

SOUTHERN CALIFORNIA SUNBELT DEVELOPERS, INC.

IBLA 96-257

Decided January 27, 1999

Appeal of a decision of the Palm Springs, South Coast Resource Area Office, Bureau of Land Management, cancelling right-of-way CA-14379.

Affirmed as modified.

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

A right-of-way issued for the construction, operation, and maintenance of wind-turbine generators may properly be terminated pursuant to 43 U.S.C. § 1766 (1994) and 43 C.F.R. § 2803.4, where more than 5 continuous years have elapsed since the lands embraced within the right-of-way have been used for the purpose for which the right-of-way was granted, issued, or renewed.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Abandonment--Rights-of-Way: Cancellation

While the holder of a right-of-way may rebut the presumption of abandonment which arises upon the passage of more than 5 continuous years of nonuse by showing that the failure to develop the right-of-way was due to circumstances not within the holder's control, the existence of adverse economic conditions will generally be held not to constitute evidence sufficient to rebut the presumption.

APPEARANCES: Dan W. Baer, President, Southern California Sunbelt Developers, Inc., Anaheim, California, for appellant; Julie Dougan, Area Manager, Palm Springs - South Coast Resource Area, North Palm Springs, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southern California Sunbelt Developers, Inc. (SCSD), has appealed from a decision of the Palm Springs - South Coast Resource Area Manager,

Bureau of Land Management (BLM), dated February 21, 1996, cancelling right-of-way grant CA-14379, which had been issued for various lands, aggregating 411 acres, in sec. 34, T. 3 S., R. 5 E., San Bernardino Base Meridian (SBBM), pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994). BLM based its decision on the failure of SCSD to submit a plan for the development of the right-of-way and its further failure to take action to remove various items and reclaim unused turbine sites as previously directed by BLM. By Order dated June 6, 1996, we stayed implementation of BLM's decision pending review by this Board. For the reasons set forth below, we now affirm BLM's decision and rescind our stay on its implementation.

The lands embraced by right-of-way CA-14379 had originally been part of right-of-way CA-13983 which had been issued to Aztec Energy Corporation (Aztec) and covered portions of secs. 24, 28, and 34, T. 3 S., R. 5 E., SBBM. Under the terms of this grant, Aztec was authorized to construct and operate wind turbines on the lands covered for the purpose of generating electricity. On August 22, 1983, Aztec executed an assignment of that portion of CA-13983 within sec. 34 to Capco Financial Services (Capco). This land is generally referred to as the Edom Hill site. This assignment was approved on September 9, 1983, and right-of-way CA-14379 issued to Capco. Shortly thereafter, Capco acquired right-of-way CA-14632, which covered those lands in secs. 24 and 28 that had also been part of Aztec's original right-of-way. Thus, Capco eventually controlled all of the lands which had been included within CA-13983. It should be noted that the land within sec. 28 is generally referred to as the Willow Hole site and is almost adjacent to the Edom Hill site. Capco proceeded to erect a number of Wenco wind turbine generators (WTG's) at both the Edom Hill and Willow Hole sites. Financial and operational difficulties, however, apparently arose soon thereafter. Effective November 14, 1986, an assignment was approved of right-of-way CA-14379 from Capco to SCSD. ^{1/}

Shortly before approval of the assignment from Capco to SCSD, Capco had entered a user agreement with U.S. Windpower with respect to a portion of the Edom Hill site in sec. 34 and the assignment from Capco to SCSD had expressly been made subject to all existing user agreements. Two newer

^{1/} The record indicates that, prior to the assignment from Capco to SCSD, Capco had entered into an assignment with Airtricity Corporation (Airtricity) covering both CA-14379 and CA-14632. The assignment to Airtricity, however, had never been presented to or approved by BLM. Thereafter, Airtricity entered into an assignment agreement with SCSD, at which point it was discovered that the holder of record was still Capco. The parties apparently decided to have Capco assign directly to SCSD. See letter of September 18, 1986, from Airtricity to California Desert District Area Manager. This explains why appellant asserts that its received the right-of-way in an assignment from Airtricity, even though the official case record fails to indicate that Airtricity ever held the right-of-way.

model WTG's were erected by U.S. Windpower on sec. 34, though these apparently never became fully operational. ^{2/} In any event, soon after SCSD acquired its interest, some of the Wenco WTG's that had been previously erected by Capco began exhibiting a tendency to crash in high winds.

By letter dated December 13, 1988, the Indio Resource Area Manager informed SCSD that a surface compliance officer had noted numerous derelict WTG parts and associated trash within sec. 34. SCSD was directed to remove the parts and trash within 30 days. SCSD responded by letter dated January 6, 1989, noting that the surface compliance officer had granted an extension of the compliance date to January 31, 1989, and that SCSD had scheduled a meeting with BLM officials to determine exactly what was required. This letter also noted that "this may be an appropriate time for you and your associates to reassess the original objectives for this site, the financial viability (or liability) to continue as is, and determine that, perhaps, a reassessment is in order."

By letter dated February 9, 1990, SCSD informed BLM that it had retained the services of Peter Banner and Support Resources, Inc. (SRI), to assist it in resolving the problem of derelict WTG's at the Edom Hill site. However, by letter dated June 5, 1990, BLM informed SCSD that a May 25, 1990, compliance check had shown that, while all 11 sites which BLM had approved years ago for the placement of Wenco WTG's had been inoperative for a number of years, 6 appeared intact, 1 site had only a tower in place, 2 sites had concrete pads in place, and 2 more appear to have been graded with no subsequent development. BLM notified SCSD that this situation was unacceptable and instructed SCSD to submit either a repair plan or a removal/reclamation plan for these WTG locations by July 15, 1990, failing in which a show cause termination order would issue. A second letter from BLM, dated June 19, 1990, followed, demanding that inoperative WTG's be repaired or removed within 60 days of receipt of that letter.

In 1991, soil contamination occurred within the Edom Hill site caused by vandalism to turbines no longer in use. Ultimately, BLM authorized SCSD to implement a plan of operations to clean up and remove hazardous material spills from both the Edom Hill and Willow Hole sites. See CX No. I-7; EA No. CX-92-6. The stipulations attached to the Area Manager's approval expressly provided that "[t]he Wenco nacelles, associated hardware, and WTG towers within Section 34 will be lowered and removed from the Edom Hill wind park and stored in SCSD's storage yard within the NE¹/₄SE¹/₄ of Section 28." (Categorical Exclusion Record, dated November 30, 1991, at 2, Stipulation 3.)

It should also be noted that, at the same time that BLM was ordering SCSD to repair or remove the Wenco WTG's, SCSD had also submitted an

^{2/} The record indicates that, subsequent to SCSD's acquisition of right-of-way CA-14379, U.S. Windpower decided to abandon operations in sec. 34 and dismantled its two wind turbines in 1991.

amended plan of operations covering, *inter alia*, the lands within sec. 34. By letter dated April 20, 1990, SRI provided BLM with a draft copy of an amended plan of operations. Although this cover letter noted that SCSD was "extremely anxious to move this project ahead," the letter also cautioned that the proposed development on sec. 34 was "somewhat tentative since wind resource monitoring will be necessary to determine the quality of the resource across the property." While SRI expressed the hope that the project could be on-line by the end of May, the proposed plan proved controversial and generated much public comment, almost all adverse, from local landowners. ^{3/}

On August 5, 1991, an environmental assessment (EA 91-25) was issued covering the proposed amended plan of operations. As described in the EA, the plan called for the phased construction of up to 334 WTG's on secs. 28 and 34. Of this total, the plan envisioned that sec. 34 would ultimately be the situs of approximately 165 new WTG's at a height varying between 117 to 125 feet with a 100 to 200 kW range. See EA 91-25 at 2. Phase I of the proposed plan involved the installation of approximately 75 Windmatic WTG's on the Willow Hole site in sec. 28, within CA-14632. Phase II of the proposed plan called for the retrofitting of the 11 Wenco WTG's located on sec. 34, while Phase III involved the construction of the new WTG's on sec. 34. Id. at 3.

By decision dated January 29, 1992, BLM approved a modified amended plan of operations which allowed the installation of 82 new WTG's within sec. 28, i.e., CA-14632. Insofar as proposed development of sec. 34 was concerned, this decision noted that "[a] decision on that portion of the amended plan of operations addressing future development of SCSD's Edom Hill wind park R/W, serial number CA-14379, must await submittal of additional information requested from SCSD and review by the Palm Springs South Coast Resource Area office." (Decision at 2.) The accompanying notice to proceed expressly required that SCSD "lower and secure all remaining, inoperative WTG's located within Section 34 within 90 days of issuance of this Notice to Proceed." (Notice to Proceed, January 29, 1992, special stipulation 28.)

^{3/} Even before SCSD submitted its amended plan of operations, BLM and SCSD had agreed that some of the types of problems which had already arisen could be prevented if a formal structure were created to allow the community to have an input in the decisional process. Accordingly, a Public Awareness Team (PAT) was created, consisting of area residents, business leaders, wind park operators and BLM employees, to listen to and evaluate local concerns and make recommendations to BLM. BLM notes that an agreement was reached by the PAT members (including Banner, who had been appointed by SCSD) that PAT would review all new installations prior to any decision by BLM. When SCSD's amended plan of operations was submitted, it was subjected to the PAT process, which consumed a considerable amount of time. See generally Area Manager's Response to Stay Order, dated August 29, 1996, at 2.

On May 5, 1992, Banner wrote to BLM and informed it that SCSD would not be able to meet the schedule for dismantling the Wenco turbines on sec. 34 because it had fallen critically behind in its construction schedule on sec. 28. Banner asked BLM to extend the deadline. BLM agreed to extend the removal deadline to August 31, 1992. By letter dated August 17, 1992, Banner asked to have the deadline extended to November 1. By letter dated August 26, 1992, BLM approved the extension, although it advised Banner that no further extensions would be authorized.

At this point, matters appear to reach a standstill. There are three notes to the file, dated June 10, 1993, September 6, 1994, and March 29, 1995, respectively. The first note indicates that SCSD was working on a reclamation plan. The second note, however, contained no mention of a reclamation plan but instead indicated a desire on the part of SCSD to retain the right-of-way as a storage site for equipment. This note states that SCSD's representative was informed that the right-of-way was not properly used as a garage or for storage of vehicles. The third note simply observed that SCSD did not want to spend any money on cleaning up sec. 34.

On May 31, 1995, the Area Manager issued a show cause order. Notice was provided to SCSD to show cause why right-of-way CA-14379 should not be cancelled both for the failure of SCSD to develop the site in the period of time since it acquired the right-of-way as well as its failure to remove derelict equipment from the site despite repeated orders from BLM to do so. ^{4/} BLM directed SCSD to provide, within 30 days, "a schedule for the restoration of the wind energy production facility and an explanation of what your immediate plans for this right-of-way are." (Order of May 31, 1995, at 2.)

In a response dated June 30, 1995, SCSD denied that it had failed to comply with any term of the right-of-way grant or that it had deliberately failed to use the right-of-way for a continuous period of 2 years. The gist of its argument was that rights-of-way CA-14379 and CA-14632 should be viewed as a single windpark and, inasmuch as SCSD had developed CA-14632, it had, in effect, developed CA-14379 as well. (Response at 2-3.)

SCSD also blamed BLM for what it referred to as BLM's "delayed approval" of its amended plan of operations. SCSD argued that the 2 years which it took to obtain approval of its amended plan cost SCSD more than 2 million dollars in lost electric power sales to Southern California Edison (SCE), the loss of a "window of opportunity" from which, SCSD asserted, it had yet to recover. *Id.* at 5.

^{4/} While the Area Manager cited 43 C.F.R. § 2883.6-1 as authority for the proposed action, this regulation is inapplicable. It applies to rights-of-way issued under section 28 of the Mineral Leasing Act, 30 U.S.C. § 185 (1994). *See* 43 C.F.R. § 2880.0-7. As noted in the text of this opinion, the rights-of-way involved herein are issued under the provisions of Title V of FLPMA, not the Mineral Leasing Act. The applicable regulations are those found at 43 C.F.R. § 2803.4.

Insofar as the clean-up of sec. 34 was concerned, SCSD noted that, of the original 25 towers which Capco constructed, 5/ only 7 towers remained on site and these had been dismantled and "carefully stored" next to the pad sites awaiting "potential future development." (Response at 4.) SCSD asserted that it had already expended more than \$100,000 in the dismantling and removal of towers, transformers, and other debris. Id. at 4.

With respect to the Area Manager's requirement that SCSD provide an immediate plan for the ultimate restoration of the wind energy production facility, SCSD noted that, because SCE had drastically reduced its rates, the economic feasibility of future development had to be reassessed. SCSD informed BLM that it was actively pursuing the option of a joint venture arrangement with a number of entities and was in the process of installing wind-speed monitoring equipment on sec. 34 in order to better assess the financial viability of development. Id. at 5. Pending a determination of the viability of future development, SCSD argued that sec. 34 was "vital to the ongoing operation and maintenance of the windpark," noting that it was utilizing sec. 34 as a storage area for both turbine parts and other equipment. Id. at 5-6.

