

INTERIOR BOARD OF LAND APPEALS

Carl S. Hansen

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CARL S. HANSEN

IBLA 95-274

Decided May 2, 1997

Appeal from a decision of the Jarbridge, Idaho, Area Manager, Bureau of Land Management, denying renewal of land use permit IDI-24401.

Affirmed in part and vacated in part.

1. Public Lands: Special Use Permits--Regulations: Interpretation

Renewal of an agricultural land use permit issued in aid of a desert land entry application was properly denied, under 43 C.F.R. §§ 2920.1-1 and 2920.9-3, after the application was rejected.

APPEARANCES: Carl S. Hansen, Buhl, Idaho, pro se; Kenneth M. Seby, Esq., Office of the Field Solicitor, Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Carl S. Hansen has appealed from a February 13, 1995, Decision of the Jarbridge Area Manager, Bureau of Land Management (BLM), issued on remand following a decision of this Board in Carl S. Hansen, 130 IBLA 369 (1994). Therein, we affirmed BLM's rejection, on March 26, 1992, of Hansen's desert land entry (DLE) application (IDI-18290) and set aside a March 12, 1992, Decision denying renewal of land use permit IDI-24401. The Decision here under review again denies renewal of that permit. The expired permit had allowed Hansen to continue irrigating 18.23 acres of public land in the E½ NE¼ of sec. 28, T. 8 S., R. 13 E., Boise Meridian, adjacent to his privately owned land.

A history of the case is provided in Carl S. Hansen, supra. We there held the March 12, 1992, BLM Decision denying renewal of Hansen's land use permit was subject to our review, but that the record provided on appeal of the DLE rejection lacked sufficient documentation to allow rendition of a decision of the permit issue. The permit question was remanded to BLM to allow development of a more complete record. Id. at 375. On remand, BLM chose to implement the remand order by issuance of another decision on February 13, 1995; this Decision provides a history of the land use permit and explains why "no further farming under this permit shall be granted" and why BLM denied Hansen's "recent application to renew the subject permit."

The case file presently before us contains documentation sufficient to allow a decision on the permit question. A permit application dated July 8, 1981, describes uses that would later be permitted by IDI-24401 as "a fence has been constructed and the land has been cultivated—also a center pivot goes across the land." Successive permits for these uses were sought and approved in 1982, 1986, and 1990. On March 12, 1992, BLM notified Hansen that his permit, which had been renewed continuously since 1981, had expired and would not be renewed. The 1995 Decision on remand recites that the permit was granted in order to facilitate completion of the DLE application while avoiding a trespass on Federal lands. As explained by BLM's 1995 Decision, continuation of the permit depended on the validity of Hansen's DLE application.

While an appeal of the DLE rejection was pending, BLM issued Hansen land use permit IDI-29812, for the purpose of "crossing public lands with irrigation pivot system" on 21.7 acres of public land. Despite a variation in estimated acreage, this permit describes exactly the same land as permit IDI-24401, but does not allow its cultivation. Referring to permit IDI-29812, the 1995 BLM Decision provides that the "application to renew the subject permit (IDI-24401) for cultivation purposes is * * * denied. You are further directed to reestablish the 4 strand barbed-wire fence on the proper BLM/private land boundary within 45 days." (Decision at 5.) Hansen sought and was granted a stay on April 10, 1995, of the 1995 Decision requiring him to move the fence.

Hansen contends that he did not consent to inclusion in his permit of Special Stipulation 16, upon which BLM relies in requiring the fence replacement; this Stipulation states:

In the event the Permittee's Desert Land Application is rejected, the Permittee will move the fence back on line prior to expiration of the permit. The fence may contain gaps for the circular pivot to cross public land, but farming must cease and a Land Use Permit must be secured for the circular pivot crossing on public land.

Hansen's appeal is directed first against the application by BLM of this clause. Among numerous arguments raised against it, Hansen contends it is unreasonable to require him to move the fence because the land at issue is open range, which means that he need not fence his fields unless he wishes to do so. He explains:

What I am really concerned with is the excessive cost for a good fence if unnecessary stipulations are added just at the whim of a BLM employee. So I would request a judgement concerning this. My first request would be (whether I am allowed to lease the land or not,) that I be allowed to put the fence where the BLM officials gave my father permission to put [it] in 1974. If not, I contend that they have no authority to tell me where or what kind of fence I put on my private land.

(Statement of Reasons (SOR) at 6.)

Hansen also contends he should be allowed to continue to cultivate the land over which his irrigation system has encroached. He argues that he did so for many years in a responsible manner, and to do otherwise would be wasteful of the water provided by his system to the affected 20-acre tract. He contends it is small and isolated from other BLM properties and that his continued agricultural use would be in the best interest of the public. He suggests this land has been leased to him for many years, that he has shown himself to be a conscientious tenant, and should be allowed to continue to cultivate it.

The BLM answered the SOR; an exchange of briefs by the parties ranging across matters only remotely related to this appeal has followed. Their arguments seek to raise new questions outside the Decision here under review about the DLE application that was rejected in 1994, and the effect on permit IDI-24401 of acceptance by Hansen of Federal support payments for crops raised on his irrigated land. These matters are not directly relevant to the permit denial and will not, therefore, be further discussed; they have been considered and rejected as either irrelevant or not material to the case before us, which concerns only whether BLM properly refused to renew permit IDI-24401, and, as a subsidiary question, whether Hansen should now be required to move the fence as the 1995 BLM Decision required.

Hansen's water system has been in place at least since 1975, when his father first applied for entry onto the land at issue. See Carl S. Hansen, supra, at 370. Hansen's first permit, ID-1-TP-1-75, issued in 1981, was a "Permit issued for period From July 16, 1981 To December 31, 1982." It was based on a BLM land report dated December 31, 1981, finding that a limited land use authorization was properly included as part of a trespass settlement agreement reached by Hansen and BLM in order to facilitate an application by Hansen to acquire ownership of the public land over part of which his system was encroaching. The trespass action resolved by their agreement rose from a discovery, in 1980, that "Hansen had installed a circular sprinkler that extends onto public land." (Environmental Assessment (EA) ID-1-TP-1-75 at 1.) The EA describes how the permit came to be issued:

During the course of discussions concerning this trespass, Mr. Hansen inquired about the possibility of continuing to cultivate these lands. He was told that he could apply for a Temporary Use Permit. On July 16, 1981, he submitted a Temporary Use Permit Application.

There was a Desert Land application (I-9437) on the land that was filed by Mr. Hansen's father, Warren E. Hansen. This application was relinquished October 7, 1981, and Carl Hansen plans to file an application on this land.

(EA at 1.)

After several renewals of the permit first issued to Hansen, land use permit IDI-24401 was issued, on Departmental form 2920-1, effective from March 1, 1989, to February 28, 1992, under provisions of 43 C.F.R.

Subpart 2920, defining procedures for handling applications for private use of the public lands. Under the cited rule, permit IDI-24401 was a land use authorization, defined by 43 C.F.R. § 2920.0-5(l) to include "any authorization to use the public lands." Although Hansen argues that his long authorized use of the land eventually amounted to a lease in which he had acquired a property interest, the record before us does not support this contention.

A permit is described by 43 C.F.R. § 2920.1-1(b) to include uses for not more than 3 years requiring "little or no land improvement, construction, or investment." The regulation provides that such an instrument "conveys no possessory interest" and "shall be issued on a form" approved by BLM. A lease, however, does convey a possessory interest; it is issued for uses that involve substantial construction and extends for so long as is necessary to permit amortization of the capital investment committed by the lessee. See 43 C.F.R. § 2920.1-1(a).

[1] We find the authorization issued by BLM to Hansen was a permit and was properly so denominated by BLM. That several such 3-year permits were issued while Hansen's DLE application was pending does not change the nature of the use granted to him. An applicant before the Department can gain no right at the expense of the public because BLM employees fail to act promptly to discharge their duties, or even if they perform their work negligently. See 43 C.F.R. § 1810.3. Despite the fact that adjudication of Hansen's desert entry application took a long time, the basic nature of the use permitted while his application remained active was not altered thereby.

The permit expired at the end of its term. The March 12, 1992, BLM Decision found the permit had expired and would not be renewed. Two weeks later, BLM denied Hansen's DLE application. The Decision issued on February 13, 1995, relied on Stipulation 16 of the permit, declined to authorize continued farming under the permit, and denied renewal. The BLM was not obliged to renew the permit because it did not require or allow renewal. See 43 C.F.R. § 2920.9-3(a)(1), providing for termination of a permit when an agreed-upon event (such as denial of an application) takes place; see also 43 C.F.R. § 2920.1-1(b), making permit renewal discretionary with BLM and subject to the terms of the permit itself.

Insofar as concerns replacement of the fence, BLM now concedes that "the area in question is open range and it would be [Hansen's] obligation to fence cattle out of his private lands if he so desired." (BLM Answer at 8.) It is BLM's present position that, should a fence be constructed in the vicinity of the pivot, "it must be installed on the correct property boundary line and not necessarily where [Hansen] would prefer to put it." Id. This statement recognizes that the question whether to replace the fence or not is entirely up to Hansen (although the location of it is not). Because the BLM Decision here under review required a different result by making replacement of the fence mandatory, that requirement is not approved. Special Stipulation 16 relating to fence replacement may not, therefore, be enforced in the manner stated by BLM's Decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Decision to deny renewal of land use permit IDI-24401 is affirmed, but so much of the Decision as requires fence replacement is vacated.

Franklin D. Amess
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge