

Editor's note: Reconsideration denied by order dated March 24, 1977

RAYMOND N. JOECKEL

IBLA 77-110

Decided March 14, 1977

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, requesting additional rent prior to issuance of noncompetitive simultaneous oil and gas lease W 57728.

Affirmed.

1. Oil and Gas Leases: Applications--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Rentals-- Regulations: Applicability

Where the Department, through a duly promulgated regulation, has increased the rental rate on all noncompetitive oil and gas leases issued after a specified date, such increased rate is applicable to all leases issued subsequent to that date, including leases issued pursuant to the simultaneous filing procedures, even though the lease offers were drawn with first priority prior to the specified date.

APPEARANCES: Raymond N. Joeckel, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Raymond N. Joeckel has appealed from a decision of the Wyoming State Office, Bureau of Land Management, dated January 18, 1977, which required him to submit additional rental for lease W 57728 so as to comply with the requirement of \$ 1 per acre imposed by 43 CFR 3103.3-2, effective February 1, 1977, 42 F.R. 1032.

Appellant's offer W 57728 was drawn first for Parcel Wy 90 in the November 1976 simultaneous filing procedures. In response to a notice of rental due from the State Office, dated December 17, 1976, he tendered payment of the indicated rental at the rate of 50 cents per acre.

Appellant contends he had filed and perfected his offer to lease prior to the date of publication of the regulation change on January 5, 1977, so that he should receive his lease at the rate of 50 cents per acre which had prevailed when his offer was filed. He concedes that the Department may raise the oil and gas lease rentals but implies that such action should be applicable prospective only and not to offers filed prior to the effective date of the amendment.

[1] Section 32 of the Mineral Leasing Act, 30 U.S.C. § 189 (1970), authorizes the Secretary of the Interior to prescribe necessary and proper rules and regulations and to do all things necessary to effectuate the purposes of the Act. The courts have held that the regulations of the Secretary relating to the Mineral Leasing Act, when published in the Federal Register, have the force and effect of law. E.g., McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).

On March 18, 1976, the Secretary published at 41 F.R. 11314 a proposed amendment to 43 CFR 3103.3, with the primary purpose of giving the Government a more equitable return by raising the annual rental for noncompetitive oil and gas leases from 50 cents to \$ 1 per acre. The proposed rule-making was published pursuant to the policies expressed in the Mineral Leasing Act of 1920, as amended and supplemented, 30 U.S.C. § 181 et seq. (1970) and in Title V of the Independent Offices Act, 31 U.S.C. § 483(a) (1970). Following review of public comments, the Assistant Secretary for Land and Water Resources restated the Department's position that the increase in lease rental was in line with the fee charges both by private land owners and many States on land leased by them for oil and gas, and that the taxpayers were entitled to this more equitable return on the public domain when it is leased for oil and gas.

A similar situation relating to issuance of sulphur prospecting permits under the Mineral Leasing Act, 30 U.S.C. § 271 et seq. (1970) arose in 1968 when the Secretary determined to impose a 25 cent rental fee as a condition for issuance of such prospecting permits, instead of granting them after payment of only a filing fee. All then pending applicants were required to pay the necessary first year's rental or have their applications rejected, including those who had satisfied all earlier requests from the land office for submission of permit bond, etc. In Billy Stewart, et al., NM 4200, etc. (April 8, 1969) approved by the Assistant Secretary of the Interior May 2, 1969, it was held that an applicant for a sulphur prospecting permit is properly required to comply with the requirement for paying rental before the permit will be issued, notwithstanding that the requirement was not in effect at the time the application for permit was filed. Stewart was affirmed sub nom., Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971), wherein the court held:

The remaining question is whether it was to apply this rental provision to the applications of plaintiff and the other members of the class who had applied for permits at the time that the regulation was first announced. We are of the opinion that the plaintiff and the members of the class had not acquired any vested right which would preclude subjecting them to the operation of the regulation. The appellant would have us rule that the very terms of § 271, by authorizing and directing the Secretary to issue permits, eliminates or at least narrows his discretion to a point where he cannot refuse to issue a permit to one who pays the \$ 10.00 application fee. To read the statute in the manner requested would be to ignore the wording "under such rules and regulations as he may prescribe."

We hold that the statute contemplated that the Secretary impose reasonable conditions in connection with the filing of applications. There is no indication that he acted unreasonably; indeed, it is not contended that the condition imposed is unreasonable or arbitrary and capricious. The sole and only argument is that the Secretary lacked authority.

The District Court relied on a somewhat analogous case, Miller v. Udall, 115 U.S.App.D.C. 162, 317 F.2d 573 (1963). This involved a statutory change in noncompetitive oil and gas leases from a 25 cent minimum to a 50 cent minimum. The statute protected from the increase existing lessees. It did not protect the rights of those whose applications were pending when the statutory changes became effective. Counsel would distinguish Miller on the ground that statutory changes are differentiated from changes made by way of regulation. If, however, the Secretary has the authority, and we have here held that he has, the rule making power is not different in legal effect, at least in this context, from the power of Congress to effect any rights which have been acquired by the filing of an application. Southwestern Petroleum Corporation v. Udall, 361 F.2d 650, 654-655 (10th Cir. 1966) * * *.

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It has been held that an application for a federal oil lease is a hope or perhaps expectation

rather than a vested property right. See Schraier v. Hickel, 136 U.S.App.D.C. 81, 419 F.2d 663, 666-667 (1969). To hold otherwise, and to thereby recognize that the mere filing of an application creates a property right which is immune from modification, would seriously handicap the Secretary in the exercise of his proprietary duties. 444 F.2d at 202-03. [Emphasis added.]

So in this case the Secretary, in exercising his general powers over the public lands as guardian of the people, Knight v. United States Land Assoc., 142 U.S. 161 (1891), has discharged his duty to see that the public interest is served by exacting a fair return on behalf of the government from persons engaged in exploiting the oil and gas resources of the public domain. The imposition of an increase in the per acre rental from 50 cents to \$ 1 as a condition to issuance of a noncompetitive oil and gas lease after February 1, 1977, is within the authority of the Secretary. Further, the filing of an oil and gas lease offer prior to the promulgation of the regulation increasing the rental did not vest in applicant any vested right protected by the Fifth Amendment which would preclude subjecting him to the operation of the amended regulation. See e.g., Udall v. Tallman, 380 U.S. 1, 4 (1965); McDade v. Morton, 494 F.2d 1156 (D.C. Cir. 1974).

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

Douglas E. Henriques

Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