BLM took no immediate action after it received this submission. However, when no further response from SCSD was forthcoming, BLM issued its February 21, 1996, decision cancelling the right-of-way, from which decision SCSD has duly appealed. Together with its appeal, which generally reiterated the arguments SCSD had raised in its response to BLM's show cause order, SCSD requested that the Board stay implementation of BLM's decision pending resolution of the appeal. By Order dated June 6, 1996, the Board issued a stay.

Although in granting the stay request the Board had expressed its intention to expedite consideration of the matter, rapid resolution was not forthcoming. Accordingly, by Order dated July 9, 1997, the Board, noting that SCSD had asserted that it was actively pursuing potential partners, requested that appellant inform the Board of any actions taken to develop the site subsequent to the filing of its appeal as well as any progress to that end. In response, SCSD apprised the Board that it was still actively pursuing potential partners and investors and that preparation of an "Exclusive Option Agreement" with Constellation Power, Inc. (Constellation), was then under review. See SCSD Response dated August 8, 1997, at 3-4.

By Order dated February 25, 1998, the Board reviewed SCSD's submissions to date and requested that SCSD submit a status report detailing its efforts, whether on an individual basis or with Constellation or any other party, to repower the site for the 1998 wind season, specifically inquiring whether SCSD had submitted or was prepared to submit a plan of development for the 1998 wind season which would encompass sec. 34. In a response to

5/ This figure of 25 wind turbines includes construction on both secs. 28 and 34.

this Order dated March 18, 1998, SCSD recounted that it had participated in numerous meetings and telephone communications with potential partners and investors. It admitted, however, that it was "not fully prepared to `submit a plan of development to BLM for the 1998 wind season' at this time," though it noted that further meetings were scheduled for later that month. (Response dated March 18, 1998, at 2.) It advised this Board that "SCSD expects to be able to finalize these arrangements by early spring, with implementation, if permitted, no later than October or November of 1998." Id.

In this response, while SCSD repeated a number of its basic arguments as to the ongoing need to retain sec. 34 for storage purposes as well as its complaint that BLM's failure to more expeditiously approve its amended plan of operations in the early 1990's resulted in a significant adverse economic impact on SCSD, SCSD for the first time acknowledged that, since 1992, sec. 34 has been viewed primarily as a "reserve" for future development, when and if the economic conditions improve so as to warrant it. Id. at 4. In closing, SCSD reiterated its assurances that it would submit a plan of development to BLM "as soon after March 26, 1998, as circumstances will allow, with the anticipation of full implementation no later than October or November of 1998." Id. at 5. Notwithstanding these assurances, the Board has received no further filings from appellant since this submission. While the Board is not unsympathetic to appellant's problems, the time has clearly arrived to adjudicate the issues presented by this appeal.

[1] Right-of-way CA-14379 was issued pursuant to Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1994). The applicable statute, 43 U.S.C. § 1766 provides, in relevant part, that:

Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation of the Secretary concerned may be grounds for suspension or termination of the right-of-way if, after due notice to the holder of the right-of-way * * *, the Secretary concerned determines that any such ground exists and that suspension or termination is justified. * * * Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give written notice to the holder of the grounds for such action and shall give the holder a reasonable time to resume use of the right-of-way or to comply with this subchapter, condition, rule, or regulation as the case may be. Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way, except that where the failure of the holder to use the right-of-way for the purpose for which it was granted, issued, or renewed for any continuous 5-year period is due to circumstances not within the holder's control, the Secretary concerned is not required to commence proceedings to suspend or terminate the right-of-way.

The applicable regulations, while generally replicating the statutory language, expressly provide that holder of a right-of-way may "rebut" the presumption of abandonment flowing from a continuous 5-year period of nonuse by "proving that his failure to use the right-of-way was due to circumstances not within the holder's control." 43 C.F.R. § 2803.4(c). ^{6/}

We note that, in accordance with terms of the statute and regulations (43 C.F.R. § 2803.4(d)), BLM gave SCSD notice both of the requirement that it return the right-of-way into productive status and that it remove various items from the right-of-way. See, e.g., Latuna Gatuna, Inc., 131 IBLA 169 (1994); John and Katherine Catron, 126 IBLA 335 (1993). Appellant does not challenge the proposed action because of any insufficiency in the BLM notice. Rather, SCSD argues first, that use by SCSD of the land within sec. 34 as a storage area in conjunction with its operations on sec. 28 constitutes use of the land for the production of electricity from wind energy, and second, that the economics of wind energy development has made development of sec. 34 infeasible at the present time and that, therefore, even if it is determined that sec. 34 is not presently being used for the purposes for which the right-of-way grant was made, this failure was due to circumstances not within SCSD's control. While we acknowledge the problems which SCSD faced in its attempts to develop the lands within CA-14379, we do not believe that either of its arguments can be sustained.

Right-of-way CA-14379 was issued to Capco, under its express terms, for the "construction[,] operation, and maintenance of Wind Turbine Electric Generators (hereinafter referred to as WTG), electric transmission lines, access roads within the right-of-way boundary, and ancillary facilities." See CA-14379, Section A.3. It was further expressly provided that "[t]he right-of-way will be used to develop, produce, utilize, and sell electricity generated from wind energy." Id. While it is true that the lands within sec. 34 included in CA-14379 were part of a larger right-of-way originally held by Aztec which had included lands in secs. 24 and 28, Capco sought and received approval of an assignment limited solely to 411 acres of land in sec. 34. Indeed, at the time that Capco obtained right-of-way CA-14379, it had no interest in the other lands then contained in the base right-of-way, CA-13983, which were retained by Aztec. Thus, Capco necessarily represented that the lands within sec. 34 had an independent utility for development as a source of wind power and nothing in its right-of-way grant indicates that development of sec. 34 was somehow connected to or dependent upon the development of adjacent lands. Capco's subsequent acquisition of a right-of-way covering the lands in secs. 24 and 28 (CA-14632) did not serve to change the essential nature of the grant which Capco had acquired under CA-14379.

^{6/} In this regard, we note that while the statutory language merely provides that a showing that the failure to use the grant was due to circumstances not within the holder's control vitiates any requirement that the Secretary commence proceedings to terminate or suspend the right-of-way, the regulation seemingly provides that such a showing is an affirmative defense to any termination proceeding based solely on the presumption of abandonment.

The mere fact that SCSD acquired CA-14379 at the same time that it obtained CA-14632 cannot fairly be said to give rise to any conclusion that CA-14379 and CA-14632 were to be treated as a single right-of-way for a number of reasons. First of all, as discussed above, the assignment to SCSD of right-of-way CA-14379 was technically made by Capco, while right-of-way CA-14632 was assigned to SCSD by Airtricity. Second, at the same time that SCSD acquired CA-14632 from Airtricity, it also obtained an assignment of right-of-way CA-13771, which consists of various lands in sec. 26, T. 32 S., R. 35 E., Mount Diablo Meridian, in Kern County. See Letter dated September 18, 1986, from the President of Airtricity to Area Manager, California Desert District. The development of this latter right-of-way clearly has no relationship to any development of either CA-14379 or CA-14632. The record shows that rights-of-way CA-14379 and CA-14632 had been treated both by their holders and BLM as separate rights-of-way since Capco initially acquired CA-14379 and continued to be treated as separate entities after they were acquired by SCSD. ^{7/} We must conclude, therefore, that wind power development of the lands in sec. 28 cannot be treated as development of the lands in sec. 34 for the purpose of determining whether or not right-of-way CA-14379 has been used "to develop, produce, utilize, and sell electricity generated from wind energy."

[2] Alternatively, SCSD argues that, in effect, its failure to develop sec. 34 is the result of factors over which it had no control. In this regard, SCSD asserts that the failure of BLM to approve its amended plan of operations in a more timely fashion resulted in a financial loss from which SCSD has never recovered. SCSD also recounts its considerable efforts over the past few years to interest other entities in financing or participating in the development of sec. 34, which efforts have, unfortunately, proved unsuccessful.

While we do not doubt that SCSD has made substantial good faith efforts to interest others in joining with it to develop sec. 34 as a wind park, the plain fact of the matter is, as BLM states, that there has been no production of energy from sec. 34 for a considerable period of time, since at least 1991. ^{8/} Moreover, the record does not support any assertion that the failure of BLM to more rapidly approve SCSD's amended plan of operations was the result of any BLM malfeasance or nonfeasance. On the contrary, it is clear that BLM considered the proposal as expeditiously as might be expected in light of the public controversy it generated and the possibility of adverse environmental impacts (particularly with respect to the Coachella Valley Fringe-toed Lizard) flowing from the original amended plan.

^{7/} While the record indicates that, at one time, SCSD explored the possibility of having right-of-way CA-14379 consolidated with right-of-way CA-14632 (see Letter dated Dec. 31, 1992, from SCSD to Resource Area Office, BLM), nothing apparently ever came of this proposal.

^{8/} In fact, BLM argues that there has never been any production of electricity from sec. 34. See Area Manager's Response to Grant of Stay, dated Aug. 29, 1996, at 4.

Before the Board, BLM points out that the approved revised amended plan expressly noted that approval of the proposal with respect to sec. 34 "must await submittal of additional information requested from SCSD and review by the Palm Springs South Coast Resource Area office," and that SCSD never provided the necessary information. While SCSD has obviously used the land within sec. 34 as a storage site, this use is not the use intended when BLM granted the right-of-way.^{9/} It is, therefore, clear from the record that the lands subject to right-of-way CA-14379 have not been used for the purpose for which the right-of-way issued for a period in excess of 5 years. This, in and of itself, gives rise to a presumption of abandonment. See 43 U.S.C. § 1766 (1994).

Under the regulations, however, this presumption may be rebutted by a showing that the "failure to use the right-of-way was due to circumstances not within the holder's control." 43 C.F.R. § 2803.4(c). Appellant, pointing to economic exigencies, basically argues that its failure to develop the right-of-way site was "due to circumstances not within the holder's control." However, the meaning and scope of this regulatory language was explored in our recent decision in Creole Corp., 146 IBLA 107 (1998). Therein, we noted:

Appellant has offered a number of reasons why it has not utilized the ROW's, all principally economic in nature. Although we found no cases precisely on point, this Board nevertheless has shown its firm reluctance to hold that adverse economic conditions constitute circumstances beyond the control of the proponent of an extension so as to justify or require the granting of such extension. See, e.g., Robert B. Arnold, 125 IBLA 158, 161-62 (1993) (extension of filing of final proof in desert land entry); American Pozzolan Corporation, 6 IBLA 344, 345 (1972) (contract for sale of cinders); Nordic Veneers, Inc., 3 IBLA 86, 88 (1971) (timber sale contract); Clark Canyon Lumber Company, 3 IBLA 247, 248 (1971) (timber sale contract). To hold that adverse economic conditions alone justify an extension would create an obvious anomaly: the longer economic conditions frustrated the purpose for which the ROW's were granted, the longer the ROW's would exist. That proposition must be rejected, because these ROW grants were issued for a specific purpose, not as a place-holder by which interests in land can be retained for speculative purposes for decades in anticipation of a change in economic conditions that may never materialize.

Id. at 117 (emphasis supplied). While the time which has passed without the land being put to the use for which the right-of-way was granted is

^{9/} We would have no difficulty concluding that, if sec. 34 were being used to produce electricity, utilization of part of the lands for storage of supplies and replacement parts would be within the contemplation of the grant. It is clear, however, that use of the lands solely for storage was not the purpose for which right-of-way CA-14379 was issued.

not as egregious in the instant case as it was in Creole Corp., supra, we believe the principle espoused in Creole, i.e., the existence of adverse economic conditions, by itself, does not rebut the presumption of abandonment, is nevertheless applicable herein.

BLM has afforded SCSD a substantial period of time to commence development of sec. 34. For our part, we have been similarly indulgent in this regard, affording SCSD a number of opportunities, even at this late date, to begin development. Clearly, existing economic constraints have prevented SCSD from proceeding. We do not doubt that SCSD has used considerable efforts to bring the development of sec. 34 to fruition. But, just as in Creole, it is now perfectly clear that any development of sec. 34 must await changes in general economic conditions which may or may not ever materialize. Appellant obviously desires to hold on to this land in the hope that one day development might be feasible. But, at the present time, maintenance of a right-of-way on sec. 34 in the hope that future economic changes will permit development of a windpark must be considered purely speculative action on SCSD's part, which BLM is under no obligation to allow. BLM issued right-of-way CA-14379 with the expectation that the lands within the right-of-way would be used to develop, produce, and sell electricity generated by wind energy. While appellant and its predecessors may have made many efforts to realize this expectation, their efforts have, nevertheless, proved unavailing. We cannot say that BLM's decision to terminate the right-of-way ^{10/} was either contrary to the statute and regulations or not justified under its management prerogatives. In short, we can find no basis for overturning BLM's decision to terminate the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed as modified and the stay previously entered is dissolved.

James L. Burski
Administrative Judge

I concur:

R.W. Mullen
Administrative Judge

^{10/} While BLM purported to "cancel" the right-of-way, the proper terminology, under both the statute and regulations is "terminate," and its decision is hereby modified to so provide.

