval period for the LMU and SOP, no longer existed. (Aug. 21, 2000, decision at 1-2.) BLM further found that, since there had been no production from the lease or LMU, neither qualified for a force majeure suspension, because such a suspension required a lessee to demonstrate that operations or production under the lease or LMU had been interrupted by strikes, the elements, or casualties not attributable to the lessee. Id. at 2. Accordingly, BLM denied both suspension requests. In light of its denial of the suspensions, BLM declared LMU KYES 47411 and Federal coal lease KYES 31464 terminated for failure to meet diligent development requirements. Id.

Carbon Tech timely appealed, alleging two alternative errors in BLM's decision. First, Carbon Tech contends that BLM erred in denying the suspension requested in May 2000 because BLM failed to evaluate whether the suspension was in the interests of conservation as required by section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (2000). Carbon Tech submits that, since mine openings may not be located on the surface of the Federal tract because of its location within the Daniel Boone National Forest, the only access to the Federal coal is through the private Gilbert tract, and that terminating the LMU and lease creates the risk that the Federal coal will not be developed for the indefinite future, if it is developed at all. This risk, Carbon Tech avers, directly involves the interests of conservation, yet BLM neglected to consider the issue in its decision. (SOR at 11-12.) Acknowledging that adverse economic conditions generally do not justify an SOP, Carbon Tech nevertheless maintains that BLM must consider the greatest ultimate recovery of coal in its exercise of statutory discretion in evaluating SOP requests. Carbon Tech posits that, where cyclical economic conditions subject to change exist at the time a lessee submits an SOP application, granting the SOP and allowing operations to resume and become re-established during more favorable conditions "may be precisely the exercise of discretion that 'encourages the greatest ultimate recovery of coal.'" (SOR at 12.) Carbon Tech indicates that the recent revitalization of coal prices has now made the market one in which the Sweetwater mine can be reopened. See SOR at 12-13.

Along these lines, Carbon Tech complains that BLM neither acknowledged nor addressed, in considering the SOP request, the fact that the coal markets in the 1988-90 period, when Hot Rocks was denied beneficial use of the lease, were more favorable than those Carbon Tech faced when BLM granted the 1998 SOP application and gave Carbon Tech an additional 13 months in which to re-permit and re-initiate operations and produce 1 percent of the LMU reserves. (SOR at 13.)<sup>4/</sup> Carbon Tech avers that the additional 13-month period may have been the least favorable market period in the last 20 years. Carbon Tech insists that BLM's failure to address these unique circumstances in exercising its discretion to assess whether the 2000 suspension application is in the interest of conservation or encourages the greatest

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<sup>4/</sup> Carbon Tech submits information regarding coal price trends. One set of figures shows that real prices steadily and annually declined from 1979 through 1999, and that nominal prices showed a general decline from \$32.15 in 1982 to \$23.88 in 1999. (SOR attachment 2, "Coal Prices 1949-1999.") Another shows similar declines in real prices from 1986 through 1997. (SOR attachment 3, "The U.S. Coal Industry in the 1990's: Low Prices and Record Production," at Table 2.) Nominal spot prices, however, went up between Nov. 2000 through Sept. 2001. (SOR attachment 4, "Market Scoop," publications between Nov. 27, 2000, and Sept. 10, 2001.)

ultimate recovery of coal mandates reversal or remand of BLM's decision denying the requested suspension. Id. at 13-14.

Second, Carbon Tech disputes BLM's termination of the LMU, submitting that BLM should have credited the prior production from the private tract to the production requirements of the LMU. Carbon Tech submits that, if such crediting had been allowed, the LMU would have achieved diligent development and been subject to the continued operation obligation, which could have been satisfied with advanced royalty payments in lieu of actual production, so that the LMU and the included Federal coal lease would have been preserved. (SOR at 1-2.) Since it would have had the right to seek BLM approval to pay advanced royalties in lieu of the continued operation and production obligation, Carbon Tech avers that its failure to produce a "new" one percent of recoverable reserves by the end of the extended lease period would not have affected the vitality of the lease. Id. at 17-18. <sup>5/</sup>

Carbon Tech contends that such crediting fully comports with the motivating principles behind section 2(d) of the Mineral Leasing Act, as amended by section 5(b) of the FCLAA, 30 U.S.C. § 202a (2000), authorizing the creation of LMUs involving multiple Federal coal leases or Federal coal leases and non-Federal coal land, and implementing BLM regulations and LMU guidelines. (SOR at 14-15.) Although noting that neither the regulations implementing section 2(d) nor BLM's guidelines on LMU formation and administration, 50 FR 35145-63 (Aug. 29, 1985), authorize such crediting, Carbon Tech alleges that they do not prohibit the crediting of prior production from non-Federal lands. Thus, it avers that the matter is discretionary with BLM. Carbon Tech submits that the silence in the statute, regulations, and guidelines regarding the crediting it seeks suggests that a fair reading actually endorses the crediting of pre-LMU private production. (SOR at 16-17.)

Carbon Tech submits that the Board should set aside BLM's decision and remand the case with instructions to BLM to consider the unique factual circumstances presented here and to reasonably exercise its statutory discretion to determine whether the requested suspension is in the interest of conservation and for the purpose of encouraging the greatest ultimate recovery of coal. (SOR at 19.) Alternatively, Carbon Tech suggests that the Board should reverse BLM for failure to credit the pre-LMU private production in which case the suspension request would be

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<sup>5/</sup> Carbon Tech notes that in May 1996, while the LMU application was pending, it requested BLM approval of payment of advanced royalties in lieu of continued operation. Carbon Tech states that it is prepared to work with BLM to determine where the LMU now stands in the diligence regime and to tender advanced royalty to cover any continued operation years determined to have run. (SOR at 18-19.)

mooted and its termination of the lease and LMU would be rendered a nullity. *Id.* at 2, 20.

In answer, BLM avers that it properly rejected Carbon Tech's suspension request in light of the undisputed failure of the lessee to produce coal from the Federal lease. (Answer at 12.) Agreeing that an SOP may be granted only in the interest of conservation, BLM objects to Carbon Tech's attempt to expand that term to include the effects of adverse market conditions facing a Federal lessee at a critical time. (Answer at 12-13.) BLM argues that the statute and regulations prohibit the suspension of the diligent development period and notes that Carbon Tech's application for a suspension of operations and production, when no such operations had occurred, is an indirect attempt to circumvent the statutory diligent development period. (Answer at 14.) BLM further avers that in promulgating regulations, the Department recognized that unfavorable market conditions could interfere with the timely completion of diligent development but nonetheless was obligated to strictly comply with the statutorily mandated 10-year diligent development period. *Id.* at 16.

BLM asserts that it properly refused to credit coal production from the private tract toward diligent development of the Federal coal lease. BLM contends that the fact that the parties anticipated that private mining on the Gilbert tract would be extended underground to reach the Federal coal does not change the outcome because Hot Rocks and/or Carbon Tech did not request that the private mine be included as part of an LMU with the Federal lease until the last day before the expiration of the tenth anniversary of the lease. (Answer at 17-18.) Given the lessee's total control over the timing of an LMU application, if any, BLM maintains that Carbon Tech cannot now contend that the LMU approved in 1999 should relate back to the distant period when mining was occurring on the private tract. *Id.* at 18. Finally, BLM avers that even if the production from the private tract after the start of the lease period were applied to the LMU diligent development requirement, it would fall far short of satisfying the requisite one percent of LMU reserves. BLM cites the fact that Carbon Tech's acknowledges that 18,741 tons of coal had been extracted from the private tract after the start of the lease period, while BLM had revised the required commercial quantities for the Federal lease to 28,500 tons of coal. Thus, BLM asserts whether BLM should credit prior coal production from a private tract as meeting LMU diligent development requirements is academic. (Answer at 16-17.) Since Carbon Tech did not meet the diligence requirements, but instead sought an extension of the previously approved SOP or a *force majeure* suspension, BLM avers that it had no alternative but to deny the requests and "recognize the termination of the lease by operation of the Statute and the terms of the lease." *Id.* at 19. <sup>6/</sup>

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<sup>6/</sup> We note that the 30 U.S.C. § 207(a) (2000) is not self-executing and requires an  
(continued...)



[1] The Mineral Leasing Act (MLA) has long provided for the leasing of, inter alia, coal on Federal lands. With the passage of FCLAA, Pub. L. No. 94-377, 90 Stat. 1083, Congress addressed a number of issues with Federal coal leasing, including the problem of the widespread holding of Federal coal leases for speculative purposes. For purposes of this case, section 6 of FCLAA amended section 7 of the MLA, 30 U.S.C. § 207 (2000), to establish both an obligation on Federal coal lessees to produce in commercial quantities within 10 years of leasing and a separate obligation of continued operation.

Section 7(a) provides: "A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated." 30 U.S.C. § 207(a) (2000). Section 7(b) establishes that every lease "shall be subject 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." 30 U.S.C. § 207(b) (2000).

Departmental regulations define "diligent development" as "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period." 43 CFR 3480.0-5(a) (12). "Commercial quantities" means one percent of "recoverable coal reserves" which is "the minable reserve base excluding all coal that will be left, such as in pillars, fenders, and property barriers." 43 CFR 3480.0-5(a) (6), (32). "Continued operation means the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development \* \* \*." 43 CFR 3480.0-5(a) (8).

FCLAA also encouraged coal development in a logical and efficient manner designed to avoid mining operations that bypassed deposits that 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) (2000). An LMU is defined as

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<sup>6/</sup> (...continued)

administrative or ministerial act to effectuate a termination. See Mountain States Resources Corp., 111 IBLA 160, 162 n.4 (1989). Thus, BLM's action is properly characterized as a termination pursuant to authority of law rather than a termination "by operation of the Statute."

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. [An LMU] 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.

Id. Approval of an LMU has the consequence that diligent development, continued operation, and production anywhere within the LMU “shall be construed as occurring on all Federal leases” within it. 30 U.S.C. § 202a(3) (2000). Under 43 CFR 3483.1(c), a Federal coal lease included in an LMU becomes subject to the diligent development requirements imposed on the LMU in lieu of those that would apply to the lease individually. Production anywhere within an established LMU of either Federal or non-Federal coal applies towards satisfaction of LMU diligent development requirements. 43 CFR 3483.6(a).

Under 43 CFR 3480.0-5(a)(13)(i)(A), the diligent development period for Federal coal lease KYES 31464 was the 10-year period commencing July 1, 1985, the effective date of the lease. The deadline for the lessee to establish production in commercial quantities from the lease was originally July 1, 1995. Hot Rocks did not produce any coal from the lease by that date.

BLM’s 1999 approval of LMU KYES 47411 containing the Federal lease and the private Gilbert tract did not change the diligent development period. In accordance with 43 CFR 3480.0-5(a)(13)(ii)(B), the diligent development period for the LMU was the 10-year period beginning on the July 1, 1985, effective date of the sole Federal lease contained in the LMU. BLM’s approval of the requested SOP, however, extended the diligent development period for the LMU through May 31, 2000. It thus prevented the lease from being subject to termination at the end of its original 10-year diligent development period.

Carbon Tech did not produce any coal from the Federal lease by the end of the extended diligent development period ending May 31, 2000. Instead, Carbon Tech sought a further extension of the diligent development deadline by requesting a continuation of the previously granted SOP.

[2] Section 39 of the MLA, as amended, 30 U.S.C. § 209 (2000), authorizes the Secretary to suspend operations and production under a mineral lease “in the interest of conservation.” Such suspensions extend the term of the lease, including the diligent development period, by the length of the suspension period. Id.; see

43 CFR 3483.3(b)(3); *see also* Alfred G. Hoyl, 123 IBLA 169, 189-90, 99 I.D. 87, 98 (1992) (Hoyl I), *reaffirmed as modified*, 123 IBLA 194A, 100 I.D. 34 (1993) (Hoyl II); *aff'd sub nom Hoyl v. Babbitt*, 927 F. Supp. 1411 (D. Colo. 1996); *aff'd*, 129 F.3d 1377 (10th Cir. 1997), and authorities cited. Therefore, if a lessee is entitled to a suspension under 30 U.S.C. § 209 (2000), that lessee may successfully avoid termination of the lease for failure to meet the diligent development requirement of 30 U.S.C. § 207 (2000).<sup>7/</sup>

We have construed 30 U.S.C. § 209 (2000) as providing for suspension of a Federal coal lease either where (1) through some act, omission, or delay by a Federal agency, beneficial use of the lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee timely access to the property; or (2) in the interest of conservation, that is to prevent damage to the environment or loss of mineral resources. *See* 5M, Inc., 148 IBLA 36, 41 (1999); Hoyl I, 123 IBLA at 190-91, 99 I.D. at 98-99; Hoyl II, 123 IBLA at 194B-194C and n.2, 100 I.D. at 35 and n.2; *see also* Harvey E. Yates Co., 156 IBLA 100, 105 (2001), and cases cited. The burden of showing entitlement to a suspension rests with the lessee. Harvey E. Yates Co., 156 IBLA at 105; 5M, Inc., 148 IBLA at 41; Robert D. St. John, 141 IBLA 147, 152 (1997); TNT Oil Co., 134 IBLA 201, 203 (1995).

BLM generally enjoys discretion as to whether to grant a suspension of a coal lease under 30 U.S.C. § 209 (2000) in the interest of conservation, and “is not required to grant a suspension request whenever an application is made, but rather is vested with discretion to deny such a request under appropriate circumstances.” Getty Oil Co. v. Clark, 614 F. Supp. 904, 915 (D. Wyo. 1985).<sup>8/</sup> A BLM decision exercising this discretion will not be disturbed on appeal if it is supported by a rational basis. Hoyl II, 123 IBLA at 194S-194T, 100 I.D. at 43.

Carbon Tech has not shown that any of the requisite circumstances warranting a suspension exist, or that BLM’s denial of the suspension under the circumstances presented was in error or otherwise constituted an abuse of discretion. Carbon Tech’s

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<sup>7/</sup> In its 2000 Suspension Request, at 1, Carbon Tech expressly made a separate request for an extension of the diligent development period. We agree with BLM that there is no statutory or regulatory basis for such a request, independent of an authorized suspension of operations. (Answer at 13-14.)

<sup>8/</sup> The only exception to that discretion occurs when the Government suspends operations and production as it did in Copper Valley Machine Works v. Andrus, 653 F.2d 595 (D.C. Cir. 1981). *See* Hoyl II, 123 IBLA at 194S n.18, 100 I.D. at 43 n.18.



2000 Suspension Request specifically sought either a force majeure suspension or an extension of the previously granted SOP.<sup>9/</sup> The challenged BLM decision responded to those specific requests, finding that an extension of the current SOP was not warranted because the factors precipitating that SOP no longer existed, and that a force majeure suspension would be inappropriate because no production had ever occurred on the lease and the conditions underlying the request did not qualify for a force majeure suspension. (Decision at 1-2.) Carbon Tech does not dispute those conclusions.

Carbon Tech appears to argue instead that, regardless of how it captioned its request, BLM should have considered the 2000 Suspension Request as a request for a new suspension in the interest of conservation under 30 U.S.C. § 209 (2000), and that the decision should have addressed issues and considerations beyond those raised in the 2000 Suspension Request. We find Carbon Tech's arguments unpersuasive. Both the 2000 Suspension Request and Carbon Tech's SOR focus on the adverse economic conditions in the coal market as precipitating its failure to meet its diligent development obligation during the extended diligent development period authorized by the 1999 SOP. In short, Carbon Tech asserts that it did not proceed to develop the LMU in the 13 months permitted during the suspension it requested because the price of coal did not support spending the resources to do so.

The Board has held that adverse economic or market conditions do not fall within the phrase "interest of conservation" under 30 U.S.C. § 209 (2000), and therefore do not constitute grounds for approval of a suspension under that section. 5M, Inc., 148 IBLA at 43 n.6; Hoyl II, 123 IBLA at 194 L, 100 I.D. at 39-40, and authorities cited. Carbon Tech recognizes this holding but avers that BLM must nevertheless exercise its statutory discretion in evaluating whether the unique economic circumstances presented here warrant granting the suspension. Given the precedent cited above, Carbon Tech has not convinced us that the adverse economic and market conditions it faced during the extended diligent development period warrant granting the requested suspension or that BLM's failure to do so constituted either a failure to exercise its statutory discretion or an abuse of that discretion.

Indeed, Carbon Tech's reliance on facts as justification for the company's failure to reinstate mining during the 13-month suspension provide no basis for us to make any of the specific factual findings the company proffers. The principle fact of

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<sup>9/</sup> On appeal Carbon Tech appears to have abandoned its request for a force majeure suspension under 30 U.S.C. § 207(b) (2000). The Board has held that force majeure conditions do not include adverse market conditions, such as those presented here. See Hoyl I, 123 IBLA at 186-87, 99 I.D. at 96. We therefore find that BLM properly rejected Carbon Tech's request for a force majeure suspension.

record demonstrates that no production has occurred on the Gilbert tract or the lease since 1986. While Carbon Tech argues that, in effect, it could not have predicted the market during the relevant 13-month period, it appears that the coal market declined steadily from 1979 forward. We note that no one can ever predict a commodities market with certainty; it was hardly unique that Carbon Tech could not do so. Nonetheless, in its 1998 application, 19 years into this real price decline, Carbon Tech alleged that the 13-month period would be sufficient for it to reinitiate production. Carbon Tech did not suggest that it would choose not to do so if current trends continued, or that it was unaware of current trends. Carbon Tech was fully aware that it was obligated to produce in the 13 months notwithstanding the market, and the 1999 decision, as amended, made this clear. Carbon Tech chose not to produce. We do not find that market conditions suggest that this situation is unique.<sup>10/</sup>

Carbon Tech fully understands and concedes that a purpose of FCLAA, and of subsequent regulatory changes implementing FCLAA, was to “prevent lessees from extending leases at the very end of their terms when there have been no substantial efforts to develop a mine on the LMU properties” and that adverse economic conditions are not enough to justify suspensions. (1998 SOR Request at 3-4; SOR at 12.) We do not find BLM to have abused its discretion in refusing to extend the SOP, when the lessee made the decision, on the basis of a declining market, not to reinitiate mining after requesting a period in which to do so.<sup>11/</sup>

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<sup>10/</sup> Carbon Tech argues that the conditions in 1999 were materially worse than in 1988-89, when it was engaged in the debate over road access with OSM, which justified BLM’s later 13-month suspension. Nonetheless, the market prices were even higher during 1986-88, at a time when Hot Rocks had ceased production. In fact, Hot Rocks ceased production in 1986 when prices were higher than in the ensuing 13 years, during which a steady decline in real coal prices continued. None of these facts gives us a basis for making a factual finding as to the intentions or expectations of the relevant lessee during any particular period.

<sup>11/</sup> Carbon Tech suggests that it was aware at the time of its 1998 application that it would not be able to comply with the terms of the 13-month SOP, and that instead the reason for the 1998 filing was to ripen the issue of the crediting of production from the LMU.

“Carbon Tech recognized that there was no ripe issue regarding its request in its LMU application to credit the private tract production, in light of the 13 months of the initial ten-year term of the Lease that had been restored to Carbon Tech by the SOP. Further it knew that the issue would ripen only ‘if and when’ Carbon Tech would be unable to produce additional coal from the private tract within the ‘remaining period’  
(continued...)

Finally, Carbon Tech maintains that BLM erroneously failed to consider whether granting the 2000 Suspension Request would be in the interest of conservation of the leased Federal resource. The 2000 Suspension Request refers only cursorily to this issue, stating: “We believe it is in the best interest of all concerned that the Diligent Development period be extended as suggested below. This is justified from the standpoint of conservation of the leased federal resources and the public interest in the broader sense, but importantly too from the standpoint of the local people and economy.” (2000 Suspension Request at 1.) This unsupported statement falls far short of satisfying Carbon Tech’s burden of establishing that the suspension would be in the interest of conservation. Given the lack of development on either the Federal lease or the Gilbert tract since 1986, Carbon Tech’s speculation that the coal might remain undeveloped absent the requested suspension does not convince us that granting the additional suspension would be in the interest of conservation. We therefore find no error in BLM’s rejection of Carbon Tech’s 2000 Suspension Request and affirm its decision to the extent it denied an extension of the previously granted SOP.

[3] Turning to Carbon Tech’s arguments regarding the crediting of pre-LMU private production to the LMU, we affirm BLM’s termination of the LMU and lease for failure to meet LMU and lease diligent development requirements on the facts of this case. As noted above, approval of the LMU had the consequence that diligent development anywhere in the LMU after its formation would have been considered diligent development on all the Federal coal leases included in the LMU. 30 U.S.C. § 202a(3) (2000); 43 CFR 3483.1(c), 3483.6(a); see Lodestar Energy, Inc., 155 IBLA 286, 293 (2001). The issue Carbon Tech has raised repeatedly since 1995 is whether production from private lands which pre-dates an LMU can be credited to the LMU after its formation. We find, for two reasons, that BLM did not abuse its discretion on the facts here and affirm.

First, as BLM points out, the record contains no evidence that this is anything other than an academic exercise. In requesting the Board to remand a matter to BLM for the exercise of its discretion, or to reverse BLM and impose our own, it is incumbent upon an appellant to demonstrate that the subject matter of the request be

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<sup>11/</sup> (...continued)

of the initial ten years of the Lease. \* \* \* That ‘if and when’ unfortunately came to pass.”

