COALEX STATE INQUIRY REPORT - 275

February 1994

Olga Brunning, Esquire
Department of Natural Resources
Tawes Building - Room C-4
580 Taylor Avenue
Annapolis, Maryland 21401

TOPIC: REVOCATION OF PERMIT AS A RESULT OF ADMINISTRATIVE ERRORS

INQUIRY: The Bureau issued a permit based on a USGS map that contained a mistake. When a corrected map was submitted, it became evident that a permit should not have been issued. Is there any material that discusses the revocation of a permit when there was no fraud, pattern of violations or ownership/control problems?

SEARCH RESULTS: Research was conducted using the COALEX Library and other materials available in LEXIS. No SMCRA cases were identified that address the issue, here. Several decisions, suits brought under related and non-related statutes (e.g., Clean Air Act, Mineral Leasing Act of 1920, Agricultural Adjustment Act, etc.), have fact situations similar to the facts above. In particular, see COMMONWEALTH v FLYNN, below. Copies of the cased listed below are attached.

COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES v FLYNN, 344 A 2d 720 (Pa Commw Ct 1975).

The Township issued permits to Flynn to install an on-site sewer system and build a home. DER, after an inspection, requested the Township revoke Flynn's sewer permit, stating that the sewer system would violate DER regulations.

The court pointed out "the general rule that a municipal permit issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and it may be revoked notwithstanding that he may have acted upon the permit; any expenditures made in reliance upon such permit are made at his peril."

In concluding that Flynn had "acquired a vested right in the permit even though it was issued on the basis of a mistake", the court discussed the factors used in making its determination:

"1) his due diligence in attempting to comply with the law;
2) his good faith throughout the proceedings;
3) the expenditure by him of substantial unrecoverable funds;
4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit."

Also see PETROSKY v ZONING HEARING BD OF UPPER CHICHESTER, 402 A 2d 1385 (Pa 1979).

AMERICAN METHYL CORP. v EPA, 749 F 2d 826 (DC Cir 1984).

EPA may not revoke a waiver to market a methanol/gasoline fuel blend, based on new evidence, nearly two-and-a-half years after its initial approval. Agencies have power to correct their mistakes by re-considering their decisions but they must do so within the time period provided by the statute. Here, the Clean Air Act provided a 180-day period to rectify mistakes. The case was remanded to the agency.

"EPA's primary reason for revoking American Methyl's waiver does not relate to a defect in the original grant; thus, under EPA's own interpretation of its powers, a revocation proceeding is not warranted in this case."

Also see appeal after remand: MOTOR VEHICLE MFRS. ASSN. v EPA, 768 F 2d 385 (DC Cir 1985), cert. denied, AMERICAN METHYL CORP. v MOTOR VEHICLE MFRS. ASSN., 474 US 1082 (1986).

MORROW v CLAYTON, 326 F 2d 30 (10th Cir NM 1964).

This case involved the authority to cancel cotton acreage allotments, revise marketing quotas and assess penalties under the Agricultural Adjustment Act. The court stated:

"We conclude that the Secretary and his agents, under proper delegations of power, have the authority to cancel the allotment transfers and revise marketing quotas as well as to assess the penalties provided by statute, in situations where the transfers are obtained by fraud or misrepresentation. But he must be able to establish a basis for such cancellation, i.e., fraud or misrepresentation, and the record in this case clearly discloses a dispute as to whether the transfers were obtained by such means. This issue must be resolved by findings of fact and conclusions of law, after a full hearing thereon."

BOESCHE v UDALL, 373 US 472 (1963). [Cited in Morrow]

"SYLLABUS: The Secretary of the Interior has authority to cancel in an administrative proceeding a noncompetitive lease of public lands issued under the provisions of the

Mineral Leasing Act of 1920 in circumstances where such lease was granted in violation of the Act and the regulations promulgated there under -- i.e., he has power to correct administrative errors of the sort involved in this case by cancellation of leases in administrative proceedings timely instituted by competing applicants for the same land."

GRAY v JOHNSON, 395 F 2d 533 (10th Cir 1968), cert. denied 392 U.S. 906 (1968). [Cites to BOESCHE]

The court reviewed the Secretary's administrative decision to cancel a 10-year lease of an Indian's land which had earlier been approved, but which the Secretary found, on administrative appeal, to be void for violation of regulations limiting the length of leases on dry farming land to five years. The court held that "the execution of the lease was an administrative error which the Secretary can correct by cancellation of the lease."

JICARILLA APACHE TRIBE v ANDRUS, 687 F 2d 1324 (10th Cir 1982). [Distinguished GRAY]

The court affirmed the trial court's finding that there was a technical violation of the regulation on notice procedures for the sale of oil and gas leases and the district judge's determination not to order outright cancellation. The district judge provided, instead, that "cancellation of any of the leases could be avoided by payment of adjusted bonuses to the Tribe." In distinguishing Gray, the court found that this case "does not compel an equity court to order cancellation of all leases on Indian land for every procedural error in the leasing procedure."

"The equitable remedy of cancellation will be granted in the discretion of the chancellor. Cancellation is 'an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case....' It is not to be granted unless it appears no injustice will be done by placing the parties in the positions they occupied before the contract or conveyance was made.... Thus, a person coming into a court of equity cannot demand cancellation as a matter of right, and granting such relief is within sound discretion of the court even if the ground on which the plaintiff seeks cancellation has been clearly established.... In light of the virtual impossibility of putting these parties back in status quo after years of exploration and development, we do not think the district court abused its equitable discretion in refusing to grant outright cancellation."

The Court remanded part of the case to the district court for an accounting and a determination of the status of the many leases at issue.

GETTY OIL CO., v CLARK, 614 F Supp 904 (D WY 1984). [Cites to MORROW]

Getty, appealing an IBLA decision, challenged the Secretary's discretion or authority to condition an oil and gas lease suspension. The court recognized that the "decision of the IBLA has an immediate and direct impact upon Getty in delaying the drilling upon the lease, and additional costs and expenses will be incurred as a result of the delay."

"The language of the statutory provision clearly vests the Secretary with discretion to grant or deny a requested suspension subject to the guidelines set forth in the provision. The overriding requirement is that he act in a manner which is reasonable under the circumstances."

"We must conclude that the decision by the Secretary of the Interior, through the Director of USGS, conditioned the lease suspension on denial of drilling operations if such operations would result in unacceptable impacts to the wilderness characteristics in the area. That decision was not arbitrary, capricious, or an abuse of discretion, nor was it not in accordance with the law."

GUN SOUTH, INC. v BRADY, 877 F 2d 858 (11th Cir, Ala, 1989).

"[W]e note that the Supreme Court and other courts have recognized an implied authority in other agencies to reconsider and rectify errors even though the applicable statute and regulation do not expressly provide for such reconsideration."

THE TIMKEN CO. v U.S., 7 CIT 319 (1984).

The court remanded the case to the International Trade Administration of the Department of Commerce for a recalculation of dumping margins with regard to roller bearings: "The law is clear that remand is appropriate where an agency has followed an improper method in making a determination or where there has been a defect in the agency's finding.... Indeed, a failure to reopen in the face of erroneous factual information that would clearly mandate a change in result would itself be arbitrary and capricious."

See FORD MOTOR CO. v NLRB, 305 U.S. 364 (1939) and GREENE COUNTY PLANNING BD. v FEDERAL POWER COMM'N, 559 F 2d 1227 (2d Cir 1977).

IN THE MATTER OF MODERN LANDFILL, INC. v JORLING, 161 AD 2d 1112 (NY App Div 1990).

"An administrative agency can annul its prior determination where there 'was irregularity in vital matters, illegality or conduct tantamount to fraud'".

BOOKMAN v U.S., 453 F 2d 1263 (Ct Cl 1972).

SYLLABUS:"[2] It is the general rule that every tribunal, judicial or administrative, has some power to correct its own errors or other wise appropriately to modify its judgment, decree or order. Absent contrary legislative intent or other affirmative evidence, the Civil Service Commission Regional Office possesses inherent power to reconsider its own decision on employee-position classification, so long as the action is conducted within a reasonable time period."

ATTACHMENTS

A. COMMONWEALTH OF PENN., DEPT. OF ENVIRONMENTAL RESOURCES v FLYNN, 344 A 2d 720 (Pa Commw Ct 1975).
B. PETROSKY v ZONING HEARING BD OF UPPER CHICHESTER, 402 A 2d 1385 (Pa 1979).
C. AMERICAN METHYL CORP. v EPA, 749 F 2d 826 (DC Cir 1984).
D. MOTOR VEHICLE MFRS. ASSN. v EPA, 768 F 2d 385 (DC Cir 1985).
E. MORROW v CLAYTON, 326 F 2d 30 (10th Cir NM 1964).
F. BOESCHE v UDALL, 373 US 472 (1963).
G. GRAY v JOHNSON, 395 F 2d 533 (10th Cir 1968), cert. denied 392 U.S. 906 (1968).
H. JICARILLA APACHE TRIBE v ANDRUS, 687 F 2d 1324 (10th Cir 1982).
I. GETTY OIL CO., v CLARK, 614 F Supp 904 (D WY 1984).
J. GUN SOUTH, INC. v BRADy, 877 F 2d 858 (11th Cir, Ala, 1989).
K. THE TIMKEN CO. v U.S., 7 CIT 319 (1984).
L. FORD MOTOR CO. v NLRB, 305 U.S. 364 (1939).
M. GREENE COUNTY PLANNING BD. v FEDERAL POWER COMM'N, 559 F 2d 1227 (2d Cir 1977).
N. IN THE MATTER OF MODERN LANDFILL, INC. v JORLING, 161 AD 2d 1112 (NY App Div 1990).
O. BOOKMAN v U.S., 453 F 2d 1263 (Ct Cl 1972).