

REO BROADCAST MANAGEMENT CO.

IBLA 86-40

Decided June 22, 1987

Appeal from a decision of the Albuquerque District Office, New Mexico, Bureau of Land Management, demanding rental payment for right-of-way NM 33302.

Affirmed.

1. Appraisals--Communication Sites--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally

Where BLM grants a communication site right-of-way under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982) and the grantee fails to file an application for assignment as required by 43 CFR 2803.6-3, rental resulting from a subsequent appraisal may be properly assessed against the grantee. The period of assessment properly included that period the grantee, under a private arrangement, allowed another party to use the right-of-way.

2. Administrative Authority: Laches--Estoppel--Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

APPEARANCES: Richard E. Oppenheimer, President, Reo Broadcast Management Company, Austin, Texas, for appellant; Margaret C. Miller, Esq., Department Counsel, Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Reo Broadcast Management Company has appealed from a decision dated October 1, 1985, by the Albuquerque District Office, Bureau of Land Management (BLM), demanding rental and administrative fees in the amount of \$4,750 covering the period August 14, 1979, through August 13, 1986, for electronic radio site right-of-way NM 33302. The right-of-way, located in the S ½ SW ¼, sec 4, T. 10 N., R. 10 W., New Mexico Principal Meridian, New Mexico, is for a communication building and tower.

On August 14, 1979, BLM issued a decision granting the right-of-way to Grants Broadcasting Company (Grants). ^{1/} The grant, issued under authority of section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1982), does not cite an amount for rental but refers instead to paragraph 8 of the "Terms and Conditions of Grant" which states: "The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request." An appraisal report was subsequently prepared by BLM and approved on January 29, 1985. The report determined that the fair market rental value of the site was \$650 per year as of August 14, 1979.

The record contains an April 3, 1985, note indicating Robert C. Hedin talked to a BLM representative and advised that he was "trying to work [with] other previous owners on paying rental." On the same date, a billing was sent to Hedin requesting payment of \$4,100. This amount represented annual rental for 6 years at the rate of \$650 per year plus administrative charges. A final notice was sent to Hedin on June 24, 1985, stating that the right-of-way would be terminated and his company would be cited for trespass if payment was not made within 30 days of receipt of the notice. Another note in the record indicates that on July 15, 1985, Hedin talked to a BLM representative and asked that BLM notify Grants at a new address. On July 17, 1985, BLM sent the billing to Richard E. Oppenheimer, Grants Broadcasting, at the new address and advised that since Hedin had informed BLM he was using the right-of-way, Oppenheimer needed to file an assignment thereof to Hedin. Subsequently, Oppenheimer filed an assignment with BLM on August 6, 1985. The document was signed on July 31, 1985, by Oppenheimer as vice president of Grants and stated in part, "This assignment effective August 14, 1979." There is no indication in the record that BLM has taken any action on the assignment. ^{2/}

On October 1, 1985, BLM served notice of trespass on Robert Hedin and issued the decision here appealed to Richard E. Oppenheimer. On October 3, Oppenheimer wrote BLM, stating Hedin had been trying to pay off the radio station and it was agreed that "he would assume total liability for the charges of appraisal and that we would discount from the final payment that amount which is applicable to Grants Broadcasting prior to the date of transfer."

^{1/} In its statement of reasons, appellant (apparently the successor to Grants) indicates it sold its radio station to "Rainbow Broadcasting" in 1983, transferring its FCC license to Rainbow on November 1, 1983. The record is less than clear regarding the chain of succession to the radio station, but it appears that Rainbow was owned in whole or in part by Robert C. Hedin. An FCC ownership report in the file indicates that as of October 19, 1984, the name of the licensee of the station had been changed to Kapdin Communications, Inc. The report shows Hedin is the president of Kapdin and he and his wife are majority shareholders.

^{2/} We note the assignment filed does not meet the requirements of 43 CFR 2803.6-4.

In its statement of reasons, appellant asserts that paragraph 8 of the right-of-way grant is ambiguous and that "one could assume that only under special conditions there may be a lease fee." Appellant argues that because its FCC license was transferred to Rainbow Broadcasting on November 1, 1983, appellant should not be liable for rental from that date to the present. Appellant also argues that BLM's billing is unreasonable because it was made 6 years after the right-of-way grant.

In its answer, BLM argues that no assignment of November 1, 1983, was brought to BLM's attention until this dispute and a retroactive assignment should not be honored. BLM argues that paragraph 8 does not apply only to special conditions and states prior case law has established that imposition of rentals after appraisal is not considered a prohibited retroactive rental. As to the delay in billing for rental, BLM asserts that such delay cannot vitiate the authority of the United States to enforce a public right or protect a public interest.

[1] Department regulation 43 CFR 2803.6-3 requires that any proposed assignment of any right or interest in a right-of-way grant be filed with BLM and states, "No assignment shall be recognized unless and until it is approved in writing by the authorized officer." Thus, absent compliance with this regulation, the obligations of appellant under the terms and conditions of the right-of-way grant cannot be avoided, regardless of any private arrangements with other parties. We therefore reject appellant's argument that it is only liable for the rental during the period it used the right-of-way. In references to paragraph 8 of the grant, we do not find support for appellant's argument that the paragraph is ambiguous, or that it applies only under "special conditions." In Lone Star Steel Co., 79 IBLA 345 (1984), the Board reviewed the language of this paragraph and held that where BLM grants a right-of-way under section 501 of FLPMA subject to a future appraisal, BLM may subsequently appraise the land included in the right-of-way, and the rental charges imposed from the date of the right-of-way grant will not be considered retroactive. See also Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984).

[2] Finally, we must reject appellant's argument that the delay in changing the rental is unreasonable. As pointed out in BLM's answer, this argument was made in Lone State Steel Co., *supra*, wherein we stated at 349:

The clear mandate of FLPMA, pursuant to which appellant's use of the right-of-way was authorized, requires that the holder pay the fair market value thereof. 43 U.S.C. § 1764(g) (1976). The authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. Amoco Production Co., 78 IBLA 93 (1983); Alyson A. Allison, 72 IBLA 333 (1983); Warren L. Jacobs, 71 IBLA 385 (1983).

We therefore conclude that BLM's October 1, 1985, decision demanding rental payment for right-of-way NM 33302 was correct.

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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 affirmed.

John H. Kelly
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

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