

ROBERT A. ERKINS

IBLA 90-55

Decided October 25, 1991

Appeal from a decision of the Area Manager, Bennett Hills Resource Area, Idaho, Bureau of Land Management, cancelling reservoir right-of-way grant No. I-07421.

Affirmed.

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

It is proper for BLM to cancel a reservoir right-of-way grant pursuant to sec. 506 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1766 (1988), when the grantee fails to obtain a performance bond required by the grant, after having been given notice and a reasonable time to comply.

APPEARANCES: Robert A. Erkins, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert A. Erkins has appealed from a September 14, 1989, decision of the Area Manager, Bennett Hills Resource Area, Idaho, Bureau of Land Management (BLM), cancelling a reservoir right-of-way.

Right-of-way I-07421 is an amended right-of-way grant issued to Erkins on June 1, 1983, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1988). The right-of-way authorized expansion of an existing reservoir, with associated dam, spillway, dikes, and other facilities on 49 acres of land situated in secs. 29 and 32, T. 4 S., R. 13 E., Boise Meridian, Gooding County, Idaho. A number of stipulations were attached to the grant, including stipulation 14 which called for a performance bond in the amount of 10 percent of the estimated total construction costs of the reservoir. A performance bond submitted by Erkins on June 7, 1982, was accepted by BLM.

On March 30, 1989, the bonding company advised BLM that the performance bond was being cancelled by the surety effective May 26, 1989. On April 10,

1989, a BLM employee contacted Erkins advising him of BLM's receipt of the cancellation notice and asking if he intended to have a new bond in place when the old one expired on May 26. Erkins advised him that a new bond would be obtained before that date. On June 5 Erkins was again contacted and asked if he had secured a bond. When he was advised that Erkins was unable to obtain a replacement bond, the BLM employee suggested a cash deposit (personal surety) to satisfy the requirements of stipulation 14. Erkins stated that he would pursue a replacement bond and let BLM know within the next few days.

In a letter dated July 13, 1989, the Area Manager advised Erkins that he must secure a performance bond (either surety or personal) to replace the bond that had been cancelled the previous May. Erkins was afforded 30 days from receipt of the Area Manager's July 1989 letter to submit the new bond. The Area Manager further stated:

If we have not received notification of the placement of the required performance bond by that date, we will issue a decision to cancel this right-of-way. At that time you will have 30 days to appeal the decision. After the 30[-]day appeal period, the right-of-way will be cancelled and rehabilitation of the area may be required.

Erkins received the Area Manager's letter on July 14, 1989. Therefore, he had until August 14, 1989, to secure the necessary bond. On August 10, 1989, Erkins called BLM to indicate that he would post a personal bond. BLM sent him the necessary form on August 16, 1989, which was 2 days after the original deadline had expired. In its cover letter Erkins was instructed to submit the executed form, and the necessary payment. BLM also stated: "As soon as the check clears the bank, you will be in compliance with your bonding."

Having received nothing from Erkins, the Area Manager issued his September 14, 1989, decision cancelling the right-of-way grant "without further notice" because Erkins had failed to secure a bond, as required by the July 1989 letter. The decision stated that Erkins had a right to appeal to the Board. Erkins received the Area Manager's cancellation decision on September 15, 1989. On October 10, 1989, Erkins filed a letter with BLM stating that he had been "out of the country off and on" during the crucial period and: "Hence the Right-of-Way was not handled as it should have been." He requested a hearing and stated that he would contact BLM on October 26, 1989, after returning from an overseas trip.

BLM interpreted Erkins' October 1989 letter as a notice of appeal from the September 14, 1989, decision, and forwarded the case file to the Board. Erkins was notified of the docketing of the appeal in a Board letter dated October 24, 1989. On December 11, 1989, BLM filed a motion to dismiss alleging that Erkins had failed to file a statement of reasons for his appeal.

Erkins filed a response to BLM's motion to dismiss on December 18, 1989. He states that, upon returning to the country and receiving the October 1989 docketing letter from the Board he was "under the impression that [he] would be advised when and where to appear for this appeal," but that "[t]his was clearly not to be from what I understood from the letter." He next explained how, under the right-of-way grant, he had transformed a "dry lake bed" into a reservoir providing "protection or nesting areas for water birds or sport fishing for game fishermen." According to Erkins, without a continuing right-of-way grant, the land will revert to its previous state. Finally, he requests a hearing "to maintain our right-of-way so that this small lake in this desert area of Idaho can be maintained by us as we have done in the past."

At the outset, it is apparent that Erkins did not regard his October 1989 letter to BLM as a notice of appeal from the Area Manager's September 1989 decision. The letter includes a request for a hearing directed to BLM. That request is at odds with a notice of appeal, which transfers jurisdiction to the Board, lodging the power to decide whether to grant a request for a hearing solely with the Board. See, e.g., Thana Conk, 114 IBLA 263, 273 (1990). Regardless of Erkins' apparent intent, the Area Manager's September 1989 decision cancelling the right-of-way grant adversely affected Erkins, and was sufficient to give rise to a right to appeal pursuant to 43 CFR 4.410(a). When Erkins implicitly objected to the cancellation, i.e., BLM's "handl[ing]" of his right-of-way grant, BLM was correct when it construed the letter as a notice of appeal.

Departmental regulation 43 CFR 4.412(a) requires an appellant to file a statement of reasons "within 30 days after the notice of appeal was filed," if the notice did not contain a statement of reasons. Failure to file a statement of reasons within the prescribed time subjects the appeal to summary dismissal. See 43 CFR 4.402. A proper statement of reasons must set forth the appellant's objections to the decision appealed from and the reasons for those objections. See Burton A. & Mary H. McGregor, 119 IBLA 95, 98 (1991). There was no other document filed with the Board within 30 days of BLM's receipt of the notice of appeal. Therefore, we must look solely to the adequacy of the statement of reasons set out in the notice of appeal. We conclude that, although far from totally satisfactory, the notice meets the minimum standard for a statement of reasons. The stated basis for objecting to BLM's cancellation of the subject right-of-way grant is that Erkins was "out of the country off and on." It remains that Erkins seeks to justify his failure to secure a new bond and avoid cancellation of his right-of-way grant because of his absence from the country during the crucial time period. This constitutes a reason, albeit meager, for objecting to the Area Manager's September 1989 decision and thus satisfies the statement of reasons requirement. Accordingly, we deny BLM's motion to dismiss the appeal.

[1] Turning to the merits of Erkins' appeal, we note that under section 506 of FLPMA, 43 U.S.C. § 1766 (1988), BLM is authorized to terminate a right-of-way grant for "noncompliance with any * * * condition of the right-of-way." See also 43 CFR 2803.4(b). However, BLM must give to

the grantee "written notice * * * of the grounds for such [contemplated] action and * * * a reasonable time * * * to comply with th[e violated] * * * condition" prior to terminating the right-of-way, 43 U.S.C. § 1766 (1988); see also 43 CFR 2803.4(d).

BLM conditioned Erkins' right-of-way grant on Erkins furnishing a bond for reclamation of the affected land to protect the Federal Government from loss if the proposed reservoir expansion was not completed, if the reservoir were to fail, or if the required reclamation was not carried out when the right-of-way was terminated. This action was permitted by section 504(i) of FLPMA, 43 U.S.C. § 1764(i) (1988), and 43 CFR 2803.1-4 and embodied in stipulation 14.

Erkins secured the required bond prior to issuance of the right-of-way grant, but that bond was cancelled effective May 26, 1989. In order to ensure continuing compliance with the stipulation 14 requirement that a bond be "in place," BLM notified Erkins of the impending cancellation, and when the bond was not replaced the Area Manager notified him in the letter dated July 13, 1989, that he was to once again secure the necessary bond and that he was to do so within 30 days of receipt of the letter. Erkins was also advised that if he failed to do so, BLM would cancel his right-of-way grant. Erkins had until August 14, 1989, to obtain the bond.

The Area Manager's July 1989 letter gave Erkins the option of either submitting a surety bond or a personal bond. Prior to the August 14 deadline, Erkins informed BLM that he was opting to submit a personal bond. On August 16, 1989, BLM sent Erkins the necessary bond form and stated that he would be deemed to be in compliance with the bonding requirement once the check in the bond amount (which was to be submitted with the executed form) cleared the bank. The August 16 letter clearly had the effect of extending the time for compliance where it stated that submission of the personal bond after the August 14 deadline would constitute compliance with the bonding requirement, and if we were considering whether the personal bond had been submitted in a timely manner we would be required to consider what would be a reasonable extension of time.

Erkins submitted neither a surety nor a personal bond, and after waiting almost a full month for a response, the Area Manager issued his decision. The initial time period had expired and Erkins was afforded a reasonable amount of additional time to either submit the required personal bond or seek additional time to do so. The Area Manager's July 1989 letter clearly advised Erkins that he was no longer in compliance with the terms of stipulation 14, and he was placed upon notice that he must comply within 30 days or risk cancellation of his right-of-way. Nothing was heard from him until 2 days prior to the end of the period for performance, and no further action was taken by him until after the notice of cancellation was issued and received. It was well within BLM's authority to cancel the right-of-way for noncompliance. See Roy L. Parrish, 114 IBLA 336, 338 (1990). Erkins was afforded a "reasonable time" to correct such noncompliance when he was afforded a full 61 days from receipt of the Area Manager's July 1989 letter to take the necessary action or seek additional

time to do so. 43 U.S.C. § 1766 (1988); see Frank A. Keele, 107 IBLA 296 (1989) (102 days); James L. Morrison Sr., 87 IBLA 236 (1985) (71 days). Erkins did neither.

Erkins now seeks to explain his failure to submit the required bond within the allotted time. His reason was he was "out of the country." However, it is obvious that he was not out of country for the entire period from July 14 until September 14, 1989, and he makes no attempt to explain why he could not have either made adequate provision for ensuring that his business affairs were properly handled in his absence or personally sought additional time to comply. We, therefore, conclude that the Area Manager properly exercised his discretionary authority when he terminated right-of-way grant I-07421 when Erkins failed to obtain a reclamation bond, as required by the grant, after having been given notice and a reasonable time to comply. See Frank A. Keele, supra at 302.

Finally, Erkins requests a hearing. The Board has the authority under 43 CFR 4.415 to order a hearing before an Administrative Law Judge, but will not do so in the absence of a material issue of fact. See Woods Petroleum Co., 86 IBLA 46, 55 (1985). Erkins has presented nothing to indicate that any material fact is in dispute. His request is denied.

Accordingly, 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 affirmed.

R. W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge