FEDERAL LAND POLICY AND MANAGEMENT ACT REGULATIONS

by John W. Arlidge

Under the Federal Land Policy and Management Act land rights may be acquired by individuals under Title II, Title III and Title V. Regulations have been established under these Titles for management of rights-of-way, leases, permits and easements and land exchanges. For the most part, these regulations are similar to regulations under previous Acts for land right acquisitions on federal lands. However, the regulations now in effect under the Federal Land Policy and Management Act have in many ways been expanded from the previous regulations. This expansion has hindered and, in many cases, prevented individuals from obtaining the necessary land rights from the federal government and has placed the land users and the federal government in adversary positions. In particular, it has hindered the continuation of commerce and business within the western United States more than any other land regulation previously issued by the federal government.

The most onerous component is the length of term allowed for leases and grants. The Federal Land Policy and Management Act, Title V, states "The Secretary should take into consideration the cost of its facilities, its useful life and any public purposes it serves in determining duration of rights-of-way . . ." The Congressional Record regarding this matter indicates that Congress fully intended to provide for obtaining the necessary land rights for the full term of need and use insofar as it would be consistent with public purposes. But the regulations as written specify leases shall be issued for a term not to exceed thirty years (43 C.F.R., Section 2920.1). Certainly this does not fulfill the requirements of the Act for facilities such as electric generating plants, coal gasification plants, etc., with useful lives of fifty years and more.

Lease regulations further state that the

rental fee and terms and conditions of the lease may be adjusted every five years or earlier to reflect "current fair market value" (40 C.F.R., Section 29.20.7). A lease that is adjusted every five years at the sole discretion of the federal government is in fact only a five year lease; creating uncertain market conditions for an individual planning investments on such lands.

To further complicate this issue, the terms of the lease call for termination and suspension of the lease should the "authorized officer" determine there is noncompliance in the "terms and conditions of land use" (40 C.F.R., Section 2920.8-3). In large projects such as major electric power generating plants serving large sections of the general public an "authorized officer's" determination of non-compliance could result in "a worst-case" a shutdown of a generating station with a resultant lack of electric power to a community. Such a situation could result in damages totalling several million dollars, plus impact on public safety.

The length of lease or grant should be consistent with the Act and for the useful

(see Act, pg. 23)

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Current assignments include the development of the Allen-Warner Valley Energy System. The Energy System is composed of a coalfield, slurry pipeline, one 500-megawatt generating station in Southern Utah, one 2,000-megawatt generating station in Southern Nevada, and associated power transmission facilities. This assignment includes developing and negotiating participation, ownership and transmission contracts for the Energy System, developing environmental assessments, coordinating preliminary engineering and scheduling, and providing the liaison among the participants and various governmental bodies involved in the development of the Energy System.

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life of the proposed use. Review of rental fees and adjustments of the terms and conditions during the lease period should be restricted to gross inequities. However, should the federal government pursue its desire for fee adjustment during the term of the lease, that adjustment should be based on specific adjustment formulas in the original lease document so that actual cost of lease to the leaseholder can be estimated at the outset of the lease period. Similar provisions are found in Federal Regulations regarding rights-of-way (40 C.F.R., Section 2800.0 through 2800.3). Thus, those regulations require similar revision.

Liability provisions of the federal land lease and right-of-way grant are awkward. The individual obtaining either lease or grant of right-of-way from the federal government is placed in a very awkward liability position due to the land-use regulations. Those regulations require that the leaseholder or holder of a right-of-way must allow physical entry on to the lease or right-of-way by the general public, other leaseholders or federal personnel. At the same time the regulations require that the leaseholder remain obligated for all liabilities to individuals entering onto the lease or right-of-way and at the same time the leaseholder must indemnify the federal government.

Right of physical entry by others should not be a general provision to all rights-of-way or leases. The particular purpose of land grant must be taken into consideration as well as the type of facilities to be placed on the land. Certainly the opportunity for physical injury to an individual walking down a transmission line corridor is much less than an individual walking through a 2,000 megawatt powerplant facility. The promulgated regulations ignore such a difference.

The terms and conditions of both lease and right-of-way require the potential land user provide detailed descriptions of facilities for which authorization is sought (40 C.F.R., Section 2920.4). Facility description should be consistent with the stage of planning and the stage of design anticipated prior to receipt and authorization of use of lands. A generating station conceptual design can be provided prior to authorization of use of lands. However, detailed designs cannot be developed until the lands are available. The Regulations further state that a legal description of the primary and alternative project location is required (40 C.F.R., Section 2920.2). Regulations by the Council on Environmental Quality on the National Environmental Policy Act, require a "scoping process" whereby the general public provides alternatives to the proposed action. The two regulations, when put together, would suggest that the potential land user must provide detailed descriptions for his proposal and all the alternatives proposed by the general public. A request to delay submission of detailed project descriptions until completion of the regulatory review process should be considered reasonable.

The above discussion does not identify all of the problems which the individual user of federal lands encounters under regulations written for the implementation of the Federal Land Policy and Management Act. To resolve concerns raised by parties effected by these and other issues, it would behoove the federal government and potential holders of federal land rights to work together for the formulation of reasonable and workable land acquisition regulations.

The last subject to be covered in this paper is that of cost recovery (40 C.F.R., Section 2802.1–2803.1). Our attorneys consider cost recovery to be invalid and unconstitutional as it invokes a federal tax formulated by the Administrative Branch of government. Requiring individuals who apply for federal land rights to reimburse the land manager for "all costs" to develop the environmental impact review and the land-right acquisition does not comply with the Federal Land Policy and Management Act, Section 304(d).

In the Congressional Record Senator McClure states, "I assume what we are trying to do in this instance is to balance the equities that are involved, but we do not want to simply in every instance say that government will absorb all of the costs of studies and of the administrative procedures. But, on the other hand, we don't always want the applicant to bear all of the costs. There has to be a reasonable balance between the two". In the Conference Report the House amendments used the adjective "reasonable" to modify charges and costs; the adjective "extraordinary" is imprinted in the Senate bill. Other citations are available to indicate that Congress did not intend that "all costs" would be reimbursed. But Congress did intend that reimbursement would be limited to those costs incurred by the federal agent that are of benefit only to the potential land user. Now under the Council on Environmental Quality regulations where alternatives are identified by the general public, the potential land user is required to reimburse "all costs" for study of those alternatives introduced by the general public. These regulations need to be abolished.

We can get into a number of areas of controversy such as the above which will result in individuals suing the federal government. This places the government and the individual in an adversary position. Would it not be better for individuals experienced in federal land acquisition to sit down with the federal land managers and assist in the development of regulations which will provide for "reasonable" reimbursement of costs for processing the proposed actions?

The federal land manager has not been able to fully consider all the ramifications of these land acquisition regulations. The federal land managers can and should join with potential land users to develop regulations for the obtaining of rights on federal lands that both the user and the land manager can accept as fair and equitable. Such a procedure is not a panacea but it's much better than the present adversary position which is time consuming, costly and completely unnecessary.

Lines **(cont. from pg. 10)**

The utility is conducting its own evaluation of effects of the EHV-DC transmission line and plans to have information available in the near future.

Without proper empathy with the private property owner, other Minnesota 400 KV/DC 427 Mile projects will take place.
