



DAN BRADSHAW

161 IBLA 116

Decided April 7, 2004

Editor's Note:

aff'd sub nom. Bolack Minerals Co. v. Norton, 370 F.Supp. 2d 161 (D.D.C. 2005).



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

DAN BRADSHAW

IBLA 2000-86

Decided April 7, 2004

Appeal from a decision by the Farmington, New Mexico, Field Office, Bureau of Land Management, denying an application for communication site right-of-way. NM 102477.

Reversed and remanded.

1. Communication Sites--Conveyances: Interests Conveyed--Conveyances: Reservations--Federal Land Policy and Management Act of 1976: Rights-of-Way--Patents of Public Lands: Reservation--Public Lands: Disposals Of: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Where the term of a communications site right-of-way was defined to coincide with the expiration of a Federal Communications Commission license to operate an FM radio station and did not otherwise specify that the license must be maintained by the right-of-way grantee, and the record shows that a valid license has been in place since 1981, a BLM decision holding that the right-of-way automatically terminated will be reversed.

2. Board of Land Appeals--Rights-of-Way: Cancellation

Before suspending or terminating a right-of-way grant for failure to comply with grant terms and conditions or applicable law or regulations, BLM must give the holder written notice that such action is contemplated and state the grounds therefor, and must allow the holder a reasonable opportunity to cure such noncompliance. 43 U.S.C. § 1766 (2000); 43 CFR 2803.4(d).

3. Communication Site--Conveyances: Interests Conveyed--
Conveyances: Reservations--Federal Land Policy and
Management Act of 1976: Rights-of-Way--Patents of
Public Lands: Reservation--Public Lands: Disposals Of:
Generally--Rights-of-Way: Federal Land Policy and
Management Act of 1976

The phrase *subject to* when used in a conveyance means “subordinate to”, “subservient to”, “limited by”, or “charged to”, and it serves to put a purchaser on notice that he is receiving less than a fee simple. An *exception* in a deed withdraws from the description of the property conveyed the property excepted therefrom. An *exception* thus is *in esse* at the time of the conveyance, and title remains in the grantor. In contrast, a *reservation* technically is a conveyance of the grantor’s entire interest in property by which an interest that did not previously exist as an independent right or interest is simultaneously created and vested in the grantor. When a patent contains a clause *excepting and reserving to* the United States certain identified rights-of-way and easements, while also conveying the patented lands *subject to* other provisions, the patent will be construed as excepting the lands within the boundaries of the rights-of-way and easements from the description of the land conveyed by the patent.

4. Communication Sites--Conveyances: Interests Conveyed--
Conveyances: Reservations--Federal Land Policy and
Management Act of 1976: Rights-of-Way--Patents of Public
Lands: Reservation--Public Lands: Disposals Of: Generally--
Rights-of-Way: Federal Land Policy and Management Act of
1976

Where BLM has patented lands excepting and reserving to the United States a communication site right-of-way, BLM may not divest the United States of land thus retained without first complying with the provisions of sec. 508 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1768 (2000), by determining that retention of Federal control is no longer necessary to assure that (1) the purpose of Title V of the Act will be carried out, based on the effect on the public interest, (2) the terms and

conditions of the right-of-way will be complied with, and
(3) the lands affected will be protected.

APPEARANCES: Dan Bradshaw, pro se; ^{1/} Richard T. C. Tully, Esq., Farmington, New Mexico, for intervenor, Bolack Minerals Company; Grant L. Vaughn, Esq., Office of the Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Dan Bradshaw has appealed a November 19, 1999, decision of the Farmington, New Mexico, Field Office, Bureau of Land Management (BLM), rejecting his application for a right-of-way grant for an existing communication site (Bradshaw Application), locally known as the "South Bluffs" communication site, ^{2/} located on lands in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 16, T. 28 N., R. 13 W., New Mexico Principal Meridian (NMPPM), near Farmington, San Juan County, New Mexico.

Bradshaw owns Direct Comm Inc., a paging company, and DCI, a two-way radio shop, which operate from the South Bluffs site. (Bradshaw Application, ¶ 12.) With his Statement of Reasons (SOR), Bradshaw petitioned for a stay of the decision, which was opposed.

BLM rejected the application on the ground that the communication site right-of-way NM 43307 originally issued to E. Boyd Whitney and KRAZ-FM expired by its own terms, and the land encompassed within its boundaries is now owned by Bolack Minerals Company, which succeeded to the interest held by Tom Bolack (individually and collectively Bolack), who acquired fee title to the land on April 19, 1982. Accordingly, Bolack has intervened in the appeal, ^{3/} claiming to be the rightful owner of the site and the fixtures thereon because the United States retained no interest in NM 43307.

^{1/} Seth V. Bingham, Esq., and Miller Stratvert P.A. had represented Bradshaw before this Board. By motion received Aug. 15, 2003, they moved to withdraw as Bradshaw's counsel. The motion is hereby granted, so that Bradshaw now appears pro se.

^{2/} See Memorandum to BLM case file dated Sept. 3, 1999, from Barbara Smith, BLM Realty Specialist.

^{3/} By order dated Apr. 24, 2000, Bolack was granted intervenor status in this appeal.

Factual Background

The BLM record, as supplemented by the parties,^{4/} provides the following factual background. Right-of-way NM 43307 was issued to E. Boyd Whitney and KRAZ-FM on February 23, 1981.^{5/} The term of the grant was to “coincide with expiration of the FCC license.” (Right-of-way Grant at 1.) Specifically, the grant was “conditioned upon the presentation of the license granted by the [FCC] for the installation.” (Right-of-way Grant, ¶ 12.) Documentation submitted by Bradshaw indicates that the FCC considers the FM station to have been “licensed and authorized to operate from 1981 to the present.” (Statement of Record of Magalie Roman Salas, Secretary for the FCC, dated May 25, 2000.) The grant also provided that “[t]he right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request.” (Right-of-way Grant, ¶ 9.) BLM did not collect an advance rental payment at the time the grant was issued.^{6/}

On April 19, 1982, BLM issued Patent No. 30-82-0010 to Tom Bolack, which conveyed, *inter alia*, lands in E½NE¼, sec. 16, T. 28 N., R. 13 W., as the culmination of a land exchange. Among other things, that patent “except[ed] and reserv[ed] to the United States * * * those rights-of-way and easements that have been granted and which are of record.” Right-of-way NM 43307 was among those identified by its serial number in the Patent. (Patent No. 30-82-0010 at 1-2.) Bolack subsequently conveyed the lands in controversy to Bolack Minerals Company. (Bolack Response to Petition for Stay at 2.)

^{4/} In its order of Apr. 24, 2000, the Board requested that the parties supplement the record with, among other things, additional documentation pertaining to the status of the Federal Communications Commission (FCC) license originally granted in connection with this right-of-way site and other matters pertaining to Bradshaw’s chain of title. BLM was asked to supplement the record with additional documentation, if any existed, pertaining either to termination or assignment of NM 43307. No evidence of termination or assignment was submitted by the parties.

^{5/} The stipulations to the grant are entitled “Stipulations for KRAZ-FM Communications R/W NM 43307” (Stipulations), and are signed as accepted by KRAZ-FM through E. Boyd Whitney, Authorized Representative.

^{6/} BLM could have estimated the fair market rental value from the outset and collected it in advance, adjusting the payment when the value was determined by appraisal. 43 CFR 2803.1-2(a) and (b) (1981).

On December 13, 1982, Whitney, “d/b/a KRZE/KRAZ Radio Stations,”^{7/} petitioned to reorganize under Chapter 11 of the U.S. Bankruptcy Code. At that point, BLM still had not determined the annual fair market rental for the grant.

In September 1984, BLM approved an appraisal assessing the fair market rental at \$1,050 per year. By certified letter dated October 15, 1984, BLM notified Whitney that he owed 4 years’ rental plus \$300 in administrative charges, for a total amount of \$4,500. Whitney filed a request for reconsideration on November 9, 1984, but did not in this letter inform BLM of his pending bankruptcy petition, which, by September 1984, had been converted to a Chapter 7 liquidation proceeding by the June 4, 1984, order of the Bankruptcy Court. It is uncertain when BLM learned of Whitney’s bankruptcy, but Mar Lyn Spears, of the BLM Farmington Resource Area Office received a copy of the Bankruptcy Court’s order from Western Bank, a participant in the liquidation proceedings, on December 21, 1984. In addition to providing a copy of the June 4, 1984, order and a copy of the Order for a Meeting of Creditors and Automatic Stays,^{8/} that letter advised Spears to contact the Bankruptcy Trustee regarding an extension of time in which to file proof of BLM’s claim for the rent. (Ex. L to SOR, letter from Western Bank to Spears dated Dec. 20, 1984).

An unsigned memorandum indicates that Spears provided information regarding the right-of-way to the BLM Albuquerque District Office on or about December 26, 1984. However, nothing in the case file or the parties’ submissions shows or indicates that the Department entered an appearance in the bankruptcy proceeding or that the rental owed to the United States was ever listed as one of Whitney’s debts.

On January 28, 1985, BLM sent a certified letter to Whitney informing him that rentals plus administrative costs were due in the amount of \$3,450.00 for the period from February 23, 1981, through October 1, 1983, based on BLM’s belief that Whitney’s FCC license had expired on October 1, 1983. That letter granted Whitney 30 days within which to pay the accrued rental and costs, and stated that, in the event payment was not timely made, the matter would be referred to the Solicitor’s Office for legal action. Copies were provided to the Bankruptcy Trustee and to Western Bank.

^{7/} This was the caption of the June 4, 1984, order of the Bankruptcy Court mentioned infra. KRZE was the call sign for Whitney’s AM radio station, and KRAZ was the call sign for the FM station.

^{8/} The creditors’ meeting was set for Jan. 21, 1983, more than a year prior to Western Bank’s letter to Spears.

The “debtor’s AM and FM radio station licenses, all electrical equipment on the premises necessary for the operation of the two radio stations, the real property located at 2802 East 20th Street, Farmington, New Mexico, the transmitters and transmitter sites, including any easements, options to purchase or leasehold interests, as well as all other personal property utilized in the operation of the radio stations” was transferred to Western Bank on December 4, 1984, for \$750,000.^{9/} (Order Approving Sale issued by the Bankruptcy Court dated Dec. 4, 1984, attached as Ex. B to Bradshaw Affidavit filed with the Board on June 7, 2000.) Western Bank accepted the offer to purchase these assets submitted by D.P., Inc., a company owned by one Homer Pirkey (Affidavit of Homer Pirkey, filed with the Board on June 5, 2000), and the FCC license for the FM station was assigned to him (Supplemental Affidavit of Bradshaw, Ex. E, filed June 7, 2000). Pirkey operated the station under the FCC permit through October 1, 1990. (Pirkey Affidavit filed with the Board May 30, 2000.) Pirkey avers that he sold the transmitter building and its contents and the transmitter tower on the right-of-way site to Bradshaw on June 1, 1990. (Pirkey Affidavit filed with the Board May 30, 2000.)

Later, Pirkey apparently filed for bankruptcy protection, after which the station was purchased by J. Thomas Development, Inc. of New Mexico, Inc. (JTD). (Ex. D to Bolack Response to Petition for Stay.) On December 21, 1991, the FCC authorized the assignment of the operating license to Robert D. Coker, Receiver, Hobbs, Minnesota, and subsequent assignment from Coker to JTD. (Bingham Affidavit filed with the Board on June 5, 2000, Ex. E, at manually paginated 17-18.) On September 1, 1994, JTD and Bradshaw’s company, Direct Comm, leased the site from Bolack for an initial term of approximately 4 years. (Bolack Opposition to Stay at 4, Ex. L.) On December 28, 1998, Bolack and Bradshaw d.b.a. DC Tower executed a second lease for the site.^{10/} (Bolack Brief in Response to Stay at 8, Ex. V.) It was during the term of the second lease that Bradshaw took steps to obtain a right-of-way grant from BLM, first in the form of a renewal of NM 43307 and then as new right-of-way application NM 102477, from which this appeal arises.

^{9/} Whitney’s FM station and/or studio was located at 2802 East 20th Street, Farmington. See Ex. E (an assemblage of several documents that were manually paginated) at pp. 2-4 to Bradshaw Affidavit received by the Board on June 5, 2000.

^{10/} The record indicates that a number of other parties have occupied the site. It does not disclose how many others, the periods of their tenure, to whom rent was paid, their relationship to the principals in this appeal, or any other details. See, e.g., Bolack’s Brief in Response to Bradshaw’s Reply at 16; Bolack’s Brief in Response to Stay, Ex. D at 2.

According to BLM Realty Specialist Smith, Bradshaw visited the BLM office in June 1999 to inquire about NM 43307. (Smith Memorandum to the File dated Sept. 3, 1999.) Smith noted that “[w]e checked the MTP’s [Master Title Plat], found the [right-of-way] number for the comm[unication] site.” Smith then retrieved the patent and “found that the [right-of-way] was reserved to the U.S.” *Id.* at 1. The memorandum stated that, after discussions with legal counsel, personnel from the New Mexico State Office determined that “since the [right-of-way] was reserved to the BLM in the patent, the [right-of-way] was still BLM’s.” *Id.* at 2. ^{11/}

Bradshaw applied for a renewal of right-of-way NM 43307 by letter and application dated June 14 and June 16, 1999, respectively. In the letter and application, Bradshaw indicated that he owned a paging company and two-way radio shop operating at the site, and asserted that he owned the “20-[foot] by 60-[foot] building” and two towers. (Bradshaw application to renew NM 43307.)

By decision dated July 30, 1999, BLM denied the right-of-way renewal application, stating that Whitney’s right-of-way “expired October 1, 1983, for failure to submit a current FCC license,” but also acknowledging that “the right-of-way was reserved to the United States when [the] patent was issued to Tom Bolack.” (July 30, 1999, Decision at 1.) BLM’s decision further acknowledged that, according to information provided by Bradshaw, he had been “in ownership since 1988.” To issue a “communication site lease” to him, Bradshaw would have to submit applicable filing fees, provide proof of ownership, pay accrued back rental from 1988, and complete use inventory sheets. (July 30, 1999, Decision at 2.)

As directed by BLM, Bradshaw submitted an application for a new right-of-way on September 20, 1999, with supporting documentation. The new application was serialized as NM 102477. Ultimately, by decision dated November 19, 1999, BLM rejected Bradshaw’s application on three grounds. ^{12/} First, BLM determined that the

^{11/} The memorandum further acknowledged that “[n]o money for this R/W was ever received due to bankruptcy. Case was closed October 1, 1983.”

^{12/} Before issuing its decision, BLM attempted to facilitate discussions between Bradshaw and Bolack. To that end, BLM officials met with all the parties on Oct. 27, 1999. According to Smith’s memorandum of that date, Bolack said he had visited the BLM office and had been “told the right-of-way had expired, therefore [there] was no reservation.” Bradshaw stated that he also had visited BLM’s office to inquire about acquiring a right-of-way and had been “advised that the land was patented to Bolack and he needed to talk to him.” Thus, BLM’s view of the status and effect of the
(continued...)

right-of-way expired “by its own terms on October 1, 1988,” five years after the date it was issued. The decision stated that the right-of-way was issued with an expiration date to “coincide with the expiration of the FCC license.” BLM determined that “FCC licenses are issued for a term of five (5) years.” (Decision at 1, ¶ 1.) Based on a conclusion that no valid FCC license existed after expiration of Whitney’s original license and that the land had been patented to Bolack, the decision held that the right-of-way “expired by its own terms” pursuant to 43 CFR 2803.4(a). (Decision at 1, ¶¶ 1 and 2.) Second, BLM determined that Whitney had paid no rentals or administrative fees for the site, and as 43 CFR 2803.1-2(a) requires that rentals must be paid annually in advance of the holder’s use of the right-of-way, the failure to do so served as an independent basis for termination of the right-of-way. (Decision at 1, ¶ 3.) Lastly, BLM determined that, even though Bradshaw claimed to have purchased improvements at the site from Homer Pirkey, BLM had received no assignment for the right-of-way, providing a third reason for termination of the right-of-way. (Decision at 1-2, ¶ 4.)

Arguments of the Parties

The parties have filed a number of briefs^{13/} to advance their arguments to support Bradshaw’s contention that right-of-way NM 43307 did not expire and that BLM therefore properly can grant a right-of-way to him, and, on the other hand, Bolack’s assertion that right-of-way NM 43307 expired so that the reservation to the United States merged with his fee and was extinguished, and thus BLM properly denied Bradshaw’s application for a right-of-way.

^{12/} (...continued)

reservation and right-of-way NM 43307 has fluctuated during the course of this controversy.

^{13/} Bradshaw filed a Notice of Appeal, Petition for Stay, Reply Brief in Support of Petition for Stay, a Statement of Reasons, and a Reply Brief in Support of Appeal, and several affidavits with supporting exhibits. Bolack filed a Response to Petition for Stay with supporting exhibits, Response to Board Order of Apr. 24, 2000, with supplemental exhibits, and a Response to Bradshaw’s Reply Brief. BLM filed a Response to the Petition for Stay, but filed no other pleadings, notwithstanding the Board’s Apr. 24, 2000, order requesting additional briefing from BLM. For clarity’s sake, we will refer to Bradshaw’s Reply Brief as a supplemental SOR (SSOR). Bolack’s pleadings will be referred to as “Responses,” with appropriate additional references.

Bradshaw argues, among other things, that the original right-of-way to Whitney did not expire or terminate (Statement of Reasons (SOR) at 1-3, Supplemental SOR (SSOR) at 2-3); that the United States did not otherwise terminate it (SSOR at 8-9); that Bolack's patent did not create a "reversionary interest" in the right-of-way (SOR at 2-3, SSOR at 10-13); and, therefore, that the right-of-way is still owned by the United States (SOR at 3-5, SSOR at 12, 13). Bradshaw maintains that, as the right-of-way still resides in the United States, BLM has authority to issue a new grant for the right-of-way. (SSOR at 13.) Bradshaw further contends that he purchased the tower and buildings at the site from Pirkey on June 1, 1990, has paid personal property taxes on the building since that date, has offered BLM back rental for the site, and is otherwise qualified to hold the right-of-way. (Bradshaw Affidavits; SSOR at 3-8.) Moreover, Bradshaw charges, BLM failed to comply with Departmental regulations requiring consultation and coordination with federal, state, and local agencies before denying a right-of-way application. (SOR at 6-7.)

Bolack responds by arguing, among other things, that Bradshaw has leased the site from Bolack since 1993, thus conceding Bolack's superior right (Response to Petition for Stay at 2-12), and that Whitney's right-of-way terminated for failure to comply with material terms, including failure to pay rental and failure of the successors-in-interest to apply for an assignment, resulted in the expiration of the grant by operation of law (Response to SSOR at ¶ F). Upon the expiration of Whitney's right-of-way, title to the full estate vested in Bolack (Response to Petition for Stay at 12-13, Response to Board Order at 5-7), and that BLM has waived any residual interest it might have retained in the right-of-way (Response to SSOR at ¶ G).^{14/}

^{14/} In its Apr. 24, 2000, Order, the Board requested the parties to supplement the record with documentary evidence they might deem relevant to a number of issues. In its July 5, 2000, response to that order, Bolack requested the Board to disregard certain of Bradshaw's documentary exhibits on grounds that they contain hearsay or are otherwise suspect. The Administrative Procedure Act (APA) provides, in pertinent part, that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d) (2000). Hearsay evidence is not *per se* inadmissible. Bennett v. National Transportation Safety Board, 66 F.3d 1130, 1137 (10th Cir. 1995). Hearsay evidence that meets the standard of section 556(d) of the APA can be weighed in agency proceedings according to its truthfulness, reasonableness, and credibility. Veg-Mix, Inc. v. U.S. Department of Agriculture, 832 F.2d 601, 606 (D.C. Cir. 1987). Ordinarily, the Board will not reject any evidence as inadmissible, but will weigh its credibility. See, e.g., David Q. Tognoni,

In its response to the stay petition, BLM maintains that its decision is correct in all respects, arguing that the patent, which contained a reservation of those rights-of-way and easements of record, did not reserve the right-of-way to the United States, but instead reserved it to Whitney. (BLM Response at 4.) BLM argues that the right-of-way expired in October 1985, when Whitney's FCC license expired, and that, in any event, it lapsed because no rentals were paid, and no assignment was ever requested. (BLM Response at 4, 5.) Once Whitney failed to comply with its terms, BLM argues, the right-of-way expired. Relying on Cole Industries, Inc., 82 IBLA 289 (1984) and Pollock v. Ramirez, 870 P. 2d 149 (N.M.App. 1994), BLM contends Board precedent and New Mexico law require application of the merger doctrine, by which, once a right-of-way expires, it merges with the dominant estate. (BLM Response at 4, 5.)

Analysis

Despite the parties' arguments in interpreting the facts of this case, the dispute comes down to adjudicating two aspects of a single issue: The present status of right-of-way NM 43307, and the nature and status of the reservation to the United States expressed in Bolack's patent.

We begin with the relevant statutory framework. Rights-of-way issued by the United States subsequent to October 21, 1976, "over, upon, under, or through" the public lands are governed by Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761-1771 (2000). That statute provides for, among other things, authority to issue rights-of-way (43 U.S.C. § 1761 (2000)); general requirements, including terms and conditions, stipulations, rental payments, etc. (43 U.S.C. § 1764 (2000)); suspension or termination (43 U.S.C. § 1766 (2000)); and conveyances of lands covered by rights-of-way (43 U.S.C. § 1768 (2000)). The statute further provides that grants shall specify whether they are renewable and under what terms (43 U.S.C. § 1764(b) (2000)); that fair market rental shall be paid to the United States annually and in advance (43 U.S.C. § 1764(g) (2000)); that the grant shall specify under what terms the right-of-way may be transferred or assigned (43 U.S.C. § 1764(c) (2000)); and that the right-of-way may be terminated by the United States, or by the holder's abandonment of the right-of-way or failure to comply with its terms (43 U.S.C. § 1766 (2000)).

^{14/} (...continued)

138 IBLA 308, 319 n.8 (1997). Bolack has questioned the veracity and credibility of Bradshaw's and Pirkey's statements that Bradshaw purchased the tower and equipment from Pirkey in June 1990. For reasons set forth infra, it is not necessary for us to rule on the credibility of this evidence.

NM 43307 specified, among others things, the following relevant terms and conditions: It was granted “subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request” (Right-of-way Grant at 2, ¶ 9); rental was to be determined by reference to ¶ 9 of the grant (Right-of-way Grant at 1); “the right to grant additional rights-of-way or permits for compatible uses on, over, under or adjacent to the lands involved in this grant” (Right-of-way Grant at 2, ¶ 10); it provided that the grant could be renewed, subject to the regulations in effect at the time of such renewal and such other terms or conditions deemed necessary to protect the public interest (Right-of-way Grant at 2, ¶ 11); and the right-of-way was granted “conditioned upon the presentation of the license granted by the [FCC] for the installation” (Right-of-way Grant at 2, ¶ 12). In addition, the expiration of the grant was “[t]o coincide with expiration of [the] FCC license.” (Right-of-way Grant at 1.) In the event Whitney failed to file a copy of a valid FCC license “within 90 days from the date of this grant,” the right-of-way would be “terminated in its entirety upon written notice from [BLM] to the grantee[,] or its successors or assigns.” (Right-of-way Grant at 2, ¶ 13.) Lastly, additional conditions were attached to the grant. Paragraph 6 of those conditions provided that “[a]ny additional users which are accommodated by the radio facilities will be required to obtain a right-of-way from the [BLM].”

[1] We can dispose of the issue of the FCC license immediately. Bolack argues that the failure to provide proof of the license within 90 days of the date the right-of-way grant was executed constituted an automatic termination by operation of law. (Bolack Response to SSOR at 4-5.) We do not agree. The second paragraph of ¶13 of the grant does not provide for automatic termination for the failure to present the license in 90 days. To the contrary, it requires written notice to the grantee or Whitney’s successor or assigns. By decision dated June 26, 1984, long after the 90-day deadline had passed, BLM demanded evidence of a valid FCC license: “Evidence that a FCC license was obtained and that it is still current must be submitted to the above address within 30 days from receipt of this letter or action will be taken to terminate the right-of-way. See 43 CFR 2803.4(b) * * * .” (June 26, 1984, Decision, Ex. A to SOR.)

This notification did not constitute an exercise of BLM’s right to terminate the grant on this basis. Instead, the June 26, 1984, decision was nothing more than a demand in contemplation of a future decision declaring the grant terminated if Whitney did not comply. That procedure is precisely what was required by ¶ 13 of the grant, which required written notice of a default as a condition precedent to termination. The record shows that Whitney provided the required evidence of his FCC license on July 23, 1984, within the period allowed by BLM to comply, and that BLM obviously accepted it as satisfactory compliance with ¶ 13.

More fundamentally, Whitney's July 23, 1984, submission to BLM shows that Whitney had timely filed an application to renew his FCC license and that the FCC allowed him to operate through October 1, 1983. That submission also shows that he was permitted to operate past that date, pending FCC review of his renewal application.^{15/} It is not clear whether or when the FCC acted on Whitney's renewal application before Pirkey and his company, D.P., Inc., acquired the license, but it was renewed in D.P., Inc.'s name on December 20, 1985. (June 5, 2000, filing with the Board, Ex. E, manually paginated p. 7.) However, the FCC has reported that the license was valid from 1981 to at least May 25, 2000. (Statement of Record of Magalie Roman Salas, Secretary for the FCC, dated May 25, 2000.) Therefore, the right-of-way grant did not expire by reason of the failure to maintain a valid FCC license to operate.^{16/}

[2] BLM twice demanded payment from Whitney, on October 15, 1984, and on January 28, 1985, respectively; he never complied with those demands. When Whitney failed to pay the annual rental, he breached the covenant to pay when requested to do so. This clearly constituted a failure to comply with applicable law, regulations, and a term and condition of the right-of-way grant, and certainly provided a sufficient basis for suspending or terminating the grant. 43 CFR 2804(b). Noncompliance did not result in an automatic termination, however.^{17/} To the contrary, BLM was required to take action to terminate the right-of-way.

^{15/} Specifically, the FCC authorization states "OPERATION BEYOND THE LICENSE EXPIRATION DATE IS AUTHORIZED PENDING FINAL DETERMINATION ON YOUR APPLICATION."

^{16/} Bolack challenges Bradshaw's standing to assert the validity of the FCC license, arguing that Bradshaw has not shown that he applied for or was granted an FCC license to operate an FM station at the site. (Bolack Response to SSOR at 15.) We have no authority to adjudicate the status of the FCC license or the effect of subsequent transfers or assignments, if any, nor is such authority necessary to resolve this case. It suffices that the right-of-way stated only that its term would coincide with the existence of a valid license for the site; it did not require that the license must be held by the original FCC licensee and right-of-way grantee.

^{17/} The facts of this case are to be distinguished from the situation presented when a lease or right terminates by operation of law for failure to pay rental. Compare, e.g., Great Western Petroleum and Refining Co., 124 IBLA 16 (1992) (oil and gas lease with clause providing for termination by operation of law).

Section 506 of FLPMA, 43 U.S.C. § 1766 (2000) provides that the holder will be given notice when BLM contemplates cancellation and an opportunity to cure noncompliance prior to termination of the grant:

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 and, * * * with respect to easements, an appropriate administrative proceeding pursuant to section 554 of Title 5 [the Administrative Procedure Act], the Secretary concerned determines that any such ground exists and that suspension or termination is justified. No such 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. * * * 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 five-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.

Sec. 506 of FLPMA, 43 U.S.C. § 1766 (2000), emphasis added. See also Creole Corp., 146 IBLA 107, 115 (1998); Laguna Gatuna, Inc., 131 IBLA 169, 173 (1994); John and Katherine Caton, 126 IBLA 335, 338 (1993).

The implementing regulation likewise provides:

(a) 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. The authorized officer may terminate a right-of-way or temporary use permit when the holder requests or consents to its termination in writing.

(b) The authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder has

failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

* * * * *

(d) Before suspending or terminating a right-of-way grant pursuant to paragraph (b) of this section, the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance.

43 CFR 2803.4, emphasis added.

Before BLM could suspend or terminate the grant, it was thus required to give Whitney written notice that such action was contemplated, stating the grounds for such action, and allowing him a reasonable opportunity to cure his noncompliance by paying the accrued rental. 43 CFR 2804(d); Creole Corp., 146 IBLA at 115; Laguna Gatuna, Inc., 131 IBLA at 173; John and Katherine Caton, 126 IBLA at 338. At the time that Whitney filed for reorganization under Chapter 11, however, BLM had not even determined the fair market rental. BLM received actual notice of the bankruptcy proceeding in December 1984 from Western Bank, but concluded, rightly or wrongly, that the debt was uncollectible and apparently did not pursue the matter or appear in the bankruptcy proceeding. Thus, at that juncture, the right-of-way remained viable, although it was vulnerable to suspension or termination by reason of the failure to comply with a grant term, if BLM took action in the manner prescribed by 43 CFR 2804 (b) and (d). BLM took no such action, absent which we conclude that the authorization to use the land contained within the boundaries of NM 43307 continued without interruption.

As we stated, among other things, Bolack's patent "except[ed] and reserv[ed] to the United States * * * those rights-of-way and easements that have been granted and which are of record." Right-of-way NM 43307 was among those identified in the patent, by serial number, as one of those rights-of-way or easements reserved to the United States. (Patent No. 30-82-0010 at 1-2.)

Sec. 508 of FLPMA, 43 U.S.C. § 1768 (2000), addresses the question of conveyances of land encumbered by existing rights-of-way out of Federal ownership. It states, in material part:

If under applicable law the Secretary [of the Interior] * * * decides to transfer out of Federal ownership any lands covered * * * by a right-of-way, * * * the lands may be conveyed subject to the right-of-way; however, if the Secretary * * * determines that retention of Federal control over the right-of-way is necessary to assure that the purposes of this subchapter [V of FLPMA] 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 conditions of the right-of-way, including the right to renew it or extend it upon its termination and to collect rents.

The statute is implemented by 43 CFR 2803.5(b), which provides, in relevant part:

Where a right-of-way grant or temporary use permit traverses public lands that are transferred out of Federal ownership, the transfer of the land shall, at the discretion of the authorized officer, include an assignment of the right-of-way, be made subject to the right-of-way, or the United States may reserve unto itself the land encumbered by the right-of-way.

There is no question that BLM did not exercise its discretion to assign NM 43307 to Bolack when patent was issued, which brings us to the reservation in the patent and whether the patent was made subject to the right-of-way, the only two other options under the statute and regulation.

[3] In this instance, the patent issued to Bolack contains both *excepting and reserving* and *conveyed subject to* language. Generally speaking, the phrase *subject to* when used in a conveyance means “subordinate to,” “subservient to,” “limited by,” or “charged to,” and it serves to put a purchaser on notice that he is receiving less than a fee simple. 40A Words and Phrases, *Subject to* at 269-78. An *exception* in a deed withdraws from the description of the property conveyed the excepted property, and thus an *exception* is *in esse* at the time of the conveyance, and is excepted therefrom and remains in the grantor. 15A Words and Phrases, *Exception* at 88-103, 2003 Cumulative Supp. at 56-61. In contrast, a *reservation* technically is a conveyance of the grantor’s entire interest in property by which an interest that did not previously exist as an independent right or interest is simultaneously created and vested in the

grantor. 37 Words and Phrases, Reservation at 133-38, 2003 Cumulative Suppl. at 133-37; Norman R. Blake, 119 IBLA 141, 142 n. 2 (1991).

When *exception* and *reservation* are used together, the legal consequence generally is that certain property is both withdrawn from the description of what is conveyed by the patent, and/or upon conveyance of the fee, an independent right to an interest in the land is created and vested in the grantor.^{18/} Thus, Bolack's patent *excepted and reserved* to the United States the rights-of-way therein identified, but, in a different provision, also stated that the lands were *conveyed subject to* certain provisions relating to the fact that the land lies within a floodplain. This further buttresses the conclusion that the terms were used in the patent according to their usual, and different, connotations. Moreover, while the language used in the patent may be adequate under 43 CFR 2803.5(b), it does not comport with either option (a) or (b) contained in sec. 508 of FLPMA, 43 U.S.C. § 1768 (2000), nor does the record contain the requisite finding or determination that "retention of Federal control over the right-of-way is necessary to assure that the purposes of this subchapter [V of FLPMA] will be carried out, the terms and conditions of the right-of-way complied with, or the lands protected" that might cast a different light on the limitations expressed in the patent. We therefore accord the phrase *excepted and reserved* its customary meaning and hold that the United States *excepted* from the land described as conveyed and/or reserved to itself the land within the boundaries of the rights-of-way identified in the patent.^{19/} The United States thus retained the rights and

^{18/} We note that the phrase is routinely employed in the context of split estates, and in that context, there is no doubt that a provision excepting and reserving the mineral estate to the United States retains and creates title to the mineral estate in the grantor. See, e.g., James A. and Ruth K. Simpson, 136 IBLA 77, 78 (1996); Shell Western E&P, Inc., 119 IBLA 125, 126 (1991); Michael L. Jensen, 105 IBLA 375, 378 (1988); State of Alaska, 105 IBLA 137, 140 (1988); Port Kendall, Inc., 93 IBLA 221, 223 (1986). Conversely, where lands are patented without a reservation in the United States, the grantor retains no jurisdiction or interest in the land conveyed. See, e.g., W.E. Haley, 62 IBLA 294, 295 (1982) (United States initially issued a patent "excepting and reserving" oil and gas interests to itself, then later issued a supplemental patent without the reservation).

^{19/} We also reject Bolack's and BLM's argument that title to the right-of-way merged with Bolack's title to the patented lands. As we stated in Cole Industries Inc., 82 IBLA at 292, "[w]hen BLM transfers the land in fee and assigns its interest in the right-of-way to appellant, so that appellant owns both interests, the right-of-way would be extinguished. [Citation omitted.] It is well established that where
(continued...)

incidents of fee title to the rights-of-way, including the right to administer the right-of-way, approve assignments, issue additional rights-of-way grants, require bonding, collect fair market rental for the use thereof, and suspend or terminate it. ^{20/} Accordingly, BLM had the authority to issue a right-of-way grant to Bradshaw.

[4] BLM enjoys considerable discretion with respect to issuance of rights-of-way and the terms and conditions on which they may be granted, 43 CFR 2802.4, and

^{19/} (...continued)

ownership of the dominant and servient estates unite under a single ownership, the two estates are merged and one estate will exist. 2 Thompson on Real Property § 449 (1961 Replacement).” In Cole, BLM had offered the holder of a right-of-way the opportunity to purchase the parcel of land on which it was located. The question was whether BLM had properly appraised the parcel as unencumbered. The Board held that where an assignment of the right-of-way to the fee holder was contemplated, the merger doctrine would apply, and it was proper for BLM to appraise the property as if unencumbered. In contrast, in this case BLM did not issue the patent to Bolack with an assignment of the right-of-way, nor does the record suggest or show that BLM contemplated any such action at the time the patent was issued.

^{20/} We recognize that a series of transactions ensued following Whitney’s bankruptcy, apparently without BLM’s knowledge or consent, commencing with the Bankruptcy Court’s order to sell debtor assets. Nothing before us suggests that the trustee or the Bankruptcy Court purported to convey the right-of-way grant as an asset of Whitney’s estate. At the same time, the present record is not adequate to reliably unravel the events associated with the right-of-way grant. We note, however, that 43 CFR 2803.6-3 requires that any proposed assignment of a right-of-way, in whole or in part, shall be filed with BLM in accordance with the provisions of 43 CFR 2802.1-1 and 2802.3.

An application for assignment shall be accompanied by evidence of the proposed assignee’s qualifications, as if such assignee were filing an initial application for a right-of-way. The assignee must state his agreement to be bound by the terms and conditions of the grant to be assigned. Most important, the regulation states that “[n]o assignment shall be recognized unless and until it is approved by the authorized officer in writing. The authorized officer may, at the time of approval of the assignment, modify or add bonding requirements.” The record contains no approved assignments, and to the extent any may have been attempted, they need not be recognized by BLM. Absent BLM’s authorization, persons using, occupying, or developing public lands are subject to trespass charges, as provided in 43 CFR 2801.3. We intimate no opinion regarding actions BLM can or should take with respect to any site occupant or the collection and retention of rentals.

we express no view regarding the outcome on remand. However, we direct the parties' attention to the BLM Manual, section 2801.6, Rel. 2-270 (Nov. 6, 1990), and to Star Lake Railroad Co., 121 IBLA 197, 98 I.D. 398 (1991), and City of Las Cruces, 105 IBLA 50 (1988). In both Star Lake and City of Las Cruces, this Board considered the impact of section 508 of FLPMA on BLM's right to administer or dispose of rights-of-way on lands conveyed out of Federal ownership. In both situations, BLM had conveyed lands *subject to* the right-of-way. In City of Las Cruces, nearly 20 years after conveying certain lands to the City of Albuquerque, BLM determined to transfer to the City of Albuquerque administration of a right-of-way for a public road that had been issued to Las Cruces. The City of Las Cruces appealed. The Board upheld BLM's decision, because appellants failed to rebut BLM's finding that the public interest was best served by the transfer of administration. In that case, the Board stated:

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).

City of Las Cruces, 105 IBLA at 51.

In Star Lake, the Albuquerque, New Mexico, District Office, BLM, transferred jurisdiction over a portion of its railroad right-of-way, NM-29324, to the Navajo Indian Tribe after issuing a patent to the Tribe, without considering whether retaining administration over the right-of-way would serve the public interest. In that case, the patent was conveyed *subject to* the right-of-way, but was silent "as to the disposition of the right of the United States to enforce the terms and conditions of the rights-of-way." Star Lake Railroad Co., 121 IBLA at 200, 98 I.D. at 400. In that case, Star Lake argued that, pursuant to section 508 of FLPMA, BLM had been remiss in its decision to convey administration of the right-of-way without first determining whether such conveyance was "in the public interest." 121 IBLA at 210, 98 I.D. at 405. The Board examined the legislative history of section 508, the statute itself, and the BLM Manual, and concluded:

BLM may divest the United States of both ownership and administration only if it determines that retention of Federal control is not necessary to assure (1) that the purpose of Title V of FLPMA will be carried out, as determined by its judged effect on the public interest, (2) that the terms and conditions of the right-of-way will be complied with, or (3) that the lands will be protected. If any of these three conditions is not met, BLM may not divest the United States of both ownership and administration, as it announced its intention to do in the May 1988 decision.

Star Lake Railroad Co., 121 IBLA at 210, 98 I.D. at 406.

Except to the extent that they have been expressly or impliedly addressed herein, all other arguments of the parties have been considered and rejected as immaterial or unsupported by the facts or the law. Bradshaw's request for a stay and Bolack's request for oral argument are denied as moot.

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 reversed and the case is remanded to BLM for action not inconsistent with this opinion.

T. Britt Price
Administrative Judge

I concur:

James F. Roberts
Administrative Judge