

INTERIOR BOARD OF LAND APPEALS

AMAX Coal Co.

131 IBLA 324 (December 14, 1994)

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AMAX COAL CO.

IBLA 92-603

Decided December 14, 1994

Appeal from two decisions of the Wyoming State Office, Bureau of Land Management, approving logical mining units CASPLMU11 and CASPLMU12.

Appeal dismissed.

1. Rules of Practice: Appeals: Dismissal

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

2. Coal Leases and Permits: Generally—Coal Leases and Permits: Leases—Rules of Practice: Appeals: Standing to Appeal

Where a provision of a logical mining unit approval document merely informs the lessee and the operator of Federal coal leases that at some time in the future the Department might seek to impose royalty on Federal coal bypassed in violation of an approved resource recovery and protection plan, but there is presently no alleged violation of such a plan or any decision imposing royalty, a dispute does not exist and the case is not ripe for review.

APPEARANCES: Lawrence G. McBride, Esq., Washington, D.C., and Steven R. Youngbauer, Esq., Gillette, Wyoming, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On September 2, 1992, AMAX Coal Company (AMAX) filed a notice of appeal of two decisions of the Wyoming State Office, Bureau of Land Management (BLM): the first, dated August 4, 1992, approved a logical mining unit (LMU) for the Eagle Butte Mine, including Federal coal leases WYW 0313773 and WYW 78631 (CASPLMU11), and the second, dated August 13, 1992, approved an LMU for the Belle Ayr Mine, including three Federal coal leases, WYW 0317682, WYW 78629, and WYW 80954 (CASPLMU12). AMAX is the

mine operator of both mines, and Meadowlark Farms, Inc. (Meadowlark), a corporate affiliate of AMAX, is lessee of record for all the leases. 1/

Attached to each decision was a copy of the LMU approval document. Section 3 of each document contained a series of "stipulations" related to the LMUs. Section 3.b. of each is virtually identical; it is entitled "RESOURCE AND RECOVERY PLAN" (R2P2), 2/ and after stating that no further submittals for the R2P2 are presently required, it provides:

(1) Proposed modifications to the approved resource recovery and protection plan for any requirements under MLA shall be submitted in writing for approval/disapproval by the authorized officer. (43 CFR 3482.2(c)(2)).

(2) Failure to comply with this requirement may result in the issuance of a Notice of Noncompliance by the authorized officer.

(a) The Notice of Noncompliance may include the amount of royalty to be assessed for Federal coal leased to the operator that recovery and protection plan.

(b) The provisions of paragraph 3.b(2)(a) are subject to the right of AMAX and Meadowlark to appeal this provision as a condition of LMU approval. BLM's approval of the LMU, effective August 1, 1992, shall be subject to all other stipulations, regardless whether or not such an appeal succeeds in nullifying, striking or modifying stipulation 3.b(2)(a). BLM agrees that AMAX and Meadowlark may challenge or resist enforcement of the provisions of paragraph 3.b.(2)(a) during the pendency of any such appeal filed by AMAX and Meadowlark.

(CASPLMU11 at 2), 3/

In its August 4, 1992, decision, BLM explained that despite a request to delete the language of subparagraph (a), it had "determined that the language in Stipulation 3.b, providing for the assessment of royalty for

1/ In its statement of reasons for appeal, AMAX states that it "appeals both on its own behalf and on behalf of Meadowlark." Meadowlark, however, filed no separate notice of appeal from either decision.

2/ As explained by counsel for appellant, an R2P2 is the regulatory phrase for the operation and reclamation plan, required for Federal lease operations under section 207(c) of the Mineral Leasing Act (MLA), 30 U.S.C. § 207(c) (1988).

3/ In CASPLMU12 the quoted language is the same except therein BLM uses the acronym "R2P2" in place of "resource recovery and protection plan."

coal that is not mined, is necessary for the efficient and orderly operation of the LMU pursuant to the regulation at 43 CFR 3487.1(e)(7)."

On appeal, AMAX challenges the inclusion by BLM of subparagraph (a), quoted above, in each approval. AMAX argues that BLM does not have authority to compel payment of royalty for Federal coal not mined, in violation of the R2P2 covering that coal, citing our decisions in Utah Power & Light Co., 118 IBLA 181, 98 I.D. 97 (1991), and Cordero Mining Co., 121 IBLA 314 (1991). It also charges that the LMU provisions of the MLA, 30 U.S.C. § 202a (1988), do not otherwise provide authority for such action by BLM.

BLM responds that its decisions must be affirmed and the stipulation upheld. It argues that the Secretary has broad discretionary authority in approving LMU's to impose conditions to protect the public interest, as well as resources. It contends that the cases cited by AMAX do not deal with LMU approval or similar exercises of Secretarial discretion. It asserts that the terms of the leases included in the LMU's authorize the royalty payments. Finally, it contends that the Cordero Mining case is distinguishable on its facts, and that even if it were factually similar, that case is plainly wrong and should be overturned by the Board.

In its statement of reasons, AMAX recognizes that an issue of ripeness may exist in this case. It states that "there is not currently any dispute between AMAX and BLM over any modification to the R2P2 for either of the mines \* \* \* lessor and lessee have not moved even that first step toward the possibility of AMAX failing to mine coal deemed recoverable in one of the approved R2P2's" (Statement of Reasons at 5). Nevertheless, AMAX felt compelled to challenge inclusion of the stipulation at this time because it did not want to risk the possibility that, if the stipulation were ever invoked, the Board would rule that by failing to appeal the inclusion of the stipulation, it had waived its right to do so. In support of its challenge, AMAX cites Crescent Porter Hale Foundation, 108 IBLA 288, 292 (1989), in which the Board stated: "Assuming, arguendo, that Crescent's predecessor-in-interest had the right to challenge the [potash lease] readjustment, we must conclude that it also waived any such right by virtue of its failure to timely object to the readjustment. Ida Mae Rose, 73 IBLA 97, 99-100 (1983)."

We believe that AMAX was clearly justified in adopting a cautious approach by objecting to the stipulation and appealing its inclusion in each case in order to protect its interests. Nevertheless, having said that, we dismiss AMAX's appeal because there is not currently a dispute between the parties which is ripe for review.

The question raised by AMAX is whether BLM has authority to assess royalty for Federal coal leased to the operator that was not mined, in violation of an approved R2P2. AMAX argues there is no authority to do so; BLM contends there is. Yet, at this time, no coal has been bypassed in violation of an R2P2 and the Department has not sought to impose royalty

on any bypassed coal. Therefore, what the parties actually seek in this case is an advisory opinion from the Board on the Department's authority to collect royalty on bypassed coal. <sup>4/</sup>

[1] Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed. Tennessee Consolidated Coal Co. v. Office of Surface Mining Reclamation & Enforcement, 99 IBLA 274 (1987); see Jesse H. Johnson, 112 IBLA 369, 371 (1990).

The case cited by AMAX, Crescent Porter, *supra*, is distinguishable. In that case, in response to a request from the lessee of certain Federal potassium leases, BLM notified the overriding royalty holder, Crescent, that it was reducing the overriding royalty rate on the leases from 3-1/2 to 2 percent for a certain period, in part, based upon readjusted lease terms imposed in 1971. Crescent appealed claiming, *inter alia*, that BLM lacked authority to reduce the overriding royalty rate pursuant to the readjusted potassium leases because the readjustments were themselves invalid because BLM had failed to notify the lessee of its intention to readjust the leases prior to the expiration of their initial 20-year term. Relying on the doctrine of administrative finality, the Board held that the record showed that the lessee had not registered any timely objection prior to readjustment and had, in fact, executed the readjusted leases, thereby waiving any objection. In addition, the Board stated that assuming Crescent's predecessor in interest had the right to challenge the readjustment, it also had waived any such right by virtue of its failure to object timely to the readjustment.

The lease term involved in that case imposed a requirement on the lessee to obtain the written consent of the owner of a specified overriding royalty interest, thereafter created by the lessee, that such interest was subject to reduction or suspension. Failure to object to the timeliness of readjustment prior to such readjustment resulted in a waiver of objection and an imposition of the requirement. <sup>5/</sup>

Unlike Crescent Porter, in this case the "stipulation" does not impose any requirement on the lessee or the operator. Stipulation 3.b. merely provides notice that certain proposed modifications of the R2P2 are to be submitted in writing to the authorized officer for approval or disapproval; that failure to do so may result in the issuance of a notice of noncompliance; and that such a notice may include "the amount of royalty to be

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<sup>4/</sup> In its answer, BLM asserts that its authority to do so is not based only on the stipulation language, but also emanates from the terms of the leases.

<sup>5/</sup> However, as pointed out by the Board, BLM's reduction of the overriding royalty in Crescent Porter was not undertaken pursuant to that lease term. Instead, we found the reduction to be based on specific regulatory language applicable to the leases. 108 IBLA at 293.

assessed for Federal coal leased to the operator that was not mined," in violation of the approved R2P2. Execution of the LMU by the lessee and the operator does not bind them to pay royalty for bypassed coal; it merely acknowledges their receipt of the notice that BLM might, in the future, seek to collect royalty. By its objection to BLM, AMAX has signaled its intention to challenge any such action.

Under the present facts, there is not a dispute between the parties which is ripe for review and any action by the Board to rule on the issue raised would constitute an advisory opinion. Therefore, the present appeal must be dismissed. However, should BLM in the future issue a notice of noncompliance or decision seeking royalty for bypassed coal from AMAX and/or Meadowlark, AMAX and/or Meadowlark may again raise the arguments presented herein in an appeal to this Board. <sup>6/</sup>

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

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James L. Bymes  
Chief Administrative Judge

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<sup>6/</sup> We note that the exact language of section 3.b.2.(a) is that a notice of noncompliance "may include the amount of royalty to be assessed for Federal coal leased to the operator" (emphasis added). It does not appear that any coal under the Federal leases involved in this case is leased to AMAX, the operator of the leases.