

CHARLES E. GIBBS

IBLA 98-191

Decided November 23, 1999

Appeal from a decision of the Ridgecrest, California, Field Office, Bureau of Land Management, holding that right-of-way CACA 19178 had expired under the terms of the grant and was not renewed.

Reversed.

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

A right-of-way grant issued pursuant to the Federal Land Policy and Management Act of 1976 expires by its own terms when renewal is not tendered in accordance with the grant and regulations. When a grant provides for renewal, the renewal of the grant is governed by 43 C.F.R. § 2803.6-5(a). Absent an express determination of nonuse, a written request for renewal of the right-of-way grant is not necessary.

APPEARANCES: Joel D. Kuperberg, Esq., and Karen E. Walter, Esq., Costa Mesa, California, for appellant Charles E. Gibbs; Lee Delaney, Field Manager, Ridgecrest, California, Field Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Charles E. Gibbs appeals a February 3, 1998, decision issued by the Ridgecrest, California, Field Office, Bureau of Land Management (BLM), holding that right-of-way CACA 19178 expired after 10 years under the terms of the grant, with no apparent use of the grant being made for the purpose for which it was authorized, and that the grant was not renewed in the manner provided for in 43 C.F.R. § 2803.6-5. 1/

1/ A previous decision in this matter was issued on Jan. 14, 1998, but was returned to BLM unclaimed. The Feb. 3 decision was sent to Gibbs' most current address after BLM was apprized of the address change on Feb. 2, 1998.

Right-of-way CACA 19178 was granted effective April 28, 1987, for the proposed construction and operation of a water system in Ts. 28 and 29 S., R. 38 E., Mount Diablo Meridian (Kern County, California). The project was to embrace approximately 3.59 acres in areas commonly referred to as Last Chance Canyon and Bonanza Gulch. It consisted of a diversionary structure and a 3-inch pipeline, approximately 4.9 miles long to serve Gibbs' mining operations. In paragraph 8 of section B, Terms and Conditions, the grant document provided:

This right-of-way shall terminate 10 years from the effective date of this grant unless prior thereto it is relinquished, abandoned, terminated, or otherwise modified pursuant to the terms and conditions of this grant or of any applicable Federal laws or regulations.

Paragraph 9 of section B provided that the "right-of-way grant may be renewed. If renewed it will be subject to regulations existing at the time of renewal."

In its decision, BLM stated that "the right-of-way is hereby determined as expired upon its o[w]n merit and the case file will be closed of record." BLM observed that the term of the grant was for a period of 10 years and that, pursuant to 43 C.F.R. § 2803.6-5, the grant holder was required to request renewal in writing prior to expiration. The decision stated that Gibbs had never made a request for an extension and the grant expired by its own terms. The decision also noted that, under 43 C.F.R. § 2803.4(c), the right-of-way was considered to be abandoned because it had not been used for the purpose for which it was authorized. Gibbs appealed.

In his statement of reasons, Gibbs argues that BLM's decision is not supported by the regulations BLM cited in its decision. He asserts that, under those regulations, he had no duty to submit a written request for renewal prior to the expiration of the initial term to prevent the grant from expiring, as 43 C.F.R. § 2803.6-5(a) requires BLM to renew the grant, absent a determination of nonuse or improper use. He contends that, even if BLM now alleges that he was not using the right-of-way, it did not provide him with the required prior notice and opportunity to be heard prior to termination. Gibbs also argues that payment pursuant to an invoice sent by BLM in January 1997 for "5 YR RENTAL" constitutes renewal of the grant, in accordance with BLM procedures, and therefore he holds a valuable property right that may not be extinguished without due process.

In its answer, BLM again reiterates its position that the right-of-way expired by its own terms on April 27, 1997, because Gibbs made no written request for renewal prior to expiration. BLM asserts that Gibbs' failure to insure that the grant would be renewed caused the grant to expire. BLM explains that the "automatic billing" of \$535 for a 5-year period had been generated by a system in Denver, Colorado, and that the rental assessed included the prorated rental due for the original grant period of January 1 through April 27, 1997. BLM argues that the billing

was proper regardless of whether the grant was renewed, and therefore Gibb's payment did not provide notice that Gibbs intended to renew the grant. BLM relates that because the opportunity to renew the right-of-way grant lapsed, a legislative withdrawal has attached and the land is no longer available for such activity. ^{2/} BLM further notes that, according to its records, the pipeline was never constructed during the 10-year period and Gibbs does not have a mining claim.

[1] The right-of-way at issue was granted pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1994). The regulations at 43 C.F.R. Part 2800 were promulgated to implement this portion of FLPMA. ^{3/} See 43 C.F.R. § 2800.0-1. At issue in this appeal is the expiration and renewal of right-of-way CACA 19178. Expiration of a right-of-way grant is governed by 43 C.F.R. § 2803.4(a), which provides:

If the right-of-way grant or temporary use permit provides by its terms that it shall terminate on the occurrence of a fixed or agreed-upon condition, event, or time, the right-of-way authorization shall thereupon automatically terminate by operation of law, unless some other procedure is specified in the right-of-way grant or temporary use permit.

See 43 U.S.C. § 1766 (1994) ("No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.") As noted, the grant stipulated at paragraph 8 that it would expire at the end of 10 years. ^{4/} Therefore, BLM was correct to observe that the right-of-way grant would terminate on April 27, 1997, without any action on its part, unless the grant was otherwise renewed or extended pursuant to "applicable Federal laws and regulations."

The focus in this case is whether the grant was renewed, extending Gibbs' right to use the land beyond the original 10-year term. BLM

^{2/} Subsequent to the grant, the lands subject to the right-of-way were withdrawn from entry under the California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471.

^{3/} Congress provided that "[t]he right-of-way shall specify whether it is or is not renewable and the terms and conditions applicable to the renewal." 43 U.S.C. § 1764(b) (1994).

^{4/} Section 504(b) of FLPMA, 43 U.S.C. § 1764(b) (1994), reads: "Each right-of-way or permit granted * * * shall be limited to a reasonable term in light of all circumstances concerning the project." When enacting FLPMA, Congress granted the authorized officer issuing a right-of-way grant more flexibility for adapting each grant to its circumstances than had been allowed under prior authority. 44 Fed. Reg. 58106, 58107 (Oct. 9, 1979). A 10-year term for the Gibbs right-of-way project was established when BLM reviewed the right-of-way application and issued the grant.

referred to the regulation at 43 C.F.R. § 2803.6-5 as containing the guidelines for the renewal process. These regulations provide:

(a) When a grant provides that it may be renewed, the authorized officer shall renew the grant so long as the project or facility is still being used for purposes authorized in the original grant and is being operated and maintained in accordance with all the provisions of the grant and pursuant to the regulations of this title.

(b) When a grant does not contain a provision for renewal, the authorized officer, upon request from the holder and prior to the expiration of the grant, may renew the grant at his discretion. A renewal pursuant to this section shall comply with the same provisions contained in paragraph (a) of this section.

(c) Temporary use permits issued pursuant to the regulations of this part may be renewed at the discretion of the authorized officer. The holder of a permit desiring a renewal shall notify the authorized officer in writing of the need for renewal prior to its expiration date. Upon receipt of the notice, the authorized officer shall either renew the permit or reject the request.

Right-of-way CACA 19178 is not a temporary use permit. A temporary use permit is "a revocable non-possessory, non-exclusive privilege, authorizing temporary use of public lands in connection with construction, operation, maintenance, or termination of a project." 43 C.F.R. § 2800.5(i). If CACA 19178 were a temporary use permit, there would be no question regarding its duration or renewal features. However, the language in subsection (c) is the language BLM quoted when stating that Gibbs was required to notify BLM in writing prior to expiration of the grant. Similarly, subsection (b), which also contains language requiring notice of an intent to renew prior to expiration, is also inapplicable because the subject grant specifically provides for renewal. Thus, subsection (a) is applicable.

Gibbs argues that, according to 43 C.F.R. § 2803.6-5(a), BLM is obligated to renew the right-of-way grant in this situation. Two prevailing factors control here. First, the grant provides that it "may be renewed" subject to regulations existing at the time of renewal. Second, the existing regulations, 43 C.F.R. § 2803.6-5(a), provide that "the authorized officer shall renew the grant so long as the project or facility is still being used for purposes authorized." Unlike the processes outlined in subsections (b) and (c) of 43 C.F.R. § 2803.6-5, the holder of a right-of-way grant which by its terms provides for renewal is not required to expressly request renewal prior to the expiration of the grant. The right of a subsection (a) right-of-way holder to appeal implies that BLM must provide

a reasonable basis for a determination not to renew. The regulation presupposes that the onus is on BLM to consider whether the grant should be renewed and, in the absence of a showing that the right-of-way is not being used as intended, it will be renewed.

Paragraph 6 of the right-of-way grant provides, in part, that "[a]ny additional rental that is determined to be due as a result of the rental determination shall be paid upon request." BLM billed Gibbs rental for a 5-year period, which included a small portion of the original grant period and rental for more than 4-½ years beyond the expiration of the grant. Gibbs tendered full payment for the 5-year period, including the period represented by the "surplus" rental, several months before the date the grant was to expire.

Nowhere in the record before us does BLM show that it formally determined that the right-of-way grant was not being used for its intended purposes prior to the expiration of the initial term. As the rental was timely paid in accordance with BLM's instructions, Gibbs did all that was required of him to renew the grant. If Gibbs had not intended to renew the grant, he could have tendered the rent owing for the balance of the initial term and not paid the rest.

The chain of events disclosed by the record now before us evidences both a BLM intent to renew the right-of-way and the holder's intent to accept the renewal. If BLM had determined not to renew the right-of-way because it was not being used for the purposes authorized in the original grant (see 43 C.F.R. § 2803.6-5(a)), it was required to communicate this intent to Gibbs prior to the renewal date established in the right-of-way. It did not. The only correspondence in the file during the period immediately prior to the expiration of the initial term was its billing for a period extending beyond the original term. BLM may not now challenge the appropriateness of the renewal which the record indicates occurred. 5/ If it desires, BLM may still invoke Gibbs' purported failure to use the right-of-way as the basis for terminating the right-of-way pursuant to 43 C.F.R. § 2803.4(c). However, it must act pursuant to 43 C.F.R. § 2803.4(c), give Gibbs notice of its intent to terminate, and afford him an opportunity to show that his failure to use the right-of-way was due to circumstances not within his control. We express no opinion regarding whether this course of action might be appropriate. We merely hold that BLM's determination that right-of-way CACA 19178 had not been renewed cannot be sustained.

5/ In its decision, BLM suggested that renewal would be improper because the land within the right-of-way had been subsequently withdrawn from entry. We note that a withdrawal of the land does not necessarily mandate rejection of a right-of-way renewal. See 44 Fed. Reg. 58106, 58111 (Oct. 9, 1979) (the holder's interests and contractual expectations in renewal will be protected).

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

R.W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

