



AMCA COAL LEASING, INC. and ANDALEX RESOURCES, INC.

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Office of Hearings and Appeals

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AMCA COAL LEASING, INC. and ANDALEX RESOURCES, INC.

IBLA 2014-13, *et al.*

January 14, 2016

Appeals from decisions of the Utah State Office, Bureau of Land Management, concerning advance royalties to be paid in lieu of continued operation of the Aberdeen Logical Mining Unit and rejection of a proposed modification to its Recovery and Protection Plan. UTU 73865.

Affirmed. Petition for Stay denied as moot.

1. COAL LEASES AND PERMITS: GENERALLY

Recoverable coal reserves are those that can be mined from a technical standpoint, as determined by the Department based on such factors as the thickness of the coal seam, mining height, and the expected percentage of coal to be recovered. Recoverable coal reserves are identified during approval of a resource recovery and production plan or a modification under 43 C.F.R. § 3483.2.

2. COAL LEASES AND PERMITS: GENERALLY -- COAL LEASES AND PERMITS: ROYALTIES

To be absolved of the requirement for continued operation and its correlative alternative of paying advance royalty under the Mineral Leasing Act, as amended, the lease must have been “mined out,” which means all its recoverable reserves have been exhausted, as determined by BLM. Without such a determination, the appellant must show it requested a determination and that BLM erred in denying its request, as by demonstrating that the recoverable reserves under a lease have been totally exhausted.

3. COAL LEASES AND PERMITS: GENERALLY -- COAL LEASES AND PERMITS: ROYALTIES

An advance royalty payment is in lieu of continued operation, which is computed on 1% of the Federal portion of recoverable

coal reserves. BLM estimates recoverable coal reserves when it initially approves a resource recovery and production plan or a modification of that plan. Although recoverable coal reserves may be revised as new information becomes available or circumstances change, it cannot be reduced by production.

APPEARANCES: Denise A. Dragoo, Esq. and James P. Allen, Esq., Snell & Wilmer, LLP, Salt Lake City, Utah, for Appellants; John W. Steiger, Esq., Acting Regional Solicitor and Christopher J. Morley, Attorney-Advisor, Office of the Regional Solicitor, Intermountain Region, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

AMCA Coal Leasing, Inc. (AMCA), ANDALEX Resources, Inc. (ANDALEX), and Utah American Energy, Inc. (UEI) appeal from decisions of the Utah State Office, Bureau of Land Management (BLM), dated September 9, 2013, September 30, 2013, and August 29, 2014, which approved payment of annual advance royalties in lieu of continued operation for each continued operation year (COY) from March 2011 through February 2015 at the Aberdeen Mine located near Price, Utah. Appellants also appeal from a BLM decision dated January 15, 2015 (January 2015 Decision), which denied their request for a determination that Logical Mining Unit 73865 (LMU)¹ was “mined out,” effective April 4, 2008, and to modify its Resource Recovery and Protection Plan (R₂P₂) so it could be retained for underground access to reserves outside the LMU.² For the reasons discussed below, we affirm these BLM decisions.

BACKGROUND

AMCA is a wholly-owned subsidiary of ANDALEX that is a wholly-owned subsidiary of UEI (hereinafter collectively referred to as Appellants or UEI). AMCA is the lessee of Federal coal lease Nos. SL-027304, SL-063058, UTU-010581, UTU-66060, UTU-69600, and UTU-79975, which are at the Aberdeen Mine and committed to the LMU (LMU Leases). *See* LMU Approval Decision dated Nov. 30, 2010.³ UEI

¹ An LMU is “an area of land in which the recoverable coal reserves can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of recoverable coal reserves and other resources.” 43 C.F.R. § 3480.0-5(a)(19).

² By Order dated Feb. 25, 2015, these appeals were consolidated under IBLA 2014-13.

³ Although the parties had long believed this LMU was approved, BLM realized it had not formally done so in late 2010. This situation was identified in and rectified by an exchange of correspondence that culminated in this decision.

produced coal under these leases until [REDACTED] August 2007.⁴ See Reply at 4. Shortly thereafter UEI requested a modification of its R₂P₂ to temporarily idle the Aberdeen Mine so it could seek answers to questions concerning [REDACTED] operation of the longwall at the Aberdeen Mine.⁵ See UEI Request dated Sept. 11, 2007, at 2 (“Assuming the engineering studies are favorable, [REDACTED], mining will resume late December or early January.”). It also requested a temporary interruption in coal severance, which BLM approved “while evaluations are conducted and modifications made [REDACTED] [REDACTED] BLM letter dated Oct. 12, 2007, at 1. After making major improvements, UEI resumed mining Panel #10 in late January 2008 but soon stopped [REDACTED]. See Reply at 5 (citing BLM Report of Inspection performed April 3, 2008). BLM issued a Notice and Order on March 28, 2008, which identified obligations UEI would be responsible for unless and until BLM approved a mine closure plan (e.g., it must leave all equipment in place at the Aberdeen Mine).

UEI requested approval to remove its longwall system from Panel #10 because it was “no longer possible to mine coal in panel #10 with total confidence in maintaining a safe workplace,” adding that since it is the deepest longwall panel in the United States and at the limit of proven technology, UEI had already “gone beyond” Maximum Economic Recovery (MER).⁶ UEI Request dated Apr. 3, 2008, at 1, 2.

⁴ The Crandall Canyon Mine was co-owned by UEI, located roughly 20 miles from the Aberdeen Mine, [REDACTED] when it collapsed [REDACTED] on Aug. 6, 2007, [REDACTED].

⁵ Longwall mining involves mining longwall panels, which are rectangular blocks of coal with one side being much longer than the other. The first step in developing a longwall panel is to drive two parallel sets of entries (gateroads) along the length of the panel using a continuous miner. After the gateroads have been driven the full length of a panel, the longwall face is established between the gateroads across the short side at the back of the panel. The longwall shearing machine cuts the coal from the panel moving from gateroad to gateroad under cover of a canopy of self-advancing steel supports. The mining advances (retreats) along the panel, moving from the back toward the main haulage way system. The gateroads must be driven the full length of the panel and the longwall face must be established at the far end of the panel before actual longwall mining operations can commence. After the gateroads and longwall face have been opened, it can take 6 weeks to move the canopy and longwall miner from a completed panel to a newly developed panel. See generally *Cyprus Shoshone Coal Corp. (Cyprus Shoshone)*, 143 IBLA 308, 311 (1998).

⁶ As the Board held in *Cyprus Shoshone*, 143 IBLA at 315:

Maximum economic recovery is achieved when, considering a “standard

(continued...)

BLM authorized removing the longwall system by Decision dated April 9, 2008, stated the R₂P₂ needed to be updated, but reserved determining whether MER had been achieved. UEI requested a second “temporary interruption” in coal severance to undertake studies for determining the long-term disposition of the LMU Leases and then requested a modification of the R₂P₂ to move equipment and put the mine in an idle status while it evaluated reserves to the west of the LMU and developed technology/equipment that might be used to recover a portion of Panel # 10. See UEI Letter dated May 13, 2008; Request dated June 11, 2008. BLM approved moving that equipment and idling the mine, directed UEI to submit lease-specific recoverable reserve tonnages⁷ and an estimate of how much coal “will now have to be left in place upon resumption of mining for longwall Panel 10,” and required it to commit “to pay royalty on the tons lost in longwall Panel 10.” Decision dated June 20, 2008, at 2. UEI replied by claiming coal left for safety reasons is not subject to royalty and that it had already achieved MER. See UEI letter dated July 31, 2008, at 2 [REDACTED]

UEI requested a modification of the R₂P₂ on July 19, 2010, to account for coal that cannot be mined due to safety concerns, claiming only [REDACTED] tons were now

(...continued)

industry operating practices, all profitable portions of a leased Federal coal deposit . . . [are] mined.” 43 C.F.R. § 3480.0-5(a)(21). It is determined by applying “standard industry operating practices” to the coal deposit without regard to the financial or contractual status of an individual operator/lessee. The test is objective and is based on “what a ‘prudent man’ would do when faced with mining operation decisions which affect profitability.” 47 Fed. Reg. 33168 (July 30, 1982); *cf. United States v. Ohio Oil Co.*, 240 F. 996, 1000 (D. Wyo. 1916) (objective standard for determining whether a valuable mineral deposit exists). Thus, achievement of maximum economic recovery depends on whether the leased coal deposit is *inherently* profitable to mine, when considering the physical nature of the deposit affecting the feasibility of mining, the costs of producing, processing and transporting the coal, the quality, quantity, and marketability of the coal, and the anticipated price at which the coal can be sold. 10/

10/ This test must be reasonable, however. Economic recovery is not intended to be used “to force any operator/lessee to produce coal at the exact ‘break-even’ point . . . [or] to force a company to mine Federal coal at a loss or to mine Federal coal that cannot be sold under existing market conditions.” 47 Fed. Reg. 33168 (July 30, 1982).

⁷ UEI later summarized how much coal was mined and remaining to be mined on each LMU Lease. See UEI letter to BLM dated Nov. 4, 2009.

mineable (e.g., under less than 1,000 feet of cover).⁸ However, BLM did not respond to that request. See Decision dated Dec. 23, 2013, at 2 (“The BLM has actively continued meeting with UEI and the BLM response to the R2P2 request has not been finalized.”).

UEI requested a partial relinquishment of LMU Leases on September 30, 2010, which BLM denied on October 28, 2010. UEI refiled and provided additional information on August 30, 2011, representing that if this lease relinquishment was approved, ██████ tons of recoverable reserves would remain in the LMU. By decision dated March 12, 2012, BLM granted this lease relinquishment and adjusted the recoverable reserve (base) to ██████ tons. UEI requested a review of the recoverable reserve (base), claiming it was only a fraction of that amount and should be calculated as the sum of “tons mined plus the tons projected to be mined.” UEI Letter dated Mar. 27, 2012. It submitted another relinquishment request, which identified the recoverable reserve (base) as ██████ tons (after the March 2012 relinquishment) and that it would be ██████ tons if its request was approved. UEI Request dated May 24, 2012. BLM approved that request and recoverable reserve estimate by decision dated Aug. 20, 2013.

Meanwhile, UEI submitted a series of requests to pay advance royalties under 43 C.F.R. § 3482.4. It submitted a generic request on July 20, 2011, “for any COY where diligence has not been met, as allowed for in 43 CFR 3482.4.” It submitted

⁸ The Board recognized in *Cyprus Shoshone*, 143 IBLA at 317-18:

As a necessary part of the documents in support of a proposed modified mine plan submitted to BLM for approval, the operator should set out the change in circumstances triggering a change in the maximum economic recovery, such as safety requirements, unanticipated physical occurrences, or unforeseen economic events that render an attempt to mine all or a portion of the recoverable coal uneconomic. In the course of its approval determination, the authorized officer will decide whether maximum economic recovery will be achieved if the coal is mined in accordance with the modified mine plan. 43 C.F.R. § 3482.2(c)(2). Based on the documents describing and setting out justification for the proposed modification, the authorized officer may approve, set conditions for approval, or disapprove the modified mine plan. It would be incorrect for the Department to reject a proposed modified mine plan without cause, and, if we found a decision rejecting a modified mine plan or the conditions for approval of that plan arbitrary, we would have no reservations about reversing that decision. See, e.g., *Pogo Producing Co.*, 138 IBLA 142 (1997); *Ark Land Co.*, 132 IBLA 235 (1995); *Peabody Coal Co.*, 79 IBLA 58 (1984).

separate requests for COY 16 (March 2010 through February 2011) and COY 17 (March 2011 through February 2012), which BLM approved by decisions dated May 17, 2012 and September 9, 2013, using a recoverable reserve (base) of [REDACTED] tons. Appellants appealed from the September 2013 decision for COY 17 (IBLA 2014-13). UEI submitted requests to pay advance royalties for COY 18 (March 2012 through February 2013) and COY 19 (March 2013 through February 2014); BLM approved these requests by separate decisions dated September 30, 2013, using a recoverable reserve (base) of [REDACTED] tons. Appellants appealed from both decisions, which we docketed as IBLA 2014-21.

UEI submitted a request to modify the LMU due to the March 2012 and August 2013 lease relinquishments and claimed a new R₂P₂ was not required because the LMU was “Mined Out.” UEI Request dated Dec. 3, 2013, at 1; *see id.* (“The LMU is only being held for access purposes only.”).⁹ By decision dated Aug. 29, 2014, BLM modified the LMU to remove lands embraced by relinquished leases and stated that since the recoverable reserve (base) is now [REDACTED] tons, UEI must mine at least 1% of that base during COY 20 (March 2014 through February 2015) or request and pay advance royalties on [REDACTED] tons of Federal coal. Appellants appealed from that decision (IBLA 2014-289). UEI requested a modification to the R₂P₂ to permit access to nearby coal on January 22, 2014, stating all recoverable reserves were then “mined out,” but its request was rejected by the January 2015 Decision, which was timely appealed by Appellants (IBLA 2015-103).

ISSUES ON APPEAL

We glean from the record, pleadings, and representations of the parties¹⁰ that there are three principal issues in this consolidated appeal:

⁹ BLM initially rejected that request by requesting additional information (*e.g.*, an updated LMU map) and stating it “does not consider the Federal coal mine lease ‘mined out.’” Decision dated Dec. 23, 2013, at 2. UEI responded by providing additional information and requesting a modification of the R₂P₂ to allow access to other coal because the LMU was “mined out.” *See* Request dated Jan. 22, 2014.

¹⁰ Appellants have filed a separate Statement of Reasons (SOR) for each of their appeals: IBLA 2014-13 (SOR 2014-13); IBLA 2014-21 (SOR 2014-21); IBLA 2014-289 (SOR 2014-289); and IBLA 2015-103 (SOR 2015-103). BLM filed a consolidated response on April 14, 2015 (Answer), which Appellants replied to on May 26, 2015 (Reply).

- Whether the LMU was “mined out.” Appellants contend the LMU was “mined out” when BLM approved removing the longwall and idling of the Aberdeen Mine on April 4, 2008, which means no advance royalty can thereafter be due on any LMU Leases. See SOR 2014-13 at 6-11; SOR 2014-21 at 5-9; SOR 2014-289 at 4-7; SOR 2015-103 at 6-11; Reply at 13-14, 19-21. BLM counters by claiming “Appellants have failed to [produce] evidence that the Aberdeen LMU is legally mined out,” shown they are prevented from mining by *force majeure*, or otherwise demonstrated that their safety concerns apply to all of the recoverable reserves in the LMU, including Area D.¹¹ Answer at 12; *see id.* at 11-12, 18-20.
- Whether BLM properly denied the request to modify the R₂P₂ for access to nearby coal. Appellants claim BLM erred in denying their request to modify the R₂P₂ to access coal under the Kenilworth Federal coal lease, UTU-81893, or conditioning such access on their including that lease in the LMU. See SOR 2014-289 at 7-8 (citing *Ark Land Co.*, 132 IBLA at 242-43); SOR 2015-103 at 11-12 (“BLM was willing to agree to the factual determination that federal reserves with[in] the LMU were mined out but only if UEI agreed to begin reclamation.”); *see also* Reply at 11-12 (denying access is not in the public interest because it wastes resources by rendering that coal “permanently inaccessible”). BLM contends it properly conditioned its approval of the R₂P₂ on including the Kenilworth lease in the LMU: “BLM’s decisions---to require Appellants to pay past-due advance royalties, modify the LMU to include additional coal reserves in an adjoining lease, or to relinquish the LMU---allow Appellants to come into compliance with the [Mineral Leasing Act of 1920 (MLA)] and avoid speculation.” Answer at 17.
- Whether BLM properly calculated advance royalties. Appellants claim BLM erred in calculating advance royalties for COY 17, COY 18, COY 19, and COY 20 because its calculations were based on an incorrect estimate of the recoverable

¹¹ Appellants explain in Reply at 18:

“Area D” was part of the R₂P₂ in 2008 because UEI planned to develop that area of the Aberdeen LMU to access a proposed federal lease to the west (the Dry Creek lease) it hoped to obtain in a competitive sale. Ultimately, UEI elected not to bid on the lease. Accordingly, the development was removed from subsequent mine plans and lease relinquishments and R₂P₂ modification requests advised of the change Once the Aberdeen Mine’s main source of production, the longwall panels, ceased operating and were removed, recovery of the small amount of coal in “Area D” was not profitable without the potential for developing the Dry Creek lease.

reserve (base), which should have been updated and corrected in response to their July 2010 and January 2014 requests to modify the R₂P₂. See SOR 2014-13 at 9; SOR 2014-21 at 8; SOR 2014-289 at 5; SOR 2015-103 at 7-8; Reply at 15-17. According to BLM, it properly calculated advance royalty based on the approved R₂P₂: “Appellants improperly claim that the BLM was arbitrary and capricious, or premature in not relying on an unapproved modification to the existing R₂P₂. Appellants may not avoid their lawfully authorized payment obligation simply because the R₂P₂ *may* be modified.” Answer at 14; *see id.* at 12-14. BLM further states that while UEI requested revisions to the recoverable reserve (base) in July 2010 [REDACTED] and January 2014 (due to the LMU being “mined out”), BLM was under “no affirmative duty” to make those revisions. *Id.* at 15 (citing 43 C.F.R. § 3482.2(a)(3)).

We separately address each of these issues below.

DISCUSSION

This appeal involves issues arising largely out of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1083. Prior to the FCLAA, coal leasing was by preference-right leasing or competitive leasing of known coal deposits, which occurred under the aegis of the MLA. See 30 U.S.C. § 201 (1970). There were never more than 40 coal leases issued in any year prior to 1960, but their number rose sharply and averaged more than 150 per year through 1965. Recoverable coal under Federal lease was estimated at 8.6 billion tons in 1971, and by 1976, it had doubled to an estimated 17.3 billion tons. See Senate Committee on Energy and Natural Resources, 95th Cong., 2d Sess., *Federal Coal Leasing Policies & Regulations* 6 (Comm. Print 1978). Despite this surge in leasing, coal production from Federal leases amounted to only 20.6 million tons in 1974 (3 percent of national production). See H.R. Rep. No. 681, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News 1943, 1945. A BLM report, “Holdings and Development of Federal Coal Leases” (1970), pointed out that while the MLA required “diligent development and continued operation,” nearly 92 percent of all Federal leases were not then producing any coal. *Id.* at 1947 (citing 30 U.S.C. § 207 (1970)). As a result, the Department informally suspended coal leasing in May 1971, followed by a formal suspension in early 1973. See Sec. Order No. 2952 (Feb. 13, 1973).

Congress took note of the Department’s concerns, the number of holding companies and speculators entering into coal leases, and the fact that coal lands were being tied up for speculative purposes. The FCLAA was therefore enacted in 1976, which replaced preference-right leasing with exploration licenses (without a right to lease). See 90 Stat. 1085, 30 U.S.C. § 201(b) (2012). It specified 20-year lease

terms, terminated leases “not producing in commercial quantities at the end of 10 years,” retained the “diligent development and continued operation” requirements, but permitted the Secretary to suspend continued operation “upon the payment of advanced royalties,” which would be “computed on a fixed reserve to production ratio (determined by the Secretary).” 30 U.S.C. § 207(a),(b) (2012). The Department issued rules to implement the FCLAA, which are now found at 43 C.F.R. Part 3400 (Coal Management).¹² See 47 Fed. Reg. 33154 (July 30, 1982); 48 Fed. Reg. 41589 (Sept. 16, 1983).

BLM addressed the circumstances for suspending “continued operation” when promulgating its implementing rules:

Section 7(b) of the MLA, as amended [by the FCLAA], conditions Federal coal leases upon “continued operation of the mine or mines” by the operator/lessee. This condition may be excused or suspended in three situations. First, at the operator/lessee’s request because of market or similar conditions, the Secretary may “suspend” under Section 7(b) of MLA only the condition of continued operations, as opposed to the entire Federal lease, by accepting advance royalty in lieu of continued operation. The operator/lessee still has beneficial use of the Federal leasehold; rental and Federal lease readjustment periods still run under the Section 7(b) advance royalty suspension. When the Secretary suspends only continued operation, Section 39 of the MLA specifies that the Secretary is not authorized to “waive, reduce, or suspend” advance royalty payments.

Second, the Federal lease condition of continued operation is excused by operation of Section 7(b) of the statute when “strikes, the elements, or casualties not attributable to the lessee” prevent operation. In such cases and if it is “in the interest of conservation,” the Secretary may also suspend rental payments and extend the term of the Federal lease under the authority of Section 39.

Finally, the Secretary in the interest of conservation may require or assent to “the suspension of operations and production” under Section 39 of MLA. The Secretary, in other words, is authorized to suspend the Federal lease and all of its conditions including the operator/lessee’s

¹² These rules include key definitions: “*Commercial quantities* means 1 percent of the recoverable coal reserves,” 43 C.F.R. § 3480.0-5(a)(6); “*Continued operation* means the production of not less than commercial quantities of recoverable coal reserves,” 43 C.F.R. § 3480.0-5(a)(8).

right to beneficially use the Federal leasehold. In such cases, suspension of the Federal lease, by terms of the statute, also suspends rental payments and extends the term of the Federal lease.

47 Fed. Reg. at 33172; *see* 43 C.F.R. § 3483.3 (Suspension of continued operation or operations and production). BLM then explained why advance royalties need not be paid during a suspension of both operations *and* production because it would preclude the beneficial use of the Federal Lease.

BLM's implementing rules specify that if it approves the payment of advance royalty "in lieu of continued operation, it shall be paid in an amount equivalent to the production royalty that would be owed on the production of 1 percent of the recoverable coal reserves or the Federal LMU recoverable coal reserves." 43 C.F.R. § 3483.4(c); *see supra* note 12. To determine recoverable coal reserves, the regulatory scheme requires an initial determination of the "coal reserve base," which is "the estimated tons of Federal coal in place in beds of [various thicknesses on the lease]," followed by a determination of the "minable reserve base," which is the portion of the coal reserve base that is "commercially minable and includes all coal that will be left, such as in pillars, fenders, or property barriers [but excluding areas where mining is not permissible]," because recoverable coal reserves "means the minable reserve base excluding all coal that will be left, such as in pillars, fenders, and property barriers." 43 C.F.R. § 3480.0-5(a)(5), (23), (32).

[1] Coal reserves are recoverable "when they can be mined from a technical standpoint. For underground mines, factors such as the thickness of the coal seam, the mining height, and the expected percentage of coal to be recovered are considered." *Cyprus Shoshone*, 143 IBLA at 314 (citing Instruction Memorandum (IM) No. 86-323, dated March 18, 1986). More to the point for this appeal:

Recoverable coal reserves are identified during the course of approval of the mine plan submitted by the lessee. *See* 43 C.F.R. § 3482.2(a)(3). In the absence of any modification initiated by the authorized officer (43 C.F.R. § 3482.2(b)) or by the lessee (43 C.F.R. § 3482.2(c)), the recoverable coal reserves will be that coal identified in an approved mine plan as the coal that the operator intends to mine.

Cyprus Shoshone, 143 IBLA at 315. Maximum Economic Recovery, a related concept, must also be addressed when approving an R₂P₂: "No resource recovery and protection plan or modification thereto shall be approved which . . . is not found to achieve MER of the Federal coal within an LMU." 43 C.F.R. § 3482.2(a)(2); *see also supra* note 6.

Having set the stage, we now address each of the issues on appeal.

I. Whether the LMU was “Mined Out.”

[2] Appellants contend the LMU was “mined out” when BLM approved their idling of the Aberdeen Mine on April 4, 2008, and since it was no longer subject to the continued operation requirement, no advance royalties need be paid. [REDACTED]

However, to be absolved of that requirement (and its correlative alternative of paying advance royalties), the lease must “have been mined out (*i.e.*, all recoverable reserves have been exhausted), as determined by the authorized officer.” 43 C.F.R. § 3472.1-2(e)(5); *see Ark Land Co.*, 132 IBLA at 241; Answer at 10. No such determination has been made by BLM, and while Appellants requested one in January 2014, BLM did not err in rejecting that request or failing to find that all recoverable reserves had been exhausted, “effective April 4, 2008.” R₂P₂ Request dated Jan. 22, 2014, at 1.

The record shows Appellants intended to resume mining of the LMU when they estimated there were [REDACTED] tons of coal remaining to be mined in November of 2009 (excluding UTU-81893). *See* UEI Letter dated Nov. 4, 2009. [REDACTED] UEI requested approval for a modified R₂P₂ to exclude areas of the LMU that are deeper than 2,900 feet or in mains/main barriers with over 1,000 feet of cover, analyzed the effect those exclusions would have on each LMU Lease, and represented that they then held [REDACTED] tons of recoverable coal. R₂P₂ Request dated July 19, 2010. BLM never responded to that request.

Appellants then proposed relinquishing several LMU Leases, representing it would hold [REDACTED] tons of recoverable reserves after relinquishment, an estimate they lowered to [REDACTED] tons in responding to BLM comments. *See* Relinquishment Request dated Dec. 10, 2010; UEI Response dated Aug. 30, 2011. BLM approved that relinquishment and later estimated the LMU had a recoverable reserve base of [REDACTED] tons. UEI Letter dated March 27, 2012; Decision dated May 17, 2012. Appellants proposed relinquishing additional leases and represented that the recoverable reserve base for the LMU would be [REDACTED] tons after relinquishment: [REDACTED] tons to be mined in Area D, plus [REDACTED] tons that “will never be mined.” Second Relinquishment Request dated May 24, 2012, at 2.¹³ BLM approved that

¹³ It is less clear whether those [REDACTED] tons were minable as a matter of technology and safety (but not economics), or whether they had already been mined. *See, e.g.*, R₂P₂ Request dated Jan. 22, 2014, at 4 (“base tons have already been mined out but are being retained for access to potential reserves”).

relinquishment by decision dated Aug. 20, 2013. Since UEI was still identifying recoverable reserves it clearly intended to mine ([REDACTED] tons in Area D), it necessarily follows that the LMU was not then mined out.

Appellants' views apparently changed in late 2013. See LMU Request dated Dec. 2, 2013, at 1 ("Since the LMU has met MER and has been 'Mined Out' and no additional R2P2 tons exist, a new R2P2 should not be required.").¹⁴ They followed up by requesting BLM to determine that the LMU was "mined out" and to modify the R₂P₂ so they could "retain portions of the LMU for underground access to reserves located outside the boundaries of the LMU." R₂P₂ Request dated Jan. 22, 2014, at 1; *see id.* at 1 ("Any coal remaining within the existing LMU is either too deep to mine, uneconomical to mine, or being left for access."), 4 (" [REDACTED] base tons have already been mined out but are being retained for access to potential reserves."). BLM rejected those requests. See January 2015 Decision at 2 ("The proposed R2P2 plan submitted does not provide for recovery of the remaining coal reserves shown in the BLM 'Coal Lease Partial Relinquishments and Relinquishment Accepted' dated August 20, 2013, (UEI relinquishment request, submitted May 24, 2012)."); *see* UEI Request dated May 24, 2012 (recoverable reserves estimated at [REDACTED] tons, but only [REDACTED] tons to be recovered, with the remainder never to be mined).

Appellants' January 2014 R₂P₂ Request did not show to BLM's satisfaction that the LMU had been mined out. They have not proffered evidence showing that all recoverable reserves were exhausted on April 4, 2008 (or on any date thereafter). See 43 C.F.R. § 3472.1-2(e)(5). Nor have they *shown force majeure* has prevented them from all mining of the LMU. See SOR at 2014-289 at 8; SOR 2015-103 at 12-13; *but see* Answer at 18-20. To the contrary, Appellants consistently and repeatedly represented that the LMU contained recoverable reserves until they changed their mind in late 2013 and began claiming it was "mined out." Recoverable reserves in the LMU may be exhausted, but neither Appellants nor the record demonstrate that such is

¹⁴ This request to modify the LMU was denied because UEI had yet to fund a cost recovery account for processing its request or submit an updated LMU map. See Decision dated Dec. 23, 2013, at 1 ("BLM will not proceed on the LMU modification concerning the March 3, 2012, relinquishments until it receives UEI's response."). BLM added it "does not consider the Federal coal mine leases 'mined out.'" *Id.* at 2; *see id.* ("If UEI is retaining the mine for future access to remaining adjacent coal reserves, then the BLM considers that reserves in the access route areas are still available for mining and a decision to not mine them is premature."). BLM concluded by requesting "that a new R2P2 map be submitted [within 30 days] detailing the timing of reopening the mine." *Id.* Appellants timely did so when requesting a modification to the R₂P₂ on Jan. 22, 2014.

this case. *See* Answer at 12 (“Appellants have failed to [proffer] evidence that the Aberdeen LMU is legally mined out and have only evidenced their own business decision not [to] mine anymore.”). In short, they have not carried their burden to show that BLM erred in rejecting their January 2014 request or otherwise failed to determine that the LMU was “mined out.”

II. Whether BLM Properly Denied a Request to Modify the R₂P₂ for Underground Access to Nearby Coal.

Rather than resume mining, Appellants want to retain the LMU for future access to nearby coal (if and when it becomes profitable for them to mine that coal). They claim coal under their Kenilworth Federal lease will be lost unless a right to future access is here granted. *See* SOR 2014-289 at 8; IBLA 2015-103 at 13 (“Without such access, the adjacent federal lease will likely never be developed.”); Reply at 18-19.¹⁵ Appellants contend BLM erred in denying their request to modify the R₂P₂ or in conditioning that modification on including that lease in the LMU. *See* IBLA 2015-103 at 11-12; Reply at 11-12. We are unpersuaded.

Appellants claim BLM improperly presented them with a “Hobson’s choice[,] either add the Kenilworth Lease to the LMU and proceed with development, or permanently abandon and reclaim the only access route to the lease.” IBLA 2015-103 at 11; *see* Reply at 11 (BLM presented them “with an ultimatum”). However, Appellants had other options,¹⁶ and we find no illegality or impropriety in conditioning approval of their request for underground access to the Kenilworth lease on including that lease in the LMU. *See* 43 C.F.R. § 3482.2(c)(2) (BLM authorized to specify conditions under which an R₂P₂ modification “would be acceptable”). Moreover, as BLM rhetorically asks, “If the Appellants’ allegation that the Aberdeen LMU is not currently economical for commercial production of the remaining

¹⁵ Appellants are willing to pay rent for a right to future access, but not advance royalties for coal they have no intention of mining. *See* SOR 2014-289 at 9; SOR 2015-103 at 13-14 (“[UEI] is clearly seeking to retain portions of the LMU for access only and this portion of the LMU should not be subject to continuous operation requirements or assessed advanced royalties.”).

¹⁶ Appellants could have requested approval to pay advance royalties until they decided whether to develop the Kenilworth lease, but such would be considerably higher than the ground rent they proposed paying. *See supra* note 15. They could have also requested a suspension of operations and production “in the interests of conservation,” which would have avoided rent and advance royalties, but no such request was made by them. 43 C.F.R. § 3483.3(b); *see* 47 Fed. Reg. at 33172; Answer at 18.

recoverable coal reserves and expanding the LMU is not currently economical, then it appears Appellants are holding the LMU only for speculative reasons.” Answer at 16. We therefore affirm the BLM decision dated January 15, 2015, rejecting a proposed modification to the R₂P₂ for underground access to their Kenilworth lease.

III. Whether BLM Properly Identified Recoverable Reserves to Calculate Advance Royalties.

[3] UEI requested approval to pay advance royalties in lieu of continued production for production from COY 16 (March 2010 through February 2011) through COY 20 (March 2014 through February 2015). BLM approved each of those requests and identified recoverable reserves for calculating advance royalty, which is “an amount equivalent to the production royalty that would be owed on the production of 1 percent of the recoverable coal reserves.” 43 C.F.R. § 3483.4(c). By rule, “recoverable coal reserves shall be those estimated by the authorized officer as of the date of approval of the [R₂P₂].” 43 C.F.R. § 3482.2(a)(3) (*Recoverable coal reserves estimates*). This estimate may be revised “as new information becomes available” but “shall not be reduced due to any production after the original estimate made by the authorized officer.” *Id.*

UEI requested its first relinquishment of LMU Lease during COY 16 on September 30, 2010. After it approved that relinquishment, BLM determined the LMU contained [REDACTED] tons of recoverable reserves. UEI requested a second lease relinquishment on May 24, 2012, which was during COY 18. In approving that relinquishment, BLM determined [REDACTED] tons of recoverable reserves were in the LMU, of which [REDACTED] tons were Federal coal, as reflected in BLM decisions dated Aug. 29, 2014, and Jan. 15, 2015. Each BLM approval to pay advance royalty identified recoverable coal reserves from the approved R₂P₂ and lease relinquishments,¹⁷ consistent with 43 C.F.R. § 3482.2(a)(3). We therefore affirm BLM decisions dated September 9, 2013, September 30, 2013, and August 29, 2014 (to the extent they tentatively approved payment of advance royalty in lieu of continued production for COY 20).¹⁸

¹⁷ Recoverable reserves were estimated at [REDACTED] tons after the first lease relinquishment, which was reduced to [REDACTED] tons after the second relinquishment.

¹⁸ We note that Appellants requested a modification to the R₂P₂ on July 19, 2010, to revise its estimate of recoverable reserves due to new information or a change in circumstances [REDACTED]. BLM has not responded to that request, notwithstanding the clear language of 43 C.F.R. § 3482.2: “The authorized officer shall promptly approve (continued...) ”

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 decisions appealed from are affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Amy B. Sosin
Administrative Judge

(...continued)
or disapprove in writing any such [R₂P₂] modifications . . . or specify conditions under which they would be acceptable.” Since this Board does not supervise BLM, we will not remand for further action to comply with that rule. Nonetheless, we are troubled by a failure to respond promptly to that request, particularly since it could have significantly affected recoverable reserve estimates when BLM approved the partial lease relinquishments on Mar. 27, 2012, and Aug. 20, 2013. See *supra* note 17.