

AZTEC ENERGY CORP.

IBLA 86-936

Decided August 3, 1987

Appeal from a decision of the California Desert District, Bureau of Land Management, terminating right-of-way CA-13983.

Affirmed.

1. Accounts: Payments -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

If a rental charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, BLM may take action to terminate a right-of-way grant issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761 through 1771 (1982). When the holder of a right-of-way grant has not paid rent for over 2 years, BLM may properly terminate the right-of-way grant.

APPEARANCES: Jeffrey E. Fromberg, Esq., Palm Springs, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Aztec Energy Corporation (Aztec) appeals from a decision of the California Desert District, Riverside, California, Bureau of Land Management (BLM), dated February 28, 1986, terminating a right-of-way grant to construct, operate, and maintain wind-turbine generators issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982). BLM terminated the right-of-way because Aztec had failed to pay rent and complete construction of wind-turbine generators specified in the plan of operations as required by 43 CFR Subpart 2800 and BLM's decision of August 17, 1983, approving an amendment to Aztec's right-of-way.

BLM executed the original right-of-way grant, CA-11688, on March 13, 1983. Under the terms of the right-of-way, Aztec was permitted to use land in secs. 24, 28, and 34, T. 3 S., R. 5 E., sec. 30, T. 3 S., R. 6 E., San Bernardino Base and Meridian. The grant specified that the right-of-way was for construction, operation, and maintenance of wind-turbine generators,

electric transmission lines, ancillary facilities, and access roads within the right-of-way boundary. The grant stated that the right-of-way, located on approximately 65 acres, would be used to develop, produce, utilize, and sell electricity generated from wind energy. Section B.7. of the grant sets forth the rental schedule. Section 8.i. of exhibit A, "Terms and Conditions of Grant," required Aztec to submit a plan of operations which would include a construction timetable.

On August 17, 1983, BLM issued a decision approving an amendment to Aztec's right-of-way. The acreage was increased from 65 to 1,615.34 acres and for administrative purposes, the serial number was changed to CA-13983 to indicate the Edom Hill portion of the grant. Section 6 of the amendment set the annual rental at \$23,260.90.

On September 9, 1983, Aztec's application to assign a portion of CA-13983 to Capco Financial Services, Inc. (Capco), was approved. Sec. 34 of T. 3 S., R. 5 E., San Bernardino Base and Meridian, was assigned under serial number CA-14379.

On December 9, 1983, an application was filed seeking assignment of secs. 24 and 28, T. 3 S., R. 5 E., and a portion of sec. 30, T. 3 S., R. 6 E., San Bernardino Base and Meridian, California. On December 14, 1983, Aztec's application to assign secs. 24 and 28 of T. 3 S., R. 5 E., San Bernardino Base and Meridian, was approved, and given serial number CA-14632.

However, the assignment of sec. 30, T. 3 S., R. 6 E. was not approved because the assignment was phrased in a manner which made it impossible to determine the acreage excluded from the assignment. BLM directed the parties to submit an assignment document describing the assigned tract by metes and bounds. Following the second assignment, the remaining lands under Aztec's right-of-way grant CA-13983 were:

T. 3 S., R. 6 E., S.B.M.,  
Section 30, Lots 1, 2, 3, 4,  
NE1/4, E1/2 NW1/4, E1/2 SW1/4,  
N1/2 SE1/4. (567.60 acres)

BLM sent Aztec several demand letters for payment of yearly rental. The letters contained a warning that nonpayment would result in termination of the right-of-way grant. <sup>1/</sup>

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<sup>1/</sup> On Apr. 13, 1984, BLM sent Aztec a letter in which it noted that according to Aztec's plan of operations submitted on Mar. 15, 1983, 76 wind turbines should have been completed by the end of April 1984; BLM informed Aztec that it was not in compliance with the right-of-way grant amendment, and requested that Aztec inform BLM as to whether it intended to relinquish the grant. Aztec replied that it had invested a great deal of time and capital into the site, that it intended to develop it as expeditiously as possible, and did not wish to relinquish or assign the right-of-way grant.

By decision dated January 23, 1986, BLM ordered Aztec to show cause why the right-of-way should not be terminated. BLM summarized the demand letters which it had issued to Aztec and referred to third and final demand letters which had been attached to the decision. These demand letters recite the following information:

| <u>Bill No.</u> | <u>Rental Period</u> | <u>Amount Due</u> |
|-----------------|----------------------|-------------------|
| A300494         | 3/13/84 - 3/12/85    | \$9,431.46        |
| A308263         | 3/13/85 - 3/12/86    | 9,431.46          |
| A308268         | Remainder of 1983    | 3,299.39          |
|                 | Total Due            | \$22,162.31       |

BLM also stated that pursuant to the plan of operations submitted by Aztec on March 15, 1983, 76 wind turbines were to be constructed by April 30, 1984. BLM noted that no construction had taken place. BLM allowed Aztec 30 days from receipt of the decision to:

- (1) submit the total amount of rental that is due and submit an updated Plan of Operations or
- (2) to show cause why the right-of-way grant should not be terminated. Failure of the Holder to take one of the above actions within the time provided above will result in the termination of the right-of-way grant.

Aztec responded by letter of January 30, 1986, in which it stated that it did not wish the right-of-way to be terminated and therefore wished to do what was required to update the plan of operations and pay the delinquent amounts due for rent.

Aztec noted that it had attempted to convey a portion of its interest in the right-of-way in sec. 30 to Capco, but that Capco and BLM were unable to agree on a boundary between the portion Aztec sought to retain and the portion that would be granted to Capco. Aztec explained that, as a result, the property remained undeveloped. Aztec asserted that a stay order was

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fn. 1 (continued)

On June 19, 1985, BLM notified Aztec that it owed \$8,689.27 (principal plus interest and administrative charges) for the period Mar. 13, 1984, through Mar. 12, 1985. BLM warned that nonpayment of the bill would result in termination of the right-of-way. On June 27, 1985, BLM sent Aztec a bill for collection, dated June 25, 1985, reminding Aztec that it owed \$3,022.43 for the balance of 1983's rent for sec. 30, T. 3 S., R. 5 E., San Bernardino Base and Meridian. BLM advised Aztec that the bill should be paid immediately, in order that the right-of-way grant not be terminated for lack of rental payments. By letter dated July 26, 1985, BLM again wrote Aztec concerning its rental liability. BLM informed Aztec that its indebtedness as of July 18, 1985, was \$8,796.44 (principal plus interest and administrative charges).

On Aug. 16, 1985, the attorney for Aztec responded to the notices stating that Aztec was not responsible for the rental payments because it had assigned its rights to another company.

imposed on Capco in a suit filed by the City of Palm Springs, California, which occasioned additional delays. Aztec requested a conference with BLM to discuss the current requirements for an amended plan of operations and adjustments to the rental due.

BLM replied that it would arrange a meeting with Aztec but stated that the rental payments must be submitted as required by BLM's decision of January 23, 1986. Aztec again wrote BLM explaining that it wished to discuss rental obligations with BLM and possible abatement for the interference with the grant as set forth in its letter of January 30, 1986. By letter dated February 24, 1986, BLM informed appellant that a meeting had been arranged to discuss a new plan of operations but that it had no authority to allow any leeway on the rental fees. Aztec replied that it was unable to meet with BLM because its counsel was scheduled for heart surgery and could not attend the meeting.

On February 28, 1986, BLM issued its decision terminating right-of-way CA-13983 because Aztec did not comply with the stipulations of the grant and the regulations set forth in 43 CFR Subpart 2800. BLM stated that as of the date of the decision, Aztec had failed to pay rent for a period of over 2 years, with accrued and unpaid rental totalling \$22,162.31. BLM also found that under the plan of operations submitted March 15, 1983, 76 wind turbines were to have been constructed by April 30, 1984, and that no construction had taken place on the right-of-way as of the date of the decision. BLM concluded that Aztec had failed to comply with the requirements of the show cause decision and terminated the right-of-way grant. BLM added that termination of the right-of-way did not relieve Aztec of the responsibility for paying past rent.

In its statement of reasons Aztec reiterates that it filed an application to assign a portion of its right-of-way grant to Capco, but BLM never acted on the application because of the uncertainty which existed regarding the dividing line between the portion of the grant being retained and the portion being transferred. Appellant asserts that during this period it should have been entitled to abatement of rent. Appellant claims that the inaction of BLM in issuing a decision to either approve or deny the application impeded Aztec's ability to meet the construction deadlines in its plan of operations. Aztec also points to the suit filed by the City of Palm Springs against Capco, other developers, and BLM, and alleges the right-of-way was not usable during this period, due to uncertainty regarding the outcome of the suit.

Aztec asserts that because it has been customary for BLM to discuss particular problems relating to rights-of-way with the grantees BLM should discuss the rent abatement issue with Aztec.

On appeal Aztec requests the following remedies:

1. The return of supervision over Right-of-Way CA 13983 to the Indio Resource Area for reinstatement and for local consideration of partial abatement of the past due rent as may be called for under the facts to be presented by Appellant;

2. The reinstatement of Right-of-Way CA 13983 to Aztec Energy Corporation, allowing thirty (30) days following reinstatement, for the payment of past due rent as determined during meeting with Indio Resource Area representatives once notice of reinstatement of the Right-of-Way grant shall have been received by Appellant or its counsel;

3. An opportunity to be afforded Appellant to meet and confer with Area Manager Leslie M. Cone, during the thirty (30) days referred to hereinabove, relative to partial abatement of rents during the periods for which such abatement may be applicable due to the reasons stated herein;

4. An opportunity to be afforded Appellant to meet and confer with Area Manager Leslie M. Cone, during the thirty (30) days referred to hereinabove, relative to necessary amendment to the Plan of Operations in order to bring the Right-of-Way into compliance.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), provides that the holder of a right-of-way shall pay annually in advance the fair market value of the right-of-way as determined by the Secretary. See also 43 CFR 2803.1-2; Bench Lake Irrigation Co., 78 IBLA 305 (1984). In its decision terminating the right-of-way, BLM notes that Aztec has failed to pay rent for over 2 years. Aztec does not dispute this fact.

Noncompliance with any provision of Title V, condition of a right-of-way, or applicable rule or regulation may be grounds for termination of the right-of-way, if, after notice to the holder of the right-of-way, the Secretary determines that any such ground exists and termination is justified. 43 U.S.C. § 1766 (1982); 43 CFR 2803.4. Appellant has failed to tender annual rental payments as required by section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), 43 CFR 2803.1-2(a), and the terms of the amended right-of-way grant. 2/ If a charge required by 43 CFR 2803.1-2 is not paid when due, and such default continues for 30 days after notice, action may be taken to terminate the right-of-way grant. 43 CFR 2803.1-2(e). See also James W. Smith, 46 IBLA 233 (1980). Appellant was given the required notice and BLM properly terminated the right-of-way grant.

Aztec's assertion that BLM's inaction regarding approval of the assignment of part of sec. 30 to Capco worked to its detriment in meeting deadlines under the plan of operations is without merit. The fact remains that Aztec was the record holder of the right-of-way and was responsible for compliance with its terms until an assignment was approved by the authorized officer. See 43 CFR 2803.6-3. Therefore, as record holder of the right-of-way, Aztec remained liable for the rental which accrued prior to termination, and is legally obligated to pay it. Carpentry Unlimited, Inc., 62 IBLA 203 (1982). Aztec is directed to remit \$22,162.31 past due rental plus interest to the

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2/ Section B.2. of the right-of-way grant specifies that if the right-of-way holder violates any of the terms and conditions of the grant, the authorized officer, after giving written notice, may declare the grant terminated.

California Desert District within 30 days from receipt of this decision, failing which, appropriate action may be taken to protect the interests of the United States.

Therefore, 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.

R. W. Mullen  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Gail M. Frazier  
Administrative Judge

