

JEAN MOUNTAINGROVE
RUTH MOUNTAINGROVE

IBLA 82-947

Decided September 20, 1982

Appeal from decision of the Medford, Oregon, District Office, Bureau of Land Management, rejecting application for a water pipeline right-of-way. OR 26639

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Conditions and Limitations

In granting a right-of-way for a domestic water pipeline pursuant to sec. 501(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(a) (1976), BLM properly may require stipulations providing that the right-of-way is not renewable. However, the Board may direct that the grant be renewable pursuant to 43 CFR 2803.6-5(a) where the circumstances of a particular case indicate that a better course of action, and one that allows the balancing of the interests of BLM and the right-of-way applicant, is to allow the grant to be renewed.

APPEARANCES: Jean Mountaingrove and Ruth Mountaingrove, pro sese.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Jean and Ruth Mountaingrove have appealed from the May 11, 1982, decision of the Medford District Office, Bureau of Land Management (BLM), rejecting their application for water pipeline and spring development, OR 26639. Appellants filed their application on May 5, 1981, and the provisions of the proposed grant have been the subject of rather intense negotiation between appellants and BLM. On February 5, 1982, the district office sent a proposed grant for appellants' to sign and return. A decision dated April 1, 1982, informed appellants that their right-of-way application was being held subject to rejection unless the signed grant was returned to the district office.

Because the signed grant had not been returned, the BLM then issued its decision of May 11 rejecting the application.

At the outset, we must note that approval of a domestic water pipeline right-of-way application filed under the provisions of the Federal Land Policy and Management Act, 43 U.S.C. § 1761(a) (1976), is discretionary with the Department. See Stanley S. Leach, 35 IBLA 53 (1978). The Department has no obligation to grant such a right-of-way and no applicant is entitled to be given one. However, appellants' application was not rejected because BLM was unwilling to grant a right-of-way; rather, the application was rejected because appellants were unwilling to accept a right-of-way which was not renewable after its initial 10-year term.

[1] In Eugene V. Vogel, 65 IBLA 213 (1982), we recently decided that BLM properly may require a stipulation in a domestic water pipeline right-of-way providing that the right-of-way is not renewable. However, we further held that the Board may direct that the grant be renewable, pursuant to 43 CFR 2803.6-5(a), where the circumstances of a particular case indicate that a better course of action, and one that allows the balancing of the interests of BLM and the right-of-way applicant, is to allow the grant to be renewed. Appellants contend that there is no source of water on their 6.87 acres of land, and that the water carried over the proposed right-of-way is their only source of water which they depend on for their household needs, their vegetable garden, and their 20 fruit and nut trees. Appellants assert: "The change from renewable to non-renewable means that we will have to live the next 10 years with constant uncertainty about having a water supply when we reach the ages of 66 and 69." (Statement of Reasons at 12). The record submitted on appeal does not establish why a provision for renewal of the right-of-way in these circumstances would be inconsistent with BLM's concerns. As we stated in Eugene V. Vogel, supra at 217:

We believe, having reviewed the record in this case, that fairness requires that [the stipulation of nonrenewability] be changed to provide for renewal of the grant pursuant to 43 CFR 2803.6-5(a). This conclusion is consistent with criterion 6 in the Josephine MFP, WL-4.5. That criterion provides for a term not to exceed 10 years "to allow reevaluation of applicable criteria at that time." Provision for renewal does not preclude reevaluation. In fact, 43 CFR 2803.6-5(a) specifically provides for modification of the grant when necessary. [1/] This authority to modify allows BLM to insure compatibility with its land

1/ The regulation has been amended to delete the specific provision for modification of the grant upon renewal. 47 FR 38804, 38806 (Sept. 2, 1982). This amendment becomes effective on Oct. 4, 1982. The stated reason for the deletion is that the present provision is believed to contradict the following provision of section 2801.1-1(j): "Each grant shall have a provision stating whether it is renewable or not and if renewable, the terms and conditions applicable to the renewal." We see no discrepancy. Although 43 CFR 2803.6-5 has been amended, we do not construe this amendment as preventing BLM from including in a grant a condition reserving to BLM the power to modify the grant upon renewal to take into account changes in circumstances

management practices. In addition, should appellant fail to comply with the terms or conditions of the grant BLM temporarily may suspend the right-of-way pursuant to 43 CFR 2803.3 or act in accordance with 43 CFR 2803.4 to suspend or terminate the right-of-way. Thus, renewal pursuant to 43 CFR 2803.6-5(a) provides protection for those concerns represented by BLM.

Accordingly, 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 reversed and the case remanded with instructions for the district office to modify the proposed grant to include a provision for its renewability pursuant to 43 CFR 2803.6-5(a).

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

fn. 1 (continued)
arising after initial issuance at the grant. We note that the notice of proposed rulemaking did not identify the deleted sentence as being in conflict with section 2801.1-1(j), but only as "not necessary." 47 FR 15284 (Apr. 8, 1982).

