

CITY OF LAS CRUCES

IBLA 87-225

Decided October 17, 1988

Appeal from a decision of the Las Cruces/Lordsburg Resource Area Manager, Bureau of Land Management, transferring administration of a right-of-way. NM 37691.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Conveyances:
Rights-of-Way: Valid Existing Rights

A BLM decision to transfer the administration of a right-of-way to a patentee of Federal land will be affirmed as a proper exercise of discretion where it is shown that the public interest is best served by the transfer of administration.

APPEARANCES: Robert B. Kelley, Esq., City Attorney, for the City of Las Cruces, New Mexico; Margaret C. Miller, Esq., Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The city of Las Cruces, New Mexico (appellant) is holder of right-of-way NM 37691 granted by the Bureau of Land Management (BLM), on November 20, 1979, for a public road across Federal lands pursuant to Section 501(a)(6) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 43 U.S.C. | 1761(a)(6) (1982). On August 5, 1982, a portion of the Federal land subservient to appellant's right-of-way was patented to the city of Albuquerque, New Mexico. The patent was issued subject to right-of-way NM 37691. On December 11, 1986, the Las Cruces/Lordsburg Resource Area Manager, BLM, issued a decision informing appellant that jurisdiction over the portion of right-of-way NM 37691 on lands patented to the City of Albuquerque had been transferred from BLM to the City of Albuquerque. Appellant has filed a timely appeal from this decision.

Appellant's fundamental contention on appeal is that the transfer of jurisdiction over the right-of-way to Albuquerque places an undue burden on its rights under the right-of-way grant. Apparently, appellant is concerned that, because it will now have to deal with Albuquerque, its planned and potential uses of the right-of-way will be curtailed. Appellant asserts that BLM's decision should have made provision to ensure no interference by the new landowner would take place.

In response, BLM states that the determination whether the United States should retain its interest as grantor of a right-of-way is a matter within the discretion of the Secretary and BLM. BLM then urges the Board to consider the policy enunciated in BLM Instruction Memoranda Nos. NM 84-201 and 84-326, which were used by the agency as a standard for the exercise of its discretion in this case. BLM also maintains that appellant was "given ample notice of the change in administration of the right-of-way with advance opportunity to negotiate terms with the patentee. BLM argues appellant has failed to show any damage from the change of administration or that a vested right exists to continued administration of the right-of-way by the United States."

[1] In considering the discretion of the Secretary to transfer jurisdiction of a right-of-way, we turn initially to Section 508 of FLPMA, 43 U.S.C. | 1768, which provides:

If under applicable law the Secretary concerned decides to transfer out of Federal ownership any lands covered in whole or in part by a right-of-way * * * the lands may be conveyed subject to the right-of-way; however, if the Secretary concerned determines that retention of Federal control over the right-of-way is necessary to assure that the purposes [sic] of this subchapter will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected, he shall (a) reserve to the United States that portion of the lands which lies within the boundaries of the right-of-way, or (b) convey the lands, including that portion within the boundaries of the right-of-way, subject to the right-of-way and reserving to the United States the right to enforce all or any of the terms and condition of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

The plain language of Section 508 permits conveyance of the right-of-way without a retention of Federal control if the Secretary does not determine retention is necessary. Further, Departmental regulation 43 CFR 2803.5(b), in implementing Section 508, states that when a right-of-way traverses public lands transferred out of federal ownership, the transfer of the land shall, at the discretion of the authorized officer, either include an assignment of the right-of-way, be made subject to the right-of-way, or reserve the right-of-way to the United States. As pointed out by BLM, "[both] the above-cited statute and regulation emphasize the agency's discretion in making such a decision and do not prohibit the transfer of administrative responsibilities" (BLM Answer at 4).

In Instruction Memorandum No. 84-326, the Director, BLM, addressed the concern of right-of-way holders that "they may experience problems if administration of a grant is transferred from BLM to a patentee * * *." The concern, the Director noted "is based on an underlying assumption that administration of the grant, if by anyone other than the United States, may be done in an unreasonable manner." The Director concluded, however, that "there is little evidence to support this assumption." Rather,

When public lands are patented, BLM through the land use planning and other processes, determines that the public interest will be best served by divesting the United States of ownership and further management responsibility for the land. Consequently, when a tract of public land on which a right-of-way grant is located is patented, future administration of the right-of-way grant including collection of rentals by BLM should be terminated wherever possible.

Thus, the very nature of the patenting process dictates that, unless the public interest would require retention of jurisdiction, the administration of the right-of-way should transfer to the patentee. (Cf. Ahtna, Inc., 103 IBLA 71 (1988); State of Alaska, 97 IBLA 229 (1987); State of Alaska, 86 IBLA 268 (1985); cases dealing with waivers of administration or rights-of-way in Alaska under provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. | 1613(g) (1982)).

Appellant has expressed the same general concern considered in the above noted instruction memorandum. However, it has not explained how the public interest would be better served by retention of jurisdiction over the right-of-way by the United States. Further, it has not refuted BLM's statement that the City had advance opportunity to resolve any potential conflict prior to the transfer of administration of the right-of-way in question. Accordingly, we find nothing to indicate that BLM's decision to transfer the authority was an abuse of its discretion under statute and regulation.

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.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge