

DAVID L. PALUSKA ET AL.

IBLA 93-270

Decided September 5, 1996

Appeal from a decision of the Yuma Area Manager, Bureau of Land Management, holding that agricultural lease AZA 22515 had expired upon the completion of its term.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Leases—Federal Land Policy and Management Act of 1976: Permits

The attempted exercise of an option to renew a permit, issued under sec. 302(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (1994), after the expiration of the term of the permit is untimely. Any equitable relief from the untimely exercise of an option must, at a minimum, be based upon a showing that hardship to the lessee would make literal enforcement of the provisions of the permit unconscionable.

APPEARANCES: John Guy, Esq., Downey, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

David L. Paluska and Heidi Crane, personal representatives of the Estate of Stanley Musgrove, Deceased, have appealed from a decision of the Yuma Area Manager, Bureau of Land Management (BLM), dated February 20, 1992, holding that agricultural lease AZA 22515 had expired on December 31, 1991. The Area Manager's decision noted that the lands described by this lease were no longer irrigable because adjoining private lands, across which irrigation water had come in past years, had been sold and were being subdivided and developed. For this reason, the Area Manager stated that BLM had no plans to renew lease AZA 22515. On February 28, 1992, appellants submitted a letter to the Yuma District Office, informing BLM that they "hereby exercise the option for a five-year renewal" of lease AZA 22515. This letter was subsequently construed by this Board as a notice of appeal of BLM's decision of February 20, 1992. See Order of Oct. 13, 1993, IBLA 93-270.

On appeal, appellants contend that BLM has wrongly refused to recognize the exercise of their option to renew permit AZA 22515 ^{1/} for a 5-year period. This permit, which authorized agricultural use of an 11.7-acre parcel of BLM land consisting of lots 14, 15, and 16 sec. 11, T. 11 S., R. 25 W., Gila and Salt River Meridian, was issued to appellants on October 27, 1987, pursuant to section 302(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (1994). This permit was the last of a series of use authorizations granted by BLM to appellants and their predecessors-in-interest, which are described more fully infra. Appellants had applied for a permit for the period from January 1, 1987, to December 31, 1991. See Item 3. The application for the permit had noted that this parcel was currently farmed by Robert K. Barkley and that the source of water to be used on the land would be the Yuma County Water Users Association.

Paragraph 16 of the permit, which is entitled "Special conditions," contained the following notation "see ATTACHMENT A, Special conditions. Five-year option to renew after December 31, 1991." Attachment A consisted of a series of special conditions, including one specifically addressing the option to renew. Thus, special condition 16.B, provided that: "The term of this lease shall be for the five (5) year term specified on the permit (commencing on January 1, 1987, and ending on December 31, 1991) with five-year options for renewal, unless sooner terminated as hereinafter provided." Termination provisions were set forth at special condition 16.D:

D. This lease shall terminate and all rights of the holder hereunder shall cease upon:

1. Expiration of the term as set forth in condition B. above, or any renewal thereof.
2. Noncompliance with provisions in Conditions 2, 3, 5, 16.G., 16.K., after notice of breach of lease terms and conditions by the Authorized Officer.
3. Failure of the lessee to use the lease for the purpose for which it was authorized. At the discretion of the Authorized Officer, nonuse for any continuous 2-year period could constitute a presumption of abandonment and termination.

^{1/} For purposes of this appeal, agricultural lease AZA 22515 and permit AZA 22515 are one and same document. This document (Form 2920-1 November 1984) is entitled Land Use Application and Permit and will, for purposes of this appeal, be referred to as a permit. The special conditions which have been appended to this document, however, refer to it as a lease. Within the confines of the instant appeal, we will ascribe no difference to these two terms.

4. Mutual agreement that the lease should be terminated, with 60 days' notice of termination before the end of June or December of any calendar year.
5. Nonpayment of rent for 2 consecutive months, following notice of payment due.
6. Notice from the Secretary that water is no longer available, whereupon termination shall occur with notification to the Authorized Officer.

Appellants make a number of arguments based on the foregoing provisions. Thus, on the one hand, they contend that if, as here, a lease does not contain provisions as to the manner and time in which an option is to be exercised, the tenant may exercise an option before the expiration of the original term by a course of conduct indicating an election to renew. Appellants contend that they did, in fact, indicate their election to renew before expiration of the original term when David Paluska traveled to Yuma in November 1991 to inspect the property covered by the permit and investigate the factors that would determine the new rental rate for the renewal period. ^{2/}

Alternatively, appellants contend that paragraph 16 of the permit is ambiguous as to the procedure to be used to exercise an option and that they reasonably believed that no notice was required to be given until after December 31, 1991, and rely on the general principle that ambiguities or uncertainties in the terms of an option to renew are generally construed against the lessor on the theory that he is the party who caused the ambiguity. In addition, appellants state that they relied upon BLM's past conduct, which they characterize as loose and informal with respect to renewal procedures. For these reasons, appellants believe that the exercise of the option to renew in writing after December 31, 1991, was a timely exercise of the option and met the reasonable expectations of both parties.

Appellants recognize that 43 CFR 2920.7(i) provides that "[t]he holder of a land use authorization * * * shall, upon the filing of a request for renewal, be the preferred user for a new land use authorization provided that the public lands are not needed for another use. Renewal, if granted, shall be subject to new terms and conditions." Appellants assert, however, that this provision is not applicable in the instant case, because they seek a renewal of an existing land authorization, not a new land authorization. See Statement of Reasons (SOR) at 10-11.

Finally, appellants argue that principles of equity relieve them of the obligation to give notice prior to termination of the permit, relying

^{2/} BLM had advised appellants that it had scheduled an appraisal of the permitted land to determine its fair market rental value. An inspection of the land was to occur in July 1991, to which appellants were invited, and any rental changes were to become effective January 1992.

on principles of unconscionability expounded in cases such as Trollen v. Wabasha, 287 N.W.2d 645 (Minn. 1979), a case which permitted a lessee's late exercise of an option to renew a lease. See SOR at 11-12.

Along these lines, appellants seek to establish that the past conduct of BLM reasonably led them to believe that they could timely exercise the option to renew even though the lease term had run its course. Appellants argue that this past conduct of BLM, which they describe as "loose and informal," began during the tenure of Sebe Musgrove on permit 1A-29(A) and continued during the tenure of his successor, Stanley Musgrove.

Appellants note that Sebe Musgrove and Stanley Musgrove did not always make advance payments in renewing their permits, but BLM allowed annual renewals without ever requiring advance renewal payments. This is consistent, appellants assert, with a statement from the Solicitor's Office that formal procedures for renewing the permits had been ignored in the past (SOR at 12). Appellants contend that the relationship between BLM, the Musgrove family and, subsequently, appellants has been one on which appellants could, and reasonably did, rely to conclude that they could renew permit AZA 22515 after expiration of its initial term. As a result, appellants argue, they had no reasonable expectation that the exercise of their option to renew after the expiration date of the permit would not be recognized. For reasons set forth below, we do not agree.

In determining whether BLM erred in refusing to recognize appellants' exercise of their option to renew, paragraph 16 of the permit and the accompanying special conditions are critical. Special conditions 16.B and 16.D make clear that the term of permit AZA 22515 expired on December 31, 1991. This result required neither action nor notice by BLM, occurring, rather, under the express language of the permit.

Equally clear is the fact that no notice of appellants' intention to renew this permit was given to BLM prior to expiration. Paluska's inspection of the permit lands in November 1991 did not constitute notice because, inter alia, he never communicated this "notice" to the lessor, i.e., BLM. A request for renewal is the proper way to exercise an option for renewal. This method is set forth at 43 CFR 2920.7(i), a regulation incorporated in permit AZA 22515 by paragraph 2 of the permit.

As noted above, paragraph 16 of the permit referenced a "[f]ive-year option to renew after December 31, 1991," while special condition 16.B provided that lease AZA 22515 would have a five-year term "with five-year options for renewal." Appellants purport to find ambiguity in these provisions, presumably based on the theory that the phrase "after December 31, 1991" could be construed to countenance exercise of the option to renew after December 31, 1991. However, whatever ambiguities might exist in paragraph 16.B, the provisions granting the right to renew the permit must be construed in pari materia with the provisions of 16.D, which provided that "[t]his lease shall terminate and all rights of the holder hereunder shall cease upon: (1) Expiration of the term as set forth in condition B.

above, or any renewal thereof" (Emphasis supplied.) The above emphasized language makes it clear that all rights of the holder of the permit, which includes the right to renew the permit, terminated upon the expiration of the original lease term or its renewal term. Thus, reading 16.D in conjunction with 16.B makes it clear that the option to renew for another 5-year term could only be exercised during the term, itself, since the right to renew would "cease" upon expiration of the lease term. A fair reading of the provisions of the permit simply does not support appellants' assertion that the option to renew could be exercised after the running of the permit term.

Insofar as the past conduct of BLM is concerned, appellants are correct in their assertion that Sebe Musgrove and Stanley Musgrove did not always pay their rent to BLM prior to January 1 and that such tardiness did not affect renewals of the two permits designated 1A-29(A). This, however, was the result of varying contract terms rather than a pattern of BLM conduct on which appellants had a right to rely. The two permits designated as 1A-29(A) did not terminate when the Musgroves failed to make timely payment of rental prior to January 1, because, under the terms of those permits, 3/ renewal was automatic in the absence of contrary notice

3/ Permit 1A-29(A), which originally issued to Sebe Musgrove on Mar. 2, 1965, described a 10-acre parcel of land, later expanded by approximately 2 acres to form the 11.7-acre parcel at issue herein. The permit had an initial term beginning on Mar. 2, 1965, and ending on Dec. 31, 1965, and continuing thereafter for successive periods of 1 year each, unless written notice of termination was given by either party at least 90 days prior to the end of the initial or extended term. The charge for each calendar year after the initial term was \$120 per year payable, in advance, on Jan. 1 of each year. Termination of permit 1A-29(A) would occur "[u]pon the termination of the term or extended term hereof" after appropriate notice (Permit dated Mar. 2, 1965, at ¶ 16(a)). Termination would also occur after the lessee's failure to comply with permit provisions and the passage of 30 days following written notice of termination for such failure to perform. Id. at ¶ 16(b).

A second permit 1A-29(A), dated Oct. 28, 1968, was subsequently issued to Sebe Musgrove for an initial period beginning Jan. 1, 1969, and ending Dec. 31, 1969, and continuing thereafter for successive periods of 1 year each. This permit could be terminated on Dec. 31 of any year during its term or any extension thereof by either party upon written notice. Charges for use of the lands in this permit were \$279.50 each calendar year, payable in advance of Jan. 1 of each year. Termination of permit 1A-29(A) would occur "[u]pon the termination of the term or extended term hereof" after appropriate notice (Permit dated Oct. 28, 1968, at ¶ 16(a)). Termination would also occur upon the lessee's failure to comply with permit provisions and the passage of 30 days following written notice of termination for such failure to perform. Id. at ¶ 16(b).

to the parties, and termination could occur only after notice to the parties. Since timely payment of the annual rentals was not a prerequisite to renewal of permits 1A-29(A), BLM's acceptance of tardy rentals under these permits could not properly be construed as evincing a willingness to disregard permit language or receive tardy notices of renewal under permit AZA 22515. Nor can it justify appellants' attempt to exercise a right of renewal granted by permit AZA 22515 after the permit, itself, had expired.

Finally, nothing in Trollen v. Wabasha compels reversal of BLM's action in the instant case. In Trollen, while the lease required that notice be given 6 months prior to expiration, the lessee gave notice of renewal with more than 4 months left in the 5-year lease. Of particular importance to the court in Trollen was the fact that the lessees had made substantial improvements to the leased premises, shoreline property owned by its lessor, the City of Wabasha, improvements whose value would be lost if the lease were not renewed. Thus, the court declared that

in cases of mere neglect in fulfilling a condition precedent of a lease, which do not fall within accident or mistake, equity will relieve when the delay was slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.

Id. at 648.

Quite apart from the fact that, in the case before the Board, appellants did not attempt to extend the permit until after the completion of its term whereas more than 4 months were left in the running of the lease in Trollen, appellants cannot establish the final element of the Trollen test. As the Court emphasized, any equitable relief from the untimely exercise of an option must be based on a showing that hardship to the lessee would make literal enforcement of the option unconscionable. No such showing has been made herein.

During the term of permit AZA 22515, appellants leased the lands to Robert Barkley ("Neither Heidi nor I have ever farmed" (SOR at Exh. K)). Barkley last farmed the land in 1990 or 1991 and has since departed. Appellants call to our attention no improvements they brought to the land that would be lost if renewal is not granted. What appellants will miss is the rent paid by a tenant. Addressing a similar situation in Lemay v. Rouse, 444 A.2d 553 (1982), the Supreme Court of New Hampshire refused to grant equitable relief where the plaintiff had attempted to exercise the right to renew 5 weeks late (though still within the term of the lease), concluding that "[t]o be sure, the plaintiffs in this case stand to lose the profit they would have made by charging the sub-tenants more for rent and the purchase option than their landlord charged them, but this can hardly be found an unconscionable hardship." Id. at 556. Appellants' position in the instant appeal is essentially the same as that of the plaintiffs in Lemay, and our conclusion is the same as that reached by

the Court in that decision. Denial of the untimely attempt to exercise the renewal option works no unconscionable hardship on appellants.

For all of the reasons delineated above, appellants' various arguments do not demonstrate error in the District Manager's decision of February 20, 1992, and provide no basis for reversing it.

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

James L. Burski
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