(SOR at 10 (citations omitted).) To the extent that Carbon Tech submitted its request for a suspension, aware that the market conditions could make it impossible to produce during the SOP, to preserve the issue of the crediting of pre-LMU private production to the LMU after it was approved, it is in no position to complain the suspension was not granted.



a live issue. We do not find that Carbon Tech has made such a showing. Rather, Carbon Tech asserts unequivocally in the SOR that the amount of production from the Gilbert tract for which it seeks credit to the LMU is 18,471 tons of coal. (SOR at 4.) Documents in the record from the initial mineral analyses conducted by BLM through the time of the LMU application suggest that 1% of the LMU production would range from no less than 22,000 to as much as 32,000 tons of production. See 1995 LMU application at 4 (total recoverable reserves from private and Federal lands are “some 3,212,000 tons”) 34, 36 (total tons that may successfully be mined are “some 2,850,000 tons”); (Oct. 23, 1984, memorandum from District Manager to State Director, attachment (parcel contains 2.2 million tons recoverable coal)); July 17, 1994, BLM letter to Hot Rocks coal (revising commercial quantities from lease to 28,500 tons). The amount of production asserted by Carbon Tech (18,471 tons) is less than the minimum (22,000 tons). Carbon Tech has not amended its LMU application or provided any information suggesting that these numbers should be reduced. In its answer, BLM expressly stated that the “private tonnage does not even satisfy the one percent level.” (Answer at 17.) Carbon Tech submitted no response.<sup>12/</sup>

Considering the lack of any record evidence to suggest that Hot Rocks in fact produced enough coal to meet the diligent development requirement of the LMU at any time before or after the LMU was approved, we could not in any scenario on this record reverse BLM based on a factual finding regarding commercial quantities, as Carbon Tech requests.<sup>13/</sup> Likewise, a remand for the BLM to consider the possibility of crediting the LMU with insufficient production would be tantamount to an advisory opinion on the topic.

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<sup>12/</sup> BLM’s 2000 Amended Decision cited a figure of 17,590 tons as the commercial quantities requirement. The basis for this number is unfounded in the record, and it contradicts all other record documentation regarding recoverable coal on the lease or LMU.

<sup>13/</sup> Carbon Tech’s contention that commercial quantities were produced is based on its claim that the “State Office, both in that evaluation [of the R2P2] and later in reviewing a revised resource recovery and protection plan for the LMU submitted in September 1996, has accepted that the lessee produced more than 1% of the proposed LMU’s recoverable reserves from the private tract during the life of the federal lease.” (SOR at 6.) Carbon Tech cites nothing in the record to suggest such an official finding by BLM; nor does it indicate what figures would have been used to render such a conclusion. BLM does not maintain such a position in this case. (Answer at 17.)

Carbon Tech clearly sought to revive a lease that had not been utilized by the lessee. BLM reasonably allowed the new lessee another 13 months in which to produce by virtue of its granting the SOP. Carbon Tech deliberately chose not to pursue the option. (SOR Ex. 1, Affidavit of Ed Groves for Carbon Tech at paragraph 10.) It then sought another SOP. We do not find these facts, or a falling market, to suggest that BLM erred in exercising its discretion not to reconsider the LMU crediting issue anew at this juncture.<sup>14/</sup>

Carbon Tech's assertion that, had BLM applied the pre-LMU coal production from the Gilbert tract towards the LMU diligent development obligation, then the LMU and the lease would have been preserved and not subject to termination, is merely an assertion of fact rather than argument in favor of its position. BLM had ample reason to believe that the Federal lease had not been mined and ample reason not to choose that result. We find no reason here to remand and compel BLM to reconsider the question.

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<sup>14/</sup> Carbon Tech acknowledges that its position regarding pre-LMU production crediting is not mandated by statute or regulation, but argues that it is within the discretion of the BLM to permit such a credit. The regulations provide that "any production credited under the rules of this part to a Federal lease prior to its inclusion in the LMU shall be applied toward diligent development for the LMU." 43 CFR 3483.5(g). BLM bears no obligation under statute or regulation to credit to an LMU containing a Federal lease production from private lands which occurs prior to the approval of an LMU. We would not reach any decision, in the abstract, on the question of whether BLM has the discretion to do so because we find no basis for compelling, by virtue of a remand, BLM to reconsider the issues and exercise more "discretion" on the facts of record. Hot Rocks requested a Federal lease for purposes of an alleged mining operation that would cross private/Federal boundaries. It won the lease, and promptly stopped mining and never resumed. We would find no abuse of discretion by BLM in refusing to "credit" production which had stopped 9 years before that application, notwithstanding how we might in another case rule on the regulatory construction question Carbon Tech asks us to decide.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge