

INTERIOR BOARD OF LAND APPEALS

Jesse H. Knight, et al.

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Appeal from a decision of the Acting Deputy State Director, Utah State Office, Bureau of Land Management, requesting final showings for preference right lease applications U-0149348, U-0149349, and U-0149368.

Affirmed as modified.

1. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

The revised regulations defining "commercial quantities" governing preference right coal lease applications, first promulgated in 1976, apply to BLM's adjudication of pending preference right coal lease applications even if the applications satisfied the standards in effect during the term of the prospecting permit. A determination made by a USGS official that coal is present in commercial quantities is not binding on USGS, BLM, or the Secretary of the Interior, and an applicant for a preference right coal lease does not acquire a vested right to a lease by virtue of the USGS finding as to commercial quantities. The Supreme Court's decision in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), does not alter these conclusions.

2. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

A party does not obtain a vested right to a lease under a preference right lease application until BLM makes a final determination that commercial quantities of coal exist on the lands under application.

3. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

BLM regulations at 43 C.F.R. § 3430.4-1(a) and § 3430.5-1(c) demonstrate that the Department envisioned situations where BLM would require submission of a final showing of commercial

quantities of coal with respect to a preference right lease application before the full completion of all necessary environmental reviews.

4. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

The screening procedures outlined in Chapter III of BLM Manual Handbook H-3430-1 establish the process by which BLM determines whether a preference right lease application clearly cannot satisfy the commercial quantities test and therefore can be rejected without the preparation of additional environmental documentation. These manual provisions are not inconsistent with the plain terms of the regulations at 43 C.F.R. Subpart 3430.

5. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

Where a set of factors and studies of current market potential for the coal underlying the lands embraced by a coal preference right lease application indicate that the applicant is unlikely to be able to satisfy the commercial quantities test, where this Board found that further evidence was necessary to show commercial quantities, and where USGS, BLM and the applicant all stated that additional information was required to show commercial quantities of coal or a valid mine development plan, BLM is not arbitrary or capricious in ordering the applicant to submit a final showing, without first preparing additional environmental documentation.

6. National Environmental Policy Act of 1969: Generally

NEPA requires agencies, in undertaking actions, to consider significant impacts on the human environment. 42 U.S.C. § 4332(2)(C) (1994). The CEQ regulations implementing NEPA at 40 C.F.R. Part 1500 specify the sufficiency of NEPA review to sustain an agency's decision to undertake the action. BLM does not undertake such an action, subject to NEPA or the CEQ rules, in ordering an applicant for a preference right lease to submit a final showing of commercial quantities of coal in support of its application.

7. Administrative Practice--Coal Leases and Permits: Leases--Coal Leases and Permits: Permits: Generally--Evidence: Generally

Where the Board, in a previous decision, ordered BLM to consider an applicant's "evidence that by the standards of the mining industry, a prudent person would be justified in expending labor and means to work the coal deposits on the subject land," to show commercial quantities of coal, and BLM orders submission of a final showing under its regulations, BLM's order is valid under agency regulations, notwithstanding whether the applicant avers that more drilling may support his position.

8. Coal Leases and Permits: Applications--Coal Leases and Permits: Leases

Under 30 U.S.C. § 201(b) (1970) and 43 C.F.R. § 3430.1-1, an applicant for a preference right coal lease must demonstrate it made a discovery of commercial quantities of coal on the lands involved within the term of the prospecting permit. Neither the statute nor the regulation prevents consideration of evidence concerning commercial quantities that was obtained after the permit expired. A preference right lease applicant must be allowed to perform additional drilling to prove that it discovered commercial quantities of coal during the term of its prospecting permit even though that permit has expired, where the applicant can show that its proposed drilling would be calculated to show that a discovery was made during the term of the permit and that this discovery meets the terms of revised regulations imposing more stringent requirements of proof of commercial quantities of coal.

APPEARANCES: Denise A. Drago, Esq., Salt Lake City, Utah, for appellants; Rose Vallie, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Jesse H. Knight, Charles H. Scammell, and Paunsaugunt Coal Company have appealed the December 22, 1997, decision of the Acting Deputy State Director (DSD), Utah State Office, Bureau of Land Management (BLM), requesting a final showing for Knight's coal preference right lease applications (PRLAs) U-0149348, U-0149349, and U-0149368. <sup>1/</sup> The appeal

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<sup>1/</sup> The record contains no reference to Scammell or the Paunsaugunt Coal Company prior to the challenged Dec. 22, 1997, decision. Rather, Knight's last record statement prior to that date was that the designated operator was Caesar Fulton. (Letter from Jesse Knight to DSD, Utah State Office, BLM, Feb. 1, 1995.) After the decision, Knight advised BLM that he was

stems from PRLAs submitted in 1971, a statutory provision repealed in 1976, and a 1981 decision of this Board.

### Legal Background

In 1920, Congress enacted the Mineral Lands Leasing Act (MLA), Act of February 20, 30 U.S.C. §§ 181 *et seq.*, 41 Stat. 437. There, Congress permitted individuals to prospect under permit for coal, apply for a preference right lease, and obtain a coal lease upon a showing that the prospected lands contained workable coal in commercial quantities.

Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this chapter, prospecting permits for a term of two years; and if within said period of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit.

30 U.S.C. § 201(b) (1970) (emphasis supplied). For the ensuing 50 years, the Department awarded leases to PRLA holders if the first-underlined "workability" standard was met, concluding without further analysis that if coal was workable, it existed in "commercial quantities." Natural Resources Defense Council, Inc. v. Berklund (Berklund), 458 F. Supp. 925, 929 (D.D.C. 1978). By the late 1960's and 1970's, the United States Geological Survey (USGS) recommended to BLM whether commercial quantities of coal could be found under a PRLA, based on whether the coal was workable. USGS made the recommendation after looking "exclusively to whether the coal deposit that was discovered actually existed and was workable, i.e., whether the deposit was of such a nature that it could be mined by existing mining technology." Utah International, Inc. v. Andrus (UII (Utah)), 488 F. Supp. 962, 965 (D. Utah 1979), quoting Memorandum for Deputy Under Secretary Lyons from Deputy Solicitor of the Interior Department, March 25, 1975, at 4.

In 1970-71, the Secretary of the Department imposed a moratorium on further coal leasing. See H. Rep. No. 94-681, 94<sup>th</sup> Cong., 2d Sess. 11 (1975), reprinted in 3 U.S.Code Cong. & Admin. News at 1943, 1947

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fn. 1 (continued)

giving "power of attorney to Scammell, President of the Paunsaugunt Coal Company, to act in my stead." (Letter from Knight to BLM, Jan. 21, 1998.) A "power of attorney" conveys limited authority to represent a party before the Board. 43 C.F.R. § 1.3(b)(3). Attorneys represent Knight before this Board in this appeal. The status of Scammell and Paunsaugunt in this appeal is not clear. We note, also, that the record contains copies of Knight's 1978 transfer of record title to Shakespear Coal Co. No other document identifies the interest holders in the PRLAs at the time of the challenged decision.

(1976). <sup>2/</sup> The Secretary took this action based on criticism of BLM leasing policy and a November 1970 BLM study, "Holdings and Development of Federal Coal Leases," concluding that leasing of federal lands had skyrocketed while production of federal coal had declined. See, generally, id., and NRDC v. Hughes (Hughes I), 437 F. Supp. 981, 983-85 (D.D.C. 1977). In 1973, the Secretary permitted coal leasing in limited circumstances not relevant here, and, in January 1976, announced plans to implement a new coal leasing program. Throughout this period, BLM faced judicial challenges and decisions with varying programmatic impacts on its coal leasing program. E.g., Kleppe v. Sierra Club, 427 U.S. 390 (1976), and cases cited above. In 1978, the United States District Court for the District of Columbia enjoined BLM from preference right leasing, until completion of a full programmatic environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994). Hughes I, 437 F. Supp. at 992. The parties ultimately resolved certain issues, and the court modified the injunction. NRDC v. Hughes (Hughes II), 454 F. Supp. 148, 151-58 (D.D.C. 1978).

On May 7, 1976, BLM promulgated, for the first time, a set of regulations defining the term "commercial quantities" to explicitly incorporate its economic nature. 43 C.F.R. § 3520.1-1(c) (1976).

A permittee has discovered commercial quantities of coal \* \* \* if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.

This standard was applicable to PRLAs pending on the effective date of the regulation. 43 C.F.R. § 3520.1-1(d) (1976).

The regulations set out procedures and information required to satisfy this standard and NEPA, as well as the contents of both the initial and final showings necessary to support an application. See 43 C.F.R. § 3521.1-1(b) and (c) (1976). BLM was obligated, after the application for a preference right lease accompanied by an initial showing, to begin "technical examination and environmental analysis." 43 C.F.R. § 3521.1-4 (1976). After completion of this process, BLM was required to prepare and forward to the applicant a report which included, inter alia, environmental problems, reclamation procedures, bonding amounts, and proposed lease terms and stipulations. 43 C.F.R. § 3521.1-5 (1976). Upon receipt, the rules

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<sup>2/</sup> This House Report contains a discussion of the history surrounding problems with coal leasing, including descriptions of BLM, General Accounting Office, and Ford Foundation reports recommending changes that ultimately led to legislative action in 1976. Id. at 1943-82.

specified that the applicant "shall submit" the final showing of commercial quantities, including cost information, mine development planning, and a comparison of costs to revenues. 43 C.F.R. § 3521.1-1(c) (1976).

On August 4, 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. FCLAA redesignated the former 30 U.S.C. § 201(b) of the MLA as section 201(b)(1) and substituted provisions relating to the issuance, terms, and conditions of coal exploration licenses for the provisions relating to prospecting permits and preference right leases, effectively repealing the latter provision. See 30 U.S.C. § 201(b)(1) and notes (1994). Thus, after FCLAA, no further prospecting permits could be issued upon which to base a PRLA. The repeal was subject to "valid existing rights." Section 4, Pub. L. No. 94-377, 90 Stat. 1085 (1976).<sup>3/</sup> The legislative history makes clear that pre-existing permits and applications contain potential rights that may be adjudicated:

The [Senate Committee on Interior and Insular Affairs] wishes to stress that the repeal of [30 U.S.C. § 201(b) (1970)] is expressly "subject to valid existing rights" and thus is not intended to affect any valid prospecting permit outstanding at the time of enactment of the amendments. Any applications for preference right leases based on such permits could be adjudicated on their merits \* \* \* if the requirements of [30 U.S.C. § 201(b) (1970)] \* \* \* were met.

S. Rep. No. 94-296, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 15 (1975). FCLAA had no effect on existing preference right leases. Further, because no person could thereafter apply for a prospecting permit on which to base a PRLA, the rules applicable to PRLAs necessarily applied only to holders of prospecting permits and PRLAs pending under the former 30 U.S.C. § 201(b) (1970) at the time of FCLAA's passage.

Congress also enacted other relevant statutes during this period. On October 21, 1976, Congress enacted the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1785, (1994), establishing provisions and policies governing the management of Federal public lands. On August 3, 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994), which established criteria and standards for surface mining on the public lands.

In 1979, BLM made further changes to the rules governing PRLA processing to incorporate emerging environmental requirements of, inter

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<sup>3/</sup> This term was adopted from legislation drafted and proposed by the Department in 1974 to amend the MLA, including the proposal to end preference right leasing. Congress reported this draft legislation in full in H. Rep. No. 94-681, 94<sup>th</sup> Cong., 2d Sess. 11 (1975), reprinted in 3 U.S. Code Cong. & Admin. News at 1958 (1976).

alia, NEPA and FLPMA. BLM also recodified and revised the definition of commercial quantities at 43 C.F.R. § 3430.1-2, as follows:

(a) The coal deposit discovered under the prospecting permit shall be of such character and quantity that a prudent person would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

(b) The applicant shall present sufficient evidence to show that there is a reasonable expectation that revenues from the sale of the coal shall exceed the cost of developing the mine and extracting, removing, transporting, and marketing the coal. The costs of development shall include the estimated cost of exercising environmental protection measures and suitably reclaiming the lands and complying with all applicable Federal and state laws and regulations.

43 C.F.R. § 3430.1-2 (1979). See 44 Fed. Reg. 42584 (July 19, 1979).

The 1979 rules added clarifying information about requirements compelled by the FLPMA land use planning and NEPA environmental analysis processes. 43 C.F.R. §§ 3430.3-1 and 3430.3-2 (1979). The rules retained the 1976 procedure regarding initial and final showings, specifying that "[u]pon completion of the environmental assessment or impact statement on the application, the authorized officer shall promptly request a final showing by the applicant." 43 C.F.R. § 3430.4-1(a) (1979). That rule set out the material required for a final showing, and BLM's continued authority to request additional data was retained in 43 C.F.R. § 3430.4-2 (1979). Further, the 1979 rule required the applicant to supply a final showing within 90 days of BLM's request. The rules at Subpart 3430 governing processing of PRLAs remain in place today, with 1982 and 1987 modifications not critical, with one exception, to this case. See 43 C.F.R. Subpart 3430. In 1987, BLM promulgated 43 C.F.R. § 3430.5-1(c), which authorized BLM to require an applicant to prove commercial quantities without any "additional NEPA documentation" or cost estimate required in, inter alia, 43 C.F.R. § 3430.3-2, subject to further proof by the applicant. 52 Fed. Reg. 25800 (July 8, 1987); see also 47 Fed. Reg. 33114 (July 30, 1982).

#### Factual Background

On April 30, 1971, Knight filed the three PRLAs at issue, together encompassing lands in Tps. 35 and 36 S., Rs. 2 and 3 W., Salt Lake Meridian, Garfield County, Utah, within the Dixie National Forest. The applications were based on exploration conducted under coal prospecting permits issued in 1967 pursuant to 30 U.S.C. § 201(b) (1971), and extended at Knight's request through April 30, 1971, by BLM decision dated May 1, 1969. BLM forwarded the application package to the United States Forest Service on May 20, 1971, for that agency's consideration as a result of its responsibilities for the Dixie National Forest. Knight modified his application by letter dated August 16, 1971. On February 23, 1972, the

USGS Director advised BLM that commercial quantities of coal had been discovered on U-0149348 and U-0149349 and on a portion of U-0149368. Consistent with the above-stated description of pre-moratorium PRLA processing, USGS's letter did not articulate any rationale for its position, either as to the coal's "workability" or "commercial" nature.

By letter dated June 30, 1972, the Utah State Director advised Knight's operator that, pursuant to Instruction Memorandum (IM) 71-23, dated January 28, 1971, all PRLAs filed after the date of that IM were to be referred to and decided by the BLM, Washington, D.C. Office (BLM-D.C.). Pursuant to the IM, on September 12, 1972, BLM forwarded to BLM-D.C. a draft decision rejecting PRLA U-0149368 in part and granting PRLAs U-0149348 and U-0149349 in their entirety, as well as a draft lease and stipulations. The cover letter reflected that the Diligent Development and Minimum Production Clauses were not included because of anticipated changes to these provisions. (September 12, 1972, Memorandum from Acting State Director, BLM, Utah State Office, to Director, BLM-D.C.) BLM-D.C. never approved the PRLAs or issued any lease with respect to them. Rather, by memorandum dated January 15, 1973, BLM-D.C. ordered the Utah State Office to suspend action on Knight's PRLAs.

Subsequently, based on the May 7, 1976, regulations, BLM initiated further review of the PRLAs. BLM provided Knight with a copy of the regulations by letter dated June 29, 1976. Thereafter, Knight sought several time extensions, and BLM sought further information based on the Federal court injunction in Hughes I, the regulations, and an IM specifying that applicants must ensure that their PRLAs do not cover mining claims under the Mining Law of 1872, 30 U.S.C. § 22 (1994). BLM permitted Knight an extension until 1977 to file the information required for an initial showing under 43 C.F.R. § 3521.1-1(b) (1976).

BLM also sought guidance from USGS as to whether the PRLAs showed "commercial quantities" under the definition in the regulations. On February 1, 1979, USGS advised BLM that it could not make such a finding without an initial showing. On February 7, 1979, BLM issued a decision ordering Knight to file his initial showing and advising him that the PRLA files would be closed if he did not do so within 60 days.

Knight filed his initial showing on April 26, 1979. As his presentation, Knight submitted a document entitled "Development Plans, [PRLAs], Prepared for Jesse H. Knight, April 1979." The document reflects that it is an "initial" rather than "final" showing in that, it "recognized that some additional drilling may be necessary before the installation of a large scale mine," and indicated that there were "some problems which will have to be resolved." Id. at 8. The document did not purport to make the requisite showing of costs versus revenues required of a final showing, both in 43 C.F.R. § 3521.1-1(c) (1976), and in the 1979 rules with final showing requirements that were substantially the same as those in 1976. 43 C.F.R. § 3430.1-2 (1979).

In an August 14, 1979, geologic report prepared for Knight's PRLAs, USGS found that exploration under the permits had shown that coal underlay

most of the application area but that the continuity of the individual coal beds could not be demonstrated using the available data. This prevented the calculation of a demonstrated reserve base and the design of a mine plan. USGS concluded that exploration under the permits had shown

that a good possibility exists that the application area is underlain by at least one coal bed that could contain commercial quantities of coal. However, before commercial quantities of coal could be demonstrated, additional exploration would be necessary to establish the continuity of at least one bed of mineable thickness.

(August 14, 1979, USGS Report at 3-4.) On August 23, 1979, the Acting Area Mining Supervisor, USGS, informed BLM of its conclusion, based on its geologic report, that Knight's PRLAs "failed to meet the requirements for initial showing because no measured or indicated reserves could be determined from the submitted information."

By decision dated March 7, 1980, BLM rejected Knight's PRLAs, adopting the conclusions reached by USGS. Knight appealed BLM's decision to this Board.

On March 3, 1981, while Knight's appeal was pending before the Board, the District Mining Supervisor, USGS, advised BLM that another geologic report had been prepared using new guidelines for processing PRLAs. This report indicated that, although the reserves on the PRLAs could not be demonstrated, a resource base could be "estimated using a hole-by-hole analysis and the reserve calculation standards of General Mining Order No. 1." (Memorandum from USGS to BLM, March 3, 1981.) Basing its estimate on a bed thickness of 4 feet or greater and an assumed recovery rate of 50 percent, the report calculated a total resource figure for the PRLAs of 81,800,000 short tons of coal and estimated the mineable resource to be about 64,500,000 tons, with approximately 32,250,000 tons of recoverable coal. Id. Employing these estimates, the District Mining Supervisor opined that the PRLAs were underlain by commercial quantities of coal. Id. The District Supervisor noted that the development plans were "deficient in meeting [three] requirements for initial showing," but concluded that the deficiencies should not disqualify Knight and recommended that "the application should continue to final showing." Id. at 1-2.

On March 24, 1981, the Board issued its decision, reversing and remanding the matter to BLM. Jesse H. Knight, 53 IBLA 300, 304 (1981). <sup>4/</sup> In that decision, the Board held that Knight must comply with the regulations promulgated in 1976 and 1979. Id. at 303, citing UII (Utah), 488 F. Supp. at 962, and Kin-Ark, 45 IBLA 159 (1980). It rejected Knight's argument that BLM was estopped from considering USGS's 1979 determination, as a result of its earlier determination in 1972, because "although a Survey recommendation is critical, BLM must issue a formal decision which either grants or denies the lease." 53 IBLA at 304, citing Utah

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<sup>4/</sup> The Board noted the USGS' 1979 "conclusion that appellant's initial showing failed to meet the requirements of the regulations." Id. at 303.

International, Inc. v. Andrus, 488 F. Supp. 976 (D. Colorado 1980) (UII (Colo.)). It denied Knight's request for a hearing, 53 IBLA at 304, but, based on his representation that he was prepared to present evidence of commercial quality, it vacated BLM's decision and remanded the case to BLM, ordering it to allow Knight to show that commercial quantities of coal, by mining industry standards, existed on the subject lands and satisfied the regulatory definition of commercial quantities. Id.

On remand, BLM issued a decision dated April 16, 1981, directing Knight to submit within 30 days additional evidence demonstrating that the PRLA lands contained commercial quantities of coal as defined by the regulatory standards in 43 C.F.R. § 3430.1-2. The record contains a series of written and documented oral correspondence between Knight and BLM, attempting to come to agreement as to how to present this evidence. See Letters from Knight to BLM, dated April 30, May 11, and May 12, 1981; Letter from BLM to Knight dated May 14, 1981. The record also contains internal correspondence within BLM regarding the proper procedure to follow consistent with the regulations and BLM's land use planning obligations under FLPMA. This culminated in a letter dated June 15, 1981, from BLM to the Regional Forester, Dixie National Forest, in which BLM determined that Knight had completed the initial showing requirements based on the March 3, 1981, USGS Memorandum. Consistent with the PRLA regulations requiring an environmental analysis prior to final showing, BLM asked the Forest Service, as the surface management agency, to coordinate the preparation of the environmental assessment (EA) on the PRLAs, pursuant to NEPA.

The Forest Service issued the EA in December 1983. The agency described the history, including the Board's decision and explained the reasoning for moving to the EA process at that juncture. Noting that the Secretary of the Interior had determined to process all PRLAs by 1984, id. at 2, the EA explained:

"[B]efore commercial quantities of coal could be demonstrated, additional exploration would be necessary to establish the continuity of at least one bed of mineable thickness." Based on this determination, the application was rejected. This was appealed to the Interior Board of Land Appeals. The Board remanded the case on March 24, 1981, for further consideration of the applicant's contention that the tracts did contain commercial quantities of coal. Since a coal estimate is necessary for environmental analysis of the leasing action, an estimate using less restrictive criteria was prepared March 3, 1981, by the USGS. This will allow the subject environmental analysis to be made and the environmental consequences of mining the coal evaluated.

(1983 EA at 1, quoting 1979 USGS determination.) 5/

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5/ Pursuant to SMCRA, 30 U.S.C. § 1272(b) (1994), the Forest Service was obligated to and did make an "unsuitability criteria determination" that no

The decision notice and finding of no significant impact (DN/FONSI) included with the EA adopted alternative B:

It is my decision to adopt Alternative B and give further consideration to the issuance of the subject PRLA's. Alternative B provides for the lease terms and stipulations necessary to process the lease application through a final showing. It will be incumbent upon the applicants to demonstrate in their final showings, prior to our recommendation to lease that the Federal coal can be economically developed in an environmentally sound manner.

Id. (emphasis added).

In the ensuing decade, the record shows correspondence between BLM and Knight's sureties regarding bonding requirements, but nothing regarding the final showing under the regulations at 43 C.F.R. Subpart 3430. By letter dated December 15, 1994, BLM notified Knight that the processing of his and the other remaining PRLAs pending in Utah had been delayed by various policy decisions until then. BLM advised Knight that procedures for processing PRLAs were complicated, time-consuming and expensive. BLM appraised Knight of the current situation relative to the PRLAs and their regional location, pointing out that, historically, southern Utah coal had never been developed into a valuable commercial operation because of the remoteness of the area and the lack of transportation and coal markets, that an existing proposed development project, if approved, would likely utilize the remaining excess capacity on the highways, that various interest groups opposed coal development in the Kaiparowits Plateau, and that the PRLAs were in or adjacent to wilderness study areas. BLM also advised Knight that, if a lease were to be issued on any PRLA, FCCLA required production within ten years of lease issuance. On this basis, BLM requested that Knight inform the agency whether he wished to continue to pursue the issuance of the coal leases.

Knight responded by letter dated February 1, 1995, asking BLM to put his applications "on ice" until he could contact the designated operator for the applications. No further correspondence from Knight appears in the case file.

In his December 22, 1997, decision, the DSD informed Knight that, in accordance with 43 C.F.R. § 3430.4-1(d), he had 90 days from receipt of the decision to submit a final showing on the PRLAs. The DSD further advised Knight that he should follow the BLM Manual Handbook H-3430-1, Chapter V--Request for a Final Showing. He indicated that, based on an independent

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fn. 5 (continued)

areas covered by the PRLAs were suitable for surface mining. (EA at 2.) It concluded that all of the area could "be considered available for leasing for underground mining with appropriate mitigation of surface impacts." Id.

study of the market potential of Kaiparowits coal commissioned by BLM, that coal was not presently economic and would not likely compete in the coal market until 2020. The DSD further noted that the final showing would be the conclusive documentation for adjudication of the PRLAs and that failure to timely respond would be grounds for their cancellation.

### Issues on Appeal

Knight argues that BLM improperly requested the final showing under 43 C.F.R. § 3430.4-1 and the BLM Manual Handbook. He asserts that BLM's decision requiring him to make a final showing is premature because, unless BLM clearly can reject a PRLA for failure to meet the commercial quantities test for coal, the agency must prepare supplemental environmental analysis and meet other requirements before requesting a final showing. (Statement of Reasons (SOR) at 5-6.)

Chapter III of section H-3430-1 of the BLM Manual Handbook allows BLM to reject PRLAs that it believes clearly cannot satisfy the commercial quantities test without first performing additional environmental analysis. Knight contends that BLM's attempt to process the PRLAs under this "screening option" ignored evidence in the record suggesting that commercial quantities of coal exist on the lease areas, including the 1979 USGS report, the 1981 USGS memorandum, and the 1983 EA. Knight maintains that, in light of this evidence, BLM should be required to process the applications under the procedures mandated for applications that cannot clearly be rejected for failure to meet the commercial quantities test which require the preparation of new or supplemental environmental documentation before requesting a final showing. (SOR at 6-7.)

Knight further avers that the EA prepared in 1983 for the PRLAs must be supplemented because significant new information has become available since the EA was drafted, including creation of the nearby Grand Staircase Escalante National Monument; new coal studies addressing coal reserves, mining costs, and transportation markets in the region; proposed wilderness study areas and roadless area review evaluations; changes in available transportation options; and updated land use analyses contained in the 1986 Dixie National Forest Land Use Plan. (SOR at 7.) Knight submits that this significant new information also renders BLM's reliance on the 1983 EA arbitrary and capricious and mandates that BLM's decision be vacated and a supplemental EA or EIS be developed. Id. at 8-9.

Knight maintains that BLM erred in applying the current regulations to his PRLAs. He contends that adjudicating his 1971 PRLAs pursuant to these regulations constitutes an impermissible retroactive application of administrative rules in violation of Bowen v. Georgetown University Hospital (Bowen), 488 U.S. 204 (1988). Knight acknowledges that Federal courts have held that PRLAs submitted before the promulgation of the 1976 regulations are nevertheless subject to those rules, but asserts that these cases should no longer be followed because they conflict with Bowen's holding that a legislative grant of rulemaking authority does not encompass the power to promulgate retroactive rules unless the statute expressly grants that authority. According to Knight, the MLA of 1920 did not

expressly grant retroactive rulemaking authority, and the regulations cannot permissibly be applied retroactively because to do so would impair the rights he possessed when he submitted his PRLAs and impose new obligations on him relating to those PRLAs. (SOR at 11-14.)

Accordingly, Knight concludes that the DSD decision should be reversed and remanded for adjudication under the workability test utilized by USGS from 1920 until 1971. Knight also argues that, in any event, because the requirements for a final showing have changed since he was issued his prospecting permits, the Board should grant him additional time to conduct further drilling and exploration before he is required to make his final showing. (SOR at 10-11.)

### Discussion

The passage of time is an unavoidable fact in this matter. The record shows multiple periods during which years passed and something that the law or the regulations would have required did not occur. We find delays on the part of both parties. Perhaps, had Knight not sought an extension of the prospecting permits in 1969, or BLM not granted it under its discretionary authority through 1971, all would have been resolved thirty years ago. But this occurred and the rest is history. Both parties were buffeted by legislative, judicial, and regulatory approaches to a number of relevant topics. With all of this as background, we must decide what should happen now.

[1] We turn first to Knight's argument under Bowen, 488 U.S. at 204. While Knight's last argument, it concludes that the Supreme Court in Bowen necessarily overruled Board precedent, a number of decisions in the Federal courts, and this Board's prior decision in his own case. Jesse H. Knight, 55 IBLA at 300. Further, because the regulations apply only to PRLAs and prospecting permits pending in 1976, Bowen, under Knight's view, necessarily invalidates the PRLA regulations now codified at 43 C.F.R. Subpart 3430. Thus, it presents the initial question of the appropriate test for adjudicating Knight's PRLAs. While this Board may not invalidate a duly promulgated rule of the Department, we may assess Knight's claim that the Supreme Court has done so.

In Bowen, the Supreme Court confronted cost-limit rules established by section 223(b) of the Social Security Amendments of 1972 (SSA). The Department of Health and Human Services (HHS) had established a rule regarding hospital cost reimbursements in 1981. 488 U.S. at 206. A Federal district court struck down that rule for failure to comply with notice and comment procedures for rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. (1994). Thenceforth, HHS collected monies from hospitals in accord with the pre-1981 rules. 488 U.S. at 207. In 1984, HHS promulgated a new rule retroactive to the date of the 1981 rule, and "proceeded to recoup sums previously paid as a result of the District Court's ruling \* \* \*. In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside." Id. Based upon language of the SSA authorizing "retroactive corrective adjustments," Justice Kennedy found for

a unanimous Court (Scalia, concurring) that the "structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, not to rulemaking." Id. at 209.

The Court analyzed the cited statutory provision as well as the one granting general rulemaking authority, id. at 210-15, to conclude that when Congress meant to apply a term retroactively, "it made that intent explicit" within the SSA. Id. at 213. In response to HHS's statement of broader concerns, the Court stated: "Whatever weight the Secretary's contentions might have in other contexts, they need not be addressed here. The case before us is resolved by the particular statutory scheme in question." Id. at 215. The Court was also influenced by the fact that HHS's current interpretation of the statute was "contrary to the narrow view of that provision advocated [by HHS] in past cases" and thus "appear[ed] to be nothing more than an agency's convenient litigation position." Id. at 212-13.

We find Knight's attempt to correlate Bowen with the situation he faces with his PRLAs to be unfounded. First, the Court's focus on the term "retroactive" in Bowen is difficult to square with the factual and legal context here. The "commercial quantities" requirement of the MLA was in place from 1920 to 1976. The fact that BLM first defined it in 1976 for all pending applicants and permit holders is hardly "retroactive" in the sense used in Bowen. Rather, the PRLA analog to the problem in that case would have appeared if BLM had attempted to retrieve preference right leases issued before 1976, and demanded that the lessees prove commercial quantities in accordance with the definition first issued in 1976. That is not this case.

Second, Knight cites Bowen for the proposition that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." (SOR at 13, citing 488 U.S. at 208.) Knight asserts that the MLA contains no such retroactive authority. However, the MLA gave authority to the Secretary to implement section 201(b) (1970), considering both of its terms "workability" and "commercial quantities." That the Department equated the two without elucidation of the latter's meaning for years did not deprive BLM of authority to attach a meaning to the term by rule.

Thus, while Bowen makes no comment on the terms of MLA section 201(b), prior court decisions have addressed exactly this provision and whether BLM was permitted to define commercial quantities when and how it did. In UII (Utah), the court upheld the applicability of these regulations to pending PRLAs, noting that under principles of statutory construction, commercial quantities must be regarded as having a meaning distinct from "workability." The court acknowledged BLM's authority to consider that difference and held that the regulations correctly construed the term "commercial quantities" as it was intended by Congress. 488 F. Supp. at 968-69. See also Amoco Production Co. v. Gambell, 480 U.S. 531, 548 (1987) ("where an expression is capable of precise definition, we will give effect to that meaning absent strong evidence that Congress actually

intended another meaning.") Likewise, our decision in Kin-Ark Corp., 45 IBLA 159, 165, 170, 87 I.D. 14, 18, 20 (1980), comprehensively addressed the issue, finding that the 1976 revised regulations unequivocally stated that the rules were to apply to all pending and future PRLAs. 45 IBLA at 166-67, 87 I.D. at 18-19. See also Thermal Energy Co., 135 IBLA 291, 323 (1996); Eugene Stevens, 126 IBLA 357, 360 (1993); Jesse H. Knight, 53 IBLA at 303; 41 Fed. Reg. 18845 (May 7, 1976).

Nothing in Bowen repudiates this analysis of the MLA regulations. To the contrary, the Court's logic on the point cited by Knight refutes such a construction. The Supreme Court cited Brimstone R. Co. v. United States, 276 U.S. 104, 122 (1928), for its conclusion that "the power to require readjustments for the past is drastic. It \* \* \* ought not to be extended so as to permit unreasonably harsh action without very plain words." See 488 U.S. at 208 (ellipses Court's). We find no effort on BLM's part to require Knight to make "readjustments for the past." Further, the Court's citation for general retroactivity principles in that paragraph to five cases from 1928 through 1964 belies Knight's assertion that the Supreme Court meant to or believed it was prompting a drastic change in the law with respect to retroactivity (SOR at 12), let alone the law for processing PRLAs prior to Bowen. (SOR at 12.)

Moreover, Knight's concern for statutory construction studiously avoids express Congressional intent contemporaneous with his PRLA filings. During the three months subsequent to BLM's promulgation of the 1976 rules, between August and October of 1976, Congress enacted FCLAA and FLPMA, both addressing or implicating mineral leasing issues. FCLAA expressly did away with the very provision authorizing the PRLAs Knight seeks to be approved. The legislative history of FCLAA alone is enough to demonstrate that Congress did so with eyes open to the Secretarial moratorium and the fact that PRLAs had been approved indiscriminately without sufficient justification in production capacity. Congress noted that they allowed persons to speculate with regard to the Federal lands. H. Rep. No. 94-681, 94<sup>th</sup> Cong., 2d Sess. 11 (1975), reprinted in 3 U.S. Code Cong. & Admin. News at 1943, 1944-48 (1976). FLPMA enacted more stringent controls for the management of public lands. In 1977, SMCRA enacted stringent guidelines for the surface mining of coal. This display of Congressional intent is relevant and contrasts sharply with Congress' purpose in Bowen.

With these enactments, other principles of statutory construction come into play. By deleting section 201(b) as enacted in 1920, Congress meant to do away with PRLAs; this expression of intent is hardly consistent with Knight's view that Congress must now be perceived as intending that pending PRLAs be approved in the same indiscriminate manner that helped to create the very ills Congress meant to avoid by legislation. Indeed, we cannot presume that the existence of the 1976 regulations was lost on Congress. Rather, Congress is presumed to know and be aware of law relative to the legislation it enacts. South Dakota v. Yankston Sioux Tribe, 522 U.S. 329, 350-51 (1998); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988). Congress expressly acknowledged awareness of the moratorium pending the agency's stated plans for regulatory change and can be presumed to

have been aware of BLM's recent construction of the statutory provision that it explicitly amended. Congress was capable of directly addressing that construction for pending applications and permits, but did not do so.

Congress' more recent enactments expressly supply a third distinction between this situation and Bowen. As noted above, FCLAA's repeal of section 201(b) (1970) was subject to "valid existing rights." 90 Stat. 1085. In considering this, the courts have made clear that a difference exists between rights to leases which have vested and the rights to pursue leases by PRLA. The line between the two is the point at which a property right to a lease has vested. The Tenth Circuit expressly stated that it would not recognize the filing of a PRLA to create a property interest. Hunter v. Morton, 529 F.2d 645, 649 (10<sup>th</sup> Cir. 1976), citing Hanifin v. Morton, 444 F.2d 200 (10<sup>th</sup> Cir. 1971).

Additional judicial and administrative decisions have likewise determined whether the 1976 rules apply to an application based on whether or not a right to a lease has vested. UII (Colo.), 488 F. Supp. at 984-87 (right to lease existed by virtue of BLM April 1970 determination that commercial quantities existed). That court found that the determination had to have been made by BLM, and that FCLAA and the 1976 rulemaking establishing the definition of commercial quantities was meant to remedy the situation where "the holder of a prospecting permit was almost automatically entitled to a preference right lease." Id. at 984 and n.7, citing Berklund, 458 F. Supp. at 930 n.8. In UII (Utah), 488 F. Supp. at 962, the court held that an applicant did not acquire a vested right to a lease immediately upon the filing of a PRLA. Because BLM had made no finding of commercial quantities prior to the moratorium, the court concluded that the applicant was entitled to a lease only if it satisfied the commercial quantities test as defined in the 1976 regulations, which expressly stated that they applied to pending PRLAs. 488 F. Supp. at 969. The Utah District Court also held that local USGS officials' determinations as to the presence of commercial quantities of coal were not binding on USGS, BLM, or the Secretary of the Interior. Id. at 967; see also Hunter v. Morton, 529 F.2d at 648-49. We find nothing in Bowen to implicate the line established by these courts. 6/

Other Supreme Court cases would suggest that because the mere filing of his PRLAs did not give Knight a vested right to issuance of the leases, applying the rules to his pending PRLAs cannot impair any right he possessed or create manifest injustice. See Landsgraf v. USI Film Products, 511 U.S. 244, 280 (1994); Bradley v. Richmond School Board, 416 U.S. 696, 711, 720 (1974); see also Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 744 n.3 (1996) (refuting Bowen's application because it

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6/ As noted, this Board also has consistently held that applicants that completed their exploration and submitted PRLAs before the 1976 and later revisions of the applicable regulations must comply with the requirements of the revised regulations. Thermal Energy Co., 135 IBLA at 323; Eugene Stevens, 126 IBLA at 360; Jesse H. Knight, 53 IBLA at 303; Kin-Ark Corp., 45 IBLA at 166-67, 87 I.D. at 18-19.

would be absurd for a court addressing transactions occurring when there was no clear agency guidance to ignore the agency's current authoritative pronouncement of what the statute means). In light of this precedent, we cannot agree with Knight that the Supreme Court's decision in Bowen can be construed to invalidate prior precedent governing PRLAs or, particularly, the Board's precedent in this case. Accordingly we reaffirm the holding in our previous decisions that the regulations as revised in 1976 and later govern the adjudication of pending PRLAs including those filed by Knight. <sup>7/</sup>

[2] To support his argument that the PRLAs should be judged under the "workability test" in effect from 1920-71 (SOR at 14), our conclusion with respect to Bowen leaves Knight to show that BLM had made a commercial quantities determination in his favor such that a right to the leases vested prior to the moratorium. To the contrary, BLM's first opining on this topic appears in a 1972 memorandum from the Utah State Director to the Director, BLM-D.C. The Director never approved this recommendation. The 1979 USGS Report required additional information before a determination of commercial quantities could be made. See 1979 USGS Report at 3-4; Jesse H. Knight, 53 IBLA at 300. Thus, no right to leases vested prior to the moratorium and Knight became subject to the procedures applicable to PRLAs in BLM's 1976 rules, as amended. We find no reason to revisit the Board's 1981 conclusion on this point other than to note that this decision applies as well to the 1982 and 1987 amendments to the PRLA rules. <sup>8/</sup>

[3] Knight argues that BLM's 1997 DSD order for a final showing is premature and does not comport with applicable regulations on grounds that the EA and draft lease stipulations completed in 1983 are inadequate because significant new information has arisen in the intervening years between the EA and the DSD order which requires preparation of supplemental environmental documentation. He argues that the regulations require a final showing after "completion of the [EA/EIS]," 43 C.F.R. § 3430.4-1(a). Focusing on the word "completion," he argues that BLM has no discretion to require a final showing until BLM has completed the NEPA process, including supplementation to the present date. (SOR at 5-7.)

This construction is not supportable. First, given the facts, we have difficulty finding that BLM had no discretion to order a final showing. This Board ordered BLM to permit Knight to submit his evidentiary

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<sup>7/</sup> So concluding, we do not address BLM's argument that Knight is estopped from duplicating claims in his pleadings in the 1981 case.

<sup>8/</sup> Knight's inability to reach agreement with BLM in 1981-1987 about how to comply with this Board's decision and the rules is only another "what if." If he had submitted the showing the Board ordered BLM to accept, maybe it would have been sufficient. Knight was well aware of this Board's ruling and never took advantage of it or the regulation permitting him to supply a final showing. This is in stark contrast with his claims now that existing evidence is sufficient to "suggest" commercial quantities of coal. (SOR at 6.) His PRLAs were and are subject to further regulatory change until he makes a final showing.

showing of commercial quantities twenty years ago, at a time when NEPA was fully in place. Jesse H. Knight, 53 IBLA at 304. The record shows that when BLM made its 1981 demand that he do so, Knight questioned the format of his presentation but never complied. One way or the other, the parties permitted the process ordered by the Board to slip in increments of years for well over a decade. To the extent Knight bases his demands for new NEPA analysis on BLM's delay in implementing the rules earlier against Knight (SOR at 9), he bears responsibility as well. Knight argues that a final showing must be made "on completion" of the EA, "with little or no interval after" its preparation. (Knight Reply at 13.) BLM asked Knight for his submission in 1981 and for a decision on whether to proceed in 1994. There is no provision for Knight to put the matter "on ice" as his response requested. While we query BLM's lack of response to the "on ice" request, we can endorse no procedure whereby a party does not respond to a direct BLM order, unilaterally places a second request from BLM on hold and then demands a benefit, at considerable cost to the taxpayer, from the passage of time due to his own silence and inaction.

More importantly, Knight's construction of the rules is more rigid than their terms allow. The regulation provides that, "[u]pon completion of the environmental assessment or impact statement on the application, the authorized officer shall, if not previously submitted, request a final showing by the applicant." 43 C.F.R. § 3430.4-1(a) (emphasis added). The underscored language demonstrates that the Department envisioned situations where a final showing would be submitted before the completion of all necessary environmental reviews.

In addition, 43 C.F.R. § 3430.5-1(c) authorizes BLM to reject any PRLA that clearly cannot satisfy the commercial quantities test, without NEPA documentation. The regulations require NEPA documentation after an initial showing. 43 C.F.R. § 3430.3-2. Knight does not dispute that this was completed in 1983. However, the regulations explicitly contemplate a situation such as this, specifying that BLM may reject a PRLA "that clearly cannot satisfy the commercial quantities test without preparing additional [NEPA] documentation and/or a cost estimate document as described in §§ 3430.3-2, 3430.3-3, and 3430.3-4." 43 C.F.R. § 3430.5-1(c). The requisite steps for doing so include notifying the applicant that the application will be rejected and the reasons for the proposed rejection, affording the applicant 60 days to provide additional information as to why the application should not be rejected, and specifying the type, quantity, and quality of the information necessary for reconsideration of the proposed rejection. 43 C.F.R. § 3430.5-1(c)(1) and (2). If the applicant submits sufficient information to convince the authorized officer to reconsider the rejection decision, 43 C.F.R. § 3430.5-1(c)(3) directs BLM to proceed to adjudicate the application in accordance with 43 C.F.R. §§ 3430.3-2, 3430.3-3, and 3430.3-4. Considering these regulatory provisions, we cannot adopt Knight's construction that they require BLM in all cases to reach the bitter end of a NEPA process before the applicant is required to submit some proof that the leases applied for would produce commercial quantities of coal.

[4] Likewise, this regulation refutes Knight's arguments against BLM's adoption of the screening procedures set forth in Chapter III of BLM

Manual Handbook H-3430-1. Knight argues that the Handbook procedures impermissibly expand the regulatory exceptions to the EA requirement in 43 C.F.R. § 3430.3-2.

To the contrary, the screening procedures outlined in Chapter III of BLM Manual Handbook H-3430-1 complement the rules. The procedures apply only to PRLAs for which there are completed EA's or EIS's. (H-3430-1, Chapter III.A.) They require "[a]uthorized officers who wish to screen PRLAs to determine if they can be rejected as clearly failing to meet the commercial quantities test" to request the applicant to submit a final showing or supplement a previously filed final showing, which the authorized officer will evaluate under applicable guidelines. (Chapter III.B.1 and B.2.) In such cases, BLM will notify an applicant that the PRLA will be rejected unless the applicant submits additional information contradicting this conclusion within 60 days, and will clearly identify the type, quality, and quantity of information needed. (Chapter III.C.) If an applicant fails to respond or the submitted information does not change the previous conclusion, then the authorized officer will reject the PRLA. However, if the authorized officer determines that the final showing is likely to satisfy the commercial quantities test or if there is uncertainty about the commercial viability of the final showing, then the authorized officer must prepare additional NEPA documentation and process the PRLA in accordance with the procedures set out in Chapters IV through VII of the Handbook for determining commercial quantities. Id.

Where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will generally uphold their application. Beard Oil Co., 105 IBLA 285, 288 (1988). Moreover, while the provisions of the BLM Manual do not have the force and effect of law, they are binding on BLM. Franklyn Dorhofer, et al., 155 IBLA 51, 55 n.6 (2001), citing Arizona Silica Sand Co., 148 IBLA 236, 243 (1999); Howard B. Keck, Jr., 124 IBLA 44, 55 (1992). We find no inconsistency between the Handbook procedures and the duly promulgated regulations because the former do not unlawfully enlarge the regulatory exceptions to the requirement that an EA or EIS be prepared before requesting a final showing. Cf., Thermal Energy Co., 135 IBLA at 325 (other portions of BLM manual not followed). Indeed, the regulation at 43 C.F.R. § 3430.5-1(c) permits an officer to propose rejection of a PRLA with little NEPA documentation at all; it does not contravene this rule to permit the same action when an EA has been completed. We thus reject Knight's challenges to the facial validity of the BLM Manual screening procedures.

[5] Knight contends that the BLM Manual Handbook was not promulgated with the APA formalities of notice and comment, and, therefore, that it should not control over contrary regulations. (Knight Reply at 15-16.) As noted above, we do not find the Handbook's screening concept to be contrary to the regulations. However, we need not address Knight's arguments against application of the Handbook to his PRLAs to the extent he argues that such application is arbitrary and capricious under the APA, because we reject his assertions that BLM was arbitrary in requiring Knight to submit a final showing now.

Contrary to Knight's suggestion (SOR at 6), BLM's order of a final showing is not a finding regarding whether commercial quantities of coal exist under his PRLAs; rather, the rules afford him the opportunity to convince BLM that his PRLAs cannot clearly be rejected for failure to meet the commercial quantities test. 43 C.F.R. § 3430.5-1(c)(3). His contention that the evidence already in the record establishes that his applications cannot clearly be rejected for failure to meet the commercial quantities test fails because, as noted above, the earlier 1979 and 1981 USGS determinations he relies on to show the existence of the requisite commercial quantities do not bind BLM. UII (Utah), 488 F. Supp. at 967; UII (Colorado), 488 F. Supp. at 984. Likewise, the 1979 USGS findings, the 1981 USGS estimate, the Forest Service EA and FONSI, and Knight's 1979 "Development Plan" all indicate that further information was necessary before a final determination could be made. Given this and the conflicting information that both parties agree exists about the likelihood of the commercial viability of Kaiparowits Plateau coal, BLM was not arbitrary in requesting, under 43 C.F.R. § 3430.5-1(c), that Knight submit additional information in the form of a final showing addressing whether the PRLAs cover "commercial quantities" of coal. We also note that the submission of a final showing conforms to our decision in Jesse H. Knight, 53 IBLA at 304, since that showing apparently will be the first additional evidence Knight has supplied since the Board issued its earlier decision.

[6] Knight argues that BLM's failure to conduct further environmental analysis violates the CEQ regulations implementing NEPA at 40 C.F.R. Part 1500. (Knight Reply at 9-11.) Knight misconstrues the coverage of the CEQ rules and NEPA. In general terms, NEPA requires agencies, in undertaking actions, to consider significant impacts on the human environment. 42 U.S.C. § 4332(2)(C) (1994). The regulation relied on by Knight, 40 C.F.R. § 1502.9(a) and (c), defines what supplemental analysis is both required and sufficient under NEPA, when BLM approves a major federal action significantly affecting the human environment. Ordering Knight to prepare his final showing is not such an action. Knight thus misapplies the NEPA rules. Whether supplemental NEPA analysis is required under the CEQ regulations would only come into play at the point BLM determined to go forward with processing and granting Knight's PRLAs.

Thus, as to Knight's assertion that supplemental environmental analysis must be conducted, if he provides sufficient information to show that the PRLAs cannot clearly be rejected for failure to meet the commercial quantities test, his applications will be processed pursuant to the procedures established in Chapters IV through VII of the Handbook. These procedures include the preparation of new or supplemental NEPA documents, consistent with 40 C.F.R. Part 1500, followed by any new or supplemental final showing necessary to address any additional concerns raised in the supplemental environmental document. See Chapters IV and V, BLM Manual Handbook H-3430-1. The significant, new information available since completion of the 1983 EA would properly be addressed during this process. Accordingly, we find that BLM committed no error under NEPA or the CEQ regulations in ordering Knight to submit his final showing.

As a final matter, Knight asks this Board to grant him additional time to make a final showing so that he may conduct further exploratory drilling. Neither the record nor either party indicates that this request was submitted to BLM. BLM objects to Knight's request on grounds that Knight has never made such a request to the agency despite knowing at least since 1981 that he would be required to meet the test adopted in 1976 and 1979. (BLM Response at 7.) Knight denies that he has waived his right to conduct further exploration on the lease areas by failing to make such a request to BLM, asserting that until the Board issued its decision in Thermal Energy Co., 135 IBLA at 325, BLM's policy was to refuse to recognize data obtained after the expiration of the prospecting permits. He reiterates that because he is now being held to a higher standard of proof than existed when he did his prospecting work, he should be allowed to do limited additional test drilling to obtain the evidence necessary to prove his discovery of commercial quantities of coal under the new standards. (SOR at 10-12.)

[7] The question of whether Knight should be obligated to provide the final showing of data which would show commercial quantities, which he alleged he had in his earlier case, is a different one from whether he should be allowed to drill, and for what purpose. Notwithstanding that we have determined that BLM was not arbitrary in ordering a final showing now, Knight's request is tantamount to asking the Board to reverse or stay the DSD decision, in any event, based on Knight's allegation that such drilling is necessary, and will plausibly produce fruitful results. We have no way of knowing this until BLM considers such a request. Without a drilling request to BLM and BLM's reasoning on a result, Knight's stated desire to drill does not affect or grant an exemption from operation of the DSD order. Knight may not be relieved of complying with BLM orders by alleging to the Board a future contingency.

The facts in the record show that every entity to consider this matter determined that a final showing was critical to determine whether commercial quantities existed. In his initial showing, "Development Plans, [PRLAs], Prepared for Jesse H. Knight, April 1979" at 8, Knight "recognized that some additional drilling may be necessary before the installation of a large scale mine." <sup>9/</sup> In the Board's previous decision, we stated:

On appeal appellant contends that \* \* \* he is prepared to present evidence that by the standards of the mining industry, a prudent person would be justified in expending labor and means to work the coal deposits on the subject lands.

\* \* \* \* \*

Accordingly, the case will be remanded to the State Office to give BLM and [USGS] the opportunity to consider

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<sup>9/</sup> As noted above, this 1979 submission by Knight regarding the coal – his last in the record – refutes Knight's view (Knight Reply at 16-17), that sufficient evidence that commercial quantities of coal exists in the record to render BLM's decision arbitrary.

appellant's evidence that commercial quantities of coal, as measured by the mining industry standards, do exist \* \* \*  
\*.

53 IBLA at 304 (emphasis added).

In the 1983 EA, the Forest Service noted that USGS concluded that

"before commercial quantities of coal could be demonstrated, additional exploration would be necessary to establish the continuity of at least one bed of miserable thickness." \* \* \* Since a coal estimate is necessary for environmental analysis of the leasing action, an estimate using less restrictive criteria was prepared March 3, 1981, by the USGS.

(1983 EA at 1, citing 1979 USGS determination.) The DN/FONSI concluded:

"It will be incumbent upon the applicants to demonstrate in their final showings, prior to our recommendation to lease that the Federal coal can be economically developed in an environmentally sound manner." *Id.* (emphasis added).

Thus, for every entity to consider Knight's PRLAs, it has remained an open question whether he could "demonstrate that he discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit." 43 C.F.R. § 3430.1-1. This Board allowed him to present evidence he claimed to possess to support a commercial quantities determination. BLM ordered him to present this data in 1981 and 1997.

Knight may not raise the specter of drilling to change the scope of this Board's 1981 ruling and BLM's authority with respect to it implemented in the DSD's 1997 order. Knight's allegation to the Board regarding drilling has no impact on the validity of the order, but rather it leaves Knight with a decision as to whether and how to comply.

[8] The issue of further drilling is a different question. If Knight substantiates a need for drilling, and new data confirms his prior discovery, this data may permit Knight to supplement his information, according to the rules at 43 C.F.R. Subpart 3430. Such a request should be made to and decided by BLM in the first instance.

Both parties' positions on this point indicate weaknesses. If BLM applies the view stated in pleadings in this case to a request for more drilling, we can reasonably anticipate that the question will produce another appeal to this Board. Thus, we note that in setting forth their positions on drilling requests, both parties must do more than present the complaints as to the passage of time that appear in their pleadings. On the one hand, the years do not convert the PRLAs into new prospecting permits, nor do they persuade us that drilling in the 21<sup>st</sup> century will equate to a showing "that [Knight] discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit"

which expired in 1971. 43 C.F.R. § 3430.1-1. On the other hand, Knight is correct that Board precedent acknowledges the dilemma presented when a commercial showing must be made under rules promulgated subsequent to drilling which was conducted under prospecting permits which pre-dated the rules.

In 1979, at the time Knight submitted and finalized his PRLA's, 43 C.F.R. § 3430.1-1 (1979) stated: "An applicant for a preference right lease shall be entitled to a noncompetitive coal lease if the applicant can demonstrate that he discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit, all other requirements having been met." (Emphasis added.) This rule remains today. 43 C.F.R. § 3430.1-1.

In Hiko Bell Mining and Oil Co., 55 IBLA 324 (1981), a case where a company had sought and BLM had denied numerous permits to drill after the prospecting permit expired, this Board identified the problem:

By denying the requests for further drilling BLM and [USGS] have seemingly held that appellant may only demonstrate the validity of a discovery made during the term of a prospecting permit by evidence obtained during the term of the permit, even though appellant is now being held to more stringent requirements of proof than existed during the term of its prospecting permit and even though under the regulations in effect in 1969 [USGS] concluded that commercial quantities of coal had been discovered.

55 IBLA at 328-29. The Board stated two principles that must be squared:

(1) the applicant must demonstrate that "he discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit," 43 C.F.R. 3430.1-1; and (2) the application must be adjudicated on the basis of the applicant's conformity with the regulations now in force. Kin-Ark Corp., *supra*; 43 C.F.R. 3430.0-7.

Id. at 329 (emphasis in original).

Citing United States v. Foresyth, 15 IBLA 43 (1974), the Board noted that "[t]here is, however, a great difference between requiring that a discovery be shown to have existed prior to a withdrawal and requiring that the discovery must be proven prior to the withdrawal." 55 IBLA at 329. The Board permitted Hiko Bell to conduct further test drilling, noting that it was "trying to prove the existence of that discovery of commercial quantities it alleges was made during the term of its permit and has sought permission to drill for the purpose of meeting the stricter evidentiary standards now in effect. It is attempting to prove that a discovery was made during the term of the permit, not to make a discovery where none had existed." 55 IBLA at 331.

In Thermal Energy Co., 135 IBLA at 325, this Board relied on Hiko Bell to reverse BLM's refusal to consider drilling data obtained by the company in 1985 for purposes of determining whether a discovery was made during the term of the prospecting permit. In doing so, the Board invalidated BLM Manual provisions prohibiting such information to be considered. <sup>10/</sup> To be clear, however, Thermal Energy does not suggest that new drilling is allowed to find coal that was not discovered during the term of the permit.

These cases make clear that BLM should seriously consider a request to conduct further drilling to validate a prior discovery which must be shown to be commercial under more stringent standards. In 1979, Knight stated that more drilling was necessary to produce a valid mine development plan. USGS and the Forest Service both state that Knight must show at least one coal bed of mineable thickness. The difficulty here is that Knight's general request before us appears as a strategy to end or delay implementation of the 1997 DSD order, and does not identify the scope of Knight's drilling request or whether it will be calculated to validate his prior discovery.

Thus, in order to substantiate a request for more drilling before BLM, Knight must show that more drilling will lead to "exploration [that] would be necessary to establish the continuity of at least one bed of miserable thickness," as was missing when USGS made its finding in 1979, and when the 1983 EA was complete. On the other hand, Knight must show that proposed drilling will not seek "to make a discovery where none had existed." Hiko Bell, 55 IBLA at 330. To do this would be tantamount to seeking a new prospecting permit – permission Congress expressly denied prospectively 25 years ago – which is at odds with 43 C.F.R. § 3430.1-1, which remains in place after both Hiko Bell and Thermal Energy. Knight must make these showings to BLM.

Conversely, BLM cannot deny Knight's request solely on grounds that Knight knew the regulatory test in 1981. BLM must consider Knight's request, if submitted to BLM, under BLM rules and Board precedent cited above.

Considering all of the facts and the need for this case to proceed to conclusion, Knight must submit all of this information to BLM within 90 days of receipt of this decision. BLM has ordered a final showing

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<sup>10/</sup> Knight correctly notes that the Board changed the "stated policy of BLM that coal and geologic data obtained after the expiration of the prospecting permit could not be used by the applicant to show the presence of coal in commercial quantities." (Knight Reply at 18, citing 135 IBLA at 332-34.) On this basis, Knight states that it is unreasonable for BLM to complain that he should have asked for the authority to drill. (Knight Reply at 18.) Hiko Bell suggests he could have tested this principle. In any event, we find no error in Knight's failure to seek a prior drilling permit except to the extent that he must present this request first to BLM.

within 90 days and we affirm this order. Knight has been aware of the obligation since no later than 1997.

Within the same 90 days, Knight must submit any drilling requests that he asserts will go further to "prove the existence of that discovery of commercial quantities it alleges was made during the term of its permit and \* \* \* prove that a discovery was made during the term of the permit, not to make a discovery where none had existed." Hiko Bell, 55 IBLA at 330. By his own admission, Knight has been aware of his alleged need for more drilling since he briefed this case, and of his ability to seek it no later than the decision in Thermal Energy in 1996. BLM should promptly and timely respond to these requests.

Based upon his pleadings, Knight may be suggesting that his available data is insufficient to meet the test of the post-moratorium rules. (SOR at 6, 10-12.) He may choose to advise BLM of this fact in lieu of a final showing and rely only on drilling requests in accordance with the terms of the above precedent. He must so state his intentions to BLM, and does so at his own risk. Failure to substantiate his positions taken before this Board by submitting this statement with a drilling request, a final showing, or both a drilling request and final showing, within 90 days would result in denial of his PRLAs. If the final showing submits sufficient information to convince the authorized officer to reconsider the rejection decision, then 43 C.F.R. § 3430.5-1(c)(3) directs BLM to proceed to adjudicate the application in accordance with 43 C.F.R. §§ 3430.3-2, 3430.3-3, and 3430.3-4. If the drilling requests indicate that they are likely to substantiate a coal discovery made during the term of the original permit, BLM must employ its continued authority to request additional data retained in 43 C.F.R. § 3430.4-2.

To the extent not specifically addressed herein, Knight's additional arguments have been considered and rejected.

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 decision appealed from is affirmed, as modified to permit appellant 90 days from receipt of this decision to file with BLM a request for drilling authorization.

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Lisa Hemmer  
Administrative Judge

I concur:

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James P. Terry  
Administrative Judge