

JOHN C. URQUIDI

IBLA 91-150

Decided December 4, 1992

Appeal from a decision of the Boise District Office, Idaho, Bureau of Land Management, cancelling right-of-way IDI-0603.

Decision set aside, case referred to Hearings Division.

1. Act of March 3, 1891--Rights-of-Way: Act of March 3, 1891--Rights-of-Way: Cancellation

Where a right-of-way grant issued under the Act of Mar. 3, 1891, does not contain provisions expressly mandating the filing of proof of construction of required improvements, failure to file does not, by itself, justify cancellation of the right-of-way.

2. Act of March 3, 1891--Rights-of-Way: Act of March 3, 1891--Rights-of-Way: Cancellation--Rules of Practice: Appeals: Hearings--Rules of Practice: Hearings

The holder of a right-of-way issued under the Act of Mar. 3, 1891, is entitled to a fact-finding hearing prior to cancellation for failure to construct improvements within 5 years of issuance as required by sec. 20 of that Act, where the case record does not demonstrate that improvements were not timely constructed, and where the right-of-way holder has expressly asserted that construction has been completed. In such hearing, BLM, as the proponent of the invalidity of the right-of-way, has the burden of proving that authorized improvements were not timely constructed.

APPEARANCES: John C. Urquidi, pro se; J. David Brunner, District Manager, Glen E. Cooper, Acting District Manager, Boise District Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

John C. Urquidi has appealed from a December 20, 1990, decision of the Boise District Office, Idaho, Bureau of Land Management (BLM), cancelling canal and reservoir right-of-way IDI-0603.

Right-of-way IDI-0603 for an irrigation ditch was originally issued to Hazel B. Owens on May 8, 1954, pursuant to the Act of May 3, 1891, 43 U.S.C. § 946 (1970), under serial number Idaho 0603, for irrigation purposes. ^{1/} On January 14, 1963, BLM issued a notice requesting from Owens proof of construction of the canal. The record contains nothing indicating that proof of construction had been filed. On the other hand, it contains nothing, such as an inspection or land report, indicating that improvements had not been constructed as of January 1963. BLM's January 14, 1963, notice evinced uncertainty as to the status of construction, in that it offered Owens various options depending on whether the construction was complete, incomplete, or in progress. Owens evidently did not respond to BLM's request for proof of construction.

On December 23, 1968, BLM issued a contest complaint to Owens against right-of-way grant Idaho 0603, specifically alleging that "[t]he canal and reservoir have not been constructed as required by the provisions of section 20 of the Act of March 3, 1891," although nothing in the present record confirms that allegation. BLM requested that it be allowed to offer proof and asked that the right-of-way grant be revoked and canceled in its entirety. No proof was ever made, however, as the complaint was returned to BLM undelivered on December 27, 1968, with a notation that Owens was deceased.

BLM evidently took no further action on the matter until the end of 1989. On November 3, 1989, BLM received a copy of a warranty deed showing that title to the irrigation ditch and associated private land had passed to John C. and Harriett Urquidi from William J. and A. Irene Owens (apparently the heirs of Hazel B. Owens). In an internal memorandum dated February 9, 1990, BLM decided to "attempt to have the new right-of-way holder file the Proof of Construction so that the grant can be perfected and the records updated as to the new holder's name and address." By letter of July 13, 1990, BLM requested Urquidi to furnish proof of construction. BLM enclosed a form for this purpose. The record contains no response. BLM again requested Urquidi to furnish proof of construction on October 26, 1990, when it issued a decision holding the right-of-way for cancellation. Having again received no response, BLM, by its decision of December 20, 1990, canceled the right-of-way.

In his statement of reasons on appeal Urquidi (appellant) contends "that proof of construction was supplied, and construction was completed." He further asserts that BLM's action reduced the value of his property and denied him his water rights.

In its response, BLM initially requests that the appeal be dismissed as untimely filed. BLM also explains that its policy is to conduct a field

^{1/} The Act of May 3, 1891, has been interpreted as applicable to rights-of-way for pipelines, flumes, or other conduits, if water is conveyed primarily for irrigation or drainage purposes. See, e.g., 43 CFR 244.15(a) (1949); Fred Markle, 6 IBLA 52, 53 n.2 (1972).

examination after proof of construction is received from the right-of-way holder. It notes that, since no proof of construction was ever received, no field examination was conducted, and no decision accepting proof of construction was issued.

As to the timeliness of the appeal, the record shows that appellant received BLM's decision on December 28, 1990. Departmental regulation 43 CFR 4.411(a) provides that "[a] person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." Thus, his notice of appeal was due to be filed on or before January 28, 1991, the first day BLM's offices were open after the expiration of the 30-day appeal period. The notice of appeal was not received by BLM until Tuesday, January 29, 1991.

However, a grace period is provided by 43 CFR 4.401(a), which states that a delay in filing will be waived if the document is filed no later than 10 days after it was required to be filed and the document was transmitted before the filing deadline. Here, the record establishes both that the notice of appeal was transmitted on January 26, 1991, before the filing deadline, and that it was received within 10 days thereafter. Accordingly, the provisions of 43 CFR 4.401(a) apply, the delay in filing is waived, and the appeal is properly considered timely filed.

Turning to the merits, we note that although the Act of May 3, 1891, was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2743, 2793, that section expressly provided that nothing in FLPMA should be construed as terminating any valid right-of-way existing on October 21, 1976. The instant right-of-way was so existing and was therefore not affected by FLPMA. See James L. Morrison Sr., 87 IBLA 236, 238 (1985).

Section 20 of the Act of March 3, 1891, 43 U.S.C. § 948 (1970), authorizing the issuance of rights-of-way for ditches and canals, imposed the following proviso:

Provided, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

That forfeiture proviso was also set out in Departmental regulations in effect at the time of issuance of the right-of-way (43 CFR 244.14(c) (1949)) and throughout the 5-year period following issuance. 43 CFR 244.22(c) (1954) and 43 CFR 2234.3-1(a)(iii) (1969). We have held that section 20 of the Act "requires forfeiture of the grant to the extent the improvements are not completed," and that, under the statute, "no extension of the original grant may be authorized." Fred Markle, 6 IBLA 52 (1972).

[1] We first consider whether the failure to file the proof of construction, by itself, constitutes grounds for cancellation of the right-of-way. In Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981), cert. denied, 454 U.S. 965, the court held that entitlement to a right-of-way under the 1891 Act was qualified by the Act of February 15, 1901, ch. 372, 31 Stat. 790 (formerly codified at 43 U.S.C. § 959 (1970)) repealed, section 706(a) of FLPMA, supra, which authorized the Secretary to condition the grant of a right-of-way "upon compliance with reasonable regulations and terms designed to protect the public interest." 638 F.2d at 103. Thus, the Secretary has authority to cancel a right-of-way for violations of the conditions set out in its terms. See James L. Morrison Sr., supra at 243-44 (Grant, A.J., concurring).

The regulations in effect during the time after issuance of the right-of-way state as follows concerning filing proof of construction: "Upon completion of construction, proof thereof should be submitted to [BLM], consisting of a statement and certificate furnished by the holder of the right-of-way." 43 CFR 244.9(a) (1949); 43 CFR 244.15(a) (1954); and 43 CFR 2234.1-4(b)(1) (1969) (emphasis supplied). That language is not mandatory, but merely precatory. 2/ To the contrary, failure to file timely proof of construction is a curable defect. See Grace Belle Wilkerson, 10 IBLA 279 (1973). We find nothing in the grant of the right-of-way itself requiring the filing of such report. Cf. James L. Morrison Sr., supra at 240-41 (emphasizing that section 3 of the right-of-way form used in that case expressly required the "filing of proof of construction within 5 years of the date of grant"). In the absence of a mandatory rule requiring that proof of construction be filed within 5 years of issuance of the right-of-way or a provision in the right-of-way grant expressly so requiring, we decline to affirm BLM's decision cancelling the right-of-way on account of that failure. 3/

[2] The present record does not provide an adequate basis to determine whether this right-of-way may be canceled under the authority of section 20 of the Act of March 3, 1891, quoted above, for failure to timely construct improvements. Although it would seem a simple matter to examine the lands in question to ascertain whether improvements have been constructed, BLM

2/ The right-of-way is expressly made subject to "all future regulations issued" under the Act of Mar. 3, 1891. The proof-of-construction regulation was subsequently redesignated, but retained the significant phrase "should be submitted." 43 CFR 2802.2-2 (1979).

3/ Failure to file proof of construction has been considered in previous cases, but never as the sole ground for cancellