

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

IBLA 87-725

Decided June 22, 1989

Appeal from a decision of the Indio Resource Area, Bureau of Land Management, amending a water pipeline and access road right-of-way grant to require rental. CA 6008.

Affirmed.

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

Under sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), the Secretary of the Interior may charge no rental for a right-of-way only in certain circumstances. The regulation implementing that provision, 43 CFR 2803.1-2(c) (1986), sets forth the circumstances under which BLM is authorized to charge no rental fee and specifically excludes from consideration municipal utilities and cooperatives whose principal source of revenue is customer charges, including a public corporation that develops, stores, and sells water at wholesale to other public water authorities.

APPEARANCES: Warren J. Abbott, Esq., and R.D. Twomey, Jr., Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Metropolitan Water District of Southern California (Metropolitan) appeals from a decision of the Indio Resource Area Office, Bureau of Land Management (BLM), dated May 6, 1987, amending right-of-way grant CA 6008 (providing for a water pipeline and access road right-of-way) to require payment of annual rental.

On March 5, 1979, Metropolitan applied for a water pipeline and access road right-of-way across public lands in secs. 10 and 15, T. 9 S., R. 3 W., San Bernardino Meridian, California, encompassing 2.7 acres, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA),

43 U.S.C. § 1761 (1982). In its application Metropolitan stated that "[t]he primary purpose of the right-of-way is for Metropolitan's San Diego Pipeline No. 4 and future pipelines, and for access roads to the pipeline right-of-way for maintenance and operation of the pipelines."

In the Environmental Assessment Record for the proposed right-of-way, dated January 31, 1980, BLM described Metropolitan as a public agency which was organized in 1928 following the California Legislature's adoption of the Metropolitan Water District Act. BLM noted that Metropolitan's primary purpose is to develop, store, and distribute water at wholesale to its member public agencies to meet their municipal and domestic needs. BLM explained that there are 128 incorporated cities within Metropolitan's boundaries and 27 constituent members as follows: 14 cities, 12 municipal water districts, and 1 county water authority.

On July 25, 1980, BLM issued a decision granting right-of-way CA 6008 in which it specified that the grant was "nonrental." BLM required Metropolitan to agree to stipulations which would be made part of the grant. Stipulation 6 provides that "[t]he grantee shall comply with applicable federal and state laws and regulations issued thereunder, existing or hereafter enacted or promulgated, affecting in any manner construction, operation, maintenance, or termination of the right-of-way grant."

By decision dated May 6, 1987, BLM amended the grant to require payment of rental. BLM based its decision on 43 CFR 2803.1-2(c) (1986), which provides in part that "(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances: (1) When the holder is a Federal, State, or local government * * *, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges" (emphasis supplied). BLM also referred to stipulation 6 which requires Metropolitan to comply with regulations "existing or hereafter enacted or promulgated." BLM held that Metropolitan is a municipal utility whose principal source of revenue is customer charges and, in accordance with the regulations, amended the right-of-way grant to require Metropolitan to pay fair market rental. 1/ Metropolitan appealed. 2/

1/ BLM's decision amended the "rental" section of the grant to read as follows:

"Rental: For and in consideration of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices."

2/ We note that the case file submitted to us by BLM on appeal contains a memorandum from the District Manager, California Desert District, BLM, to the California State Director, BLM. This memorandum, which responds to

In its statement of reasons, Metropolitan explains that it was organized and exists under the Metropolitan Water District Act of the State of California (Stats. 1927, Ch. 429, repealed and reenacted by Stats. 1969, Ch. 209, as amended; see Deering's California Codes Annotated, Water-Uncodified Act, Act 9129(b)). Metropolitan states that it is a public corporation, a local governmental agency, which sells water at wholesale under section 130 of that Act to its 27 member public agencies within six counties in Southern California, including the San Diego County Water Authority. According to Metropolitan, it does not sell water to ultimate water consumers, with the exception of sales of surplus water to the State of California, Department of Transportation, pursuant to a special contract authorized under the Act.

Metropolitan points out that in 1980 BLM, in granting its right-of-way, specifically exempted it from payment of rental fees. Metropolitan asserts that, at the time the right-of-way issued, it was in compliance with the regulations then in effect and that BLM correctly exempted it from rental payments for approximately 7 years. Metropolitan contends that BLM is not authorized to require rental payment as consideration for the grant by application of the regulation subsequently promulgated at 43 CFR 2803.1-2(c)(1) (1986). Metropolitan contends that stipulation 6, particularly when read in the context of the other stipulations, requires compliance only with applicable laws and regulations concerning matters of physical use of the right-of-way. In any event, it argues, BLM cannot charge it rental fees because Metropolitan is not a "municipal utility whose principal source of revenue is customer charges" and, therefore, is not excluded from consideration for exemption from rental charges.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1982), 3/ provides in relevant part:

fn. 2 (continued)

substantive points made in appellant's statement of reasons, was placed in the record 3 days after appellant's notice of appeal was filed. There is no indication that a copy of this memorandum was served on appellant. BLM is advised that, under 43 CFR 4.27(b)(1), it is required to furnish to appellants copies of all communications that concern the merits of the appeal and that are placed into the official record after the notice of appeal is filed. This includes not only answers and other pleadings filed with the Board, but also copies of memoranda that are not addressed directly to the Board, because we will nevertheless have them before us in the file as we consider the appeal. Appellant is normally to be provided the opportunity to respond to such communications by BLM. 43 CFR 4.27(b)(1). In the present case, we choose not to delay our decision by requiring service of this memorandum. However, BLM is further advised that failure to comply in the future may, in appropriate circumstances, result in the imposition of sanctions against it. 43 CFR 4.27(b)(2). See Amoco Production Co., 101 IBLA 152, 155-57 (1988).

3/ In 1984, the FLPMA rental provision for rights-of-way, 43 U.S.C. | 1764(g) (1982), was amended to waive charges for electric or telephone

The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The relevant regulation, 43 CFR 2803.1-2(c)(1) (1986), 4/ states:

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

Metropolitan argues that BLM cannot amend the grant to require rental payments by application of a subsequently promulgated regulation, 43 CFR 2803.1-2(c)(1) (1986). We disagree. The language of stipulation 6 is clear in requiring that the grantee shall comply with applicable Federal regulations existing or hereafter promulgated. The stipulation requires compliance with regulations "affecting in any manner construction, operation, maintenance, or termination of the right-of-way grant." This language is sufficiently broad to require compliance with the regulation as promulgated following issuance of the right-of-way. Metropolitan agreed to stipulation 6 and is therefore required to comply with 43 CFR 2803.1-2(c) (1986).

Having determined that 43 CFR 2803.1-2(c) (1986) is applicable in this case, we must now decide whether Metropolitan is exempt from rental payments

fn. 3 (continued)

facilities financed pursuant to the Rural Electrification Act, as amended, 7 U.S.C. || 904, 922 (1982). This amendment specifically limited the waiver to electric and telephone utilities financed by the Rural Electrification Act of 1936, as amended (7 U.S.C. | 901 (1982)), and extensions from such facilities.

4/ 43 CFR 2803.1-2(c) (1986) has been amended and is now codified at

43 CFR 2803.1-2(b)(1) (1987). See 52 FR 25818 (July 8, 1987); 52 FR 36576 (Sept. 30, 1987). The language relating to the exception for municipal utilities and cooperatives whose principal source of revenue is customer charges remains in effect.

under its terms. The regulation provides that no fee or less than fair market rental may be authorized when the holder is a Federal, State, or local government or any agency or instrumentality thereof, "excluding municipal utilities and cooperatives whose principal source of revenue is customer charges." See Wellton-Mohawk Irrigation & Drainage District, 79 IBLA 308 (1984); Big Horn Canal Association, 76 IBLA 283 (1983).

Metropolitan contends that it is not a municipal utility whose principal source of revenue is customer charges. We find that it is. The Metropolitan Water District Act clearly provides that a water district (such as Metropolitan) is authorized to sell water and fix the rates for such sales. Specifically, under section 130 of the Act, the water district may provide, sell, and deliver water at wholesale for municipal and domestic purposes. Under section 132, the water district may also provide, sell, and deliver surplus water not needed or required for domestic or municipal uses within the district for beneficial purposes. Under section 134, the Board of Directors must, as far as practicable, fix the rates for water that will result in revenue which will pay the operating expenses of the district. The water district also has the power to sell hydroelectric and electric power (sections 138, 139.1).

As it has stated, Metropolitan engages in these activities as a water district empowered by the Metropolitan Water District Act. There is nothing in the record to indicate that the principal source of revenue is anything other than customer charges.

Under the regulation, a municipal utility is not entitled to the rental exemption if its principal source of revenue is customer charges. Metropolitan contends that it sells water wholesale to its 27 member public agencies and that it does not sell to ultimate water consumers with the exception of sales of surplus water to the State of California, Department of Transportation. However, it is immaterial that most of Metropolitan's water is sold at wholesale. The fact remains that it derives its principal source of revenue from customer charges, even though its "customers" are not "consumers."

In City of Redding, 91 IBLA 82, 84 (1986), the Board defined "municipal utility" as used in 43 CFR 2803.1-2(c)(1) (1986) as "a business organization which regularly supplies the public with some commodity or service, such as electricity, gas, water, transportation, or telephone or telegraph service." We held further that this definition includes "an agency or branch of a political subdivision established by a subdivision to provide such services." Metropolitan argues that it is not a "municipal utility" because it is neither a political subdivision nor an agency of a political subdivision.

City of Redding, *supra*, did not limit the term "municipal utility" to include only a political subdivision or an agency of a political subdivision. It merely held that the term "municipal utility" is broad enough to include a political subdivision (in that case, the City of Redding). As

we expressly held therein, the term also encompasses business organizations, including public utilities that are public corporations or quasi-governmental entities such as Metropolitan, provided that their principal source of revenue is from sales of commodities, including water. As a "municipal utility," under binding Department regulation, Metropolitan is required to pay rental. ^{5/}

There is no dispute that Metropolitan supplies water to the public, via its customers in the district. Therefore, it properly falls within the term "municipal utility" as used in 43 CFR 2803.1-2(c)(1) (1986). ^{6/}

^{5/} When 43 CFR 2803.1-2(c) (1986) was amended in July 1987, comments on this regulation were published at 52 FR 25816 on July 8, 1987. Several comments suggested the reduction or waiver of rental for municipal utilities. In rejecting this suggestion, BLM responded as follows:

"Four comments on this point suggested that municipal utilities or cooperatives should be excluded from rentals regardless of the fact that their principal source of revenue is from customer charges. This suggested change was based on the view that the Bureau of Land Management has misinterpreted the Federal Land Policy and Management Act, in that it was the intent of Congress to reduce or waive the rental for such municipal utilities. Congress has subsequent to the enactment of the Federal Land Policy and Management Act, considered and rejected a mandatory waiver of rentals for municipal utilities (See House Report on H.R. 2111, dated September 3, 1983). The adoption of this suggested change by the final rulemaking would create a condition that is unfair and anticompetitive; it would differentiate between municipal and investor-owned utilities, therefore, the suggested change has not been adopted by the final rulemaking.

"A number of the comments suggested that public utilities, as a class, be provided reduced rentals, with some of the comments suggesting a total exemption for such utilities. Chief among the reasons given by the comments for their suggestions were that public utilities: (1) Provide for a public need; (2) are required to provide service even though some of that service may not be economic; and (3) are under the control of various governmental authorities. While these contentions may be true, public utilities already are compensated for this by: (1) Being allowed to operate as monopolies; (2) exercising, when needed, certain authorities, i.e., eminent domain, not available to others, and (3) being assured of a minimum return on their investment, a guarantee not generally available to other businesses. Further, a class exclusion or reduction, such as that suggested in the comments, would be unfair to other utilities, who by location, cannot use the public lands for rights-of-way.

"After careful review of the reasoning presented in the comments it has been determined that it is reasonable that public utilities, as a class, pay for the use of the public lands and resources. The proposed and final rulemakings provide an opportunity for individual holders to have a specific case considered for a waiver or reduction of the rental."

^{6/} In *City of Pasadena v. Chamberlain*, 204 Cal. 653, 269 P. 630 (1928), a case dealing with the Metropolitan Water District Act, the court discussed the municipal character of a water district stating:

Accordingly, 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 Indio Resource Area is affirmed.

David L. Hughes
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

fn. 6 (continued)

"The supplying of water for domestic uses within municipalities has grown of recent years to be one of the most common and well-recognized forms of municipal activities." 269 P. at 634. Indeed, it seems reasonable to assume that the water district was organized because it could supply water at a lower cost and more efficiently than a single city or governmental entity acting on its own. The water district is acting for the city in performing this function.