

ESTATE OF MALCOLM N. MCKINNON

IBLA 77-267

Decided July 22, 1977

Appeal from the rejection of an application to modify an existing coal lease by adding a section of land to the leased area, SL 050862 - U 24069 - U 24070.

Affirmed.

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

An application for modification of an existing coal lease to include an entire section is properly rejected under section 3 of the Mineral Leasing Act, since it seeks to add more than the 160-acre maximum allowed thereunder, notwithstanding the fact that the application was filed prior to the enactment of this acreage limitation.

2. Applications and Entries: Filing--Applications and Entries: Vested Rights--Coal Leases and Permits: Applications--Coal Leases and Permits: Leases-- Constitutional Law: Due Process

The filing of an application for modification of an existing coal lease is a hope or expectancy rather than a vested property right, and, as such, does not fall within a "valid existing rights" exception and is not protected by the Fifth Amendment.

3. Estoppel--Federal Employees and Officers: Authority to Bind Government

The government is not estopped from applying new provisions enacted in an amendment

to the Mineral Leasing Act to an application for modification of an existing coal lease on account of laches, administrative delay, or misrepresentation by government employees of the fact of federal ownership of the land sought in the application.

APPEARANCES: Ben E. Rawlings, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This is the second time this Board has considered this matter, which concerns the application of Malcolm N. McKinnon, now deceased, and his estate (appellant), to modify an existing coal lease by adding to it section 32, T. 16 S., R. 7 E., Salt Lake Meridian, Utah. In Malcolm N. McKinnon, 23 IBLA 1 (1975), appellant appealed the decision of the Bureau of Land Management (BLM) which rejected this application because leasing section 32 noncompetitively was not to the advantage of the United States. At the time McKinnon, supra, was issued, the controlling statute, section 3(a) of the Mineral Lands Leasing Act, 30 U.S.C. § 203 (1970), provided as follows:

Any person, association, or corporation holding a lease of coal lands or coal deposits under this chapter may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Since there were several reports in the record which indicated that contrary to the BLM's decision, modifying appellant's lease to include section 32 1/ would be to the advantage of the Government, and since the record did not demonstrate that there was an identifiable, substantial and genuine competitive interest in the

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1/ As a preliminary matter, in McKinnon, supra, we affirmed the BLM's decision that section 32 is federal land, and that, as such, it could be added to appellant's existing coal lease if the requirements of the appropriate statute were met. Employees of the Geological Survey had originally misinformed appellant that section 32 was not federally owned.

section, we vacated the decision of the BLM denying appellant's application for modification and remanded the matter for further action, including the obtaining of additional reports to provide a basis for an informed decision.

While the matter was before the BLM on remand, the Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083, 30 U.S.C. § 181, note (Supp. 1977 ), and implementing regulations, came into effect. Section 13(b) of FCLAA, 90 Stat. 1090, 30 U.S.C. § 204, note (Supp. 197\_), amended the controlling statute as follows:

Subject to valid existing rights, section 3 of the Mineral Lands Leasing Act (30 U.S.C. 203) is amended to read as follows:

Sec. 3. Any person, association, or corporation holding a lease of coal lands or coal deposits under the provisions of this Act may with the approval of the Secretary of the Interior, upon a finding by him that it would be in the interest of the United States, secure modifications of the original coal lease by including additional coal lands or coal deposits contiguous to those embraced in such lease but in no event shall the total area added by such modifications to an existing coal lease exceed one hundred sixty acres, or add acreage larger than that in the original lease. The Secretary shall prescribe terms and conditions which shall be consistent with this Act and applicable to all of the acreage in such modified lease. [Emphasis supplied.]

On January 25, 1977, 42 F.R. 4442, regulations conforming to the requirements of FCLAA were adopted, and 43 CFR 3524.2-1(a), 42 F.R. 4453, was amended to provide as follows:

Application. A lessee may obtain modification of his lease to include coal lands or coal deposits contiguous to those embraced in his lease, if the authorized officer determines that it would be in the interest of the United States to do so. In no event shall the total area added by such modifications to an existing coal lease exceed one hundred sixty acres or the same number of acres as that in the original lease, whichever is less. The lessee shall file his application for modification in duplicate in the proper land office, describing the additional lands desired, and the needs and reasons for and the advantage to the lessee of such modification. [Emphasis supplied.]

On February 25, 1977, pursuant to these new provisions, the BLM issued a decision rejecting appellant's application for modification because section 32, the total area to be added by this modification, exceeds 160 acres. Appellant has appealed from this decision.

[1] The new provisions set out above clearly bar the granting of applications for modification of existing coal leases where the area sought to be added exceeds 160 acres. The plats of section 32 in the record show without doubt that this area does exceed 160 acres.

The Department has no authority to grant an application under the public land laws contrary to a statute of Congress. Alaska District Council of the Assemblies of God, Inc., 8 IBLA 153, 155 (1972). An application which does not comply with the clear and unequivocal requirements of the Department's regulations must be rejected. Frank Allison, 3 IBLA 317, 321 (1971). Applications for modification of existing coal leases must be rejected where the acreage limit set out in section 3 of the Mineral Leasing Act, supra, is surpassed. Peabody Coal Company, 4 IBLA 303 (1972); Malcolm N. McKinnon, A-30778 (December 13, 1967).

Accordingly, we hold that the BLM properly applied the new terms of section 3 of the Mineral Leasing Act, supra, and that it properly denied appellant's application.

The arguments raised by appellant in his statement of reasons have each been considered and disposed of in similar situations involving the applicability to an application of provisions which are enacted or changed during the pendency of the application. It has been consistently held in these cases that an application is judged under the changed provision, notwithstanding the fact that this provision was not in effect at the time the application was filed. Hannifin v. Morton, 444 F.2d 200, 202-3 (10th Cir. 1971); Schraier v. Hickel, 419 F.2d 663, 666-7 (D.C. Cir. 1969); Miller v. Udall, 317 F.2d 573 (D.C. Cir. 1963); Raymond N. Joeckel, 29 IBLA 170 (1977); Walt's Racing Association, 18 IBLA 359, 364 (1975); Marvin E. Weaster, 10 IBLA 277 (1973); Clarence E. Felix, A-30197 (January 7, 1965).

[2] The filing of an application is a hope or expectation rather than a vested property right. Hannifin v. Morton, supra at 203; Thomas E. Gaynor, 24 IBLA 320 (1976); William F. Martin, 24 IBLA 271 (1976); Walt's Racing Association, supra; Clarence E. Felix, supra. Accordingly, the filing by appellant of his application for modification created no right and does not fall within

the "valid existing rights" exception in section 13(b) of FCLAA, supra. Similarly, by filing this application, appellant acquired no vested right protected by the Fifth Amendment which would preclude subjecting him to the operation of the amended provision. See, e.g., Udall v. Tallman, 380 U.S. 1, 4 (1965); McDade v. Morton, 494 F.2d 1156 (D.C. Cir. 1974); Raymond N. Joeckel, supra.

[3] Appellant suggests that the government is estopped from applying the new provisions on account of the fact that unreasonable delay resulting from the processing of his application and from the misrepresentation by the Geological Survey concerning the federal ownership of section 32 has allowed the imposition of these provisions to intervene. This argument is without merit. The Department can bear no responsibility for McKinnon's failure to ascertain that section 32 was federal land prior to accepting a lease from the State. He attempted to obtain status information from the Geological Survey rather than go to the BLM land office in Salt Lake City where official public land title and status records are maintained. Mark Systems, Inc., 5 IBLA 257, 261 (1972). The authority of the government to enforce the public land laws as set down by Congress is not vitiated or lost on account of laches, delays in the performance by its officers or agents of their duties, or any misrepresentation by them. 43 CFR 1810.3(a) and (c); Virgil Lopez, 21 IBLA 33 (1975); Mark Systems, Inc., supra. Appellant's suggestion in his statement of reasons that the BLM delayed processing his application in bad faith specifically to allow these new provisions to intervene to prevent his adding section 32 to his coal lease is entirely unsupported by the record.

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

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Edward W. Stuebing  
Administrative Judge

I concur:

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Douglas E. Henriques  
Administrative Judge

## ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN THE RESULT:

I concur in the affirmance of appellant's application to modify this coal lease, but primarily for the reasons previously expressed in my dissent in the first decision of the Board in this case, at 23 IBLA 10. I agree generally with the analysis and discussion in the majority opinion in the present decision concerning the impact and effect of the Coal Leasing Amendments Act of 1975, 90 Stat. 1083, 30 U.S.C. § 181, note (Supp. \_\_ , 197\_), and implementing regulations. Therefore, I agree that the application must be rejected in part for those reasons to the extent the acreage exceeds 160 acres or adds acreage larger than that in the original lease, whichever is less. 43 CFR 3524.2-1(a), 42 F.R. 4453 (January 25, 1977).

There are other reasons for rejection of all the acreage in this case. In my dissent I concluded that rejection of the application because there was competitive interest and because the lands could be developed as part of an independent operation was proper and that appellant had failed to show that those conditions did not exist here. The modifications of the regulations did not change the requirement that lands must be leased competitively if it is determined that the additional lands or deposits can be developed as part of an independent operation or that there is a competitive interest in them. 43 CFR 3524.2-1(b)(2), 42 F.R. 4453 (January 25, 1977). Therefore, I rest my concurrence in the affirmance of the rejection of the entire application upon this ground.

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Joan B. Thompson  
Administrative Judge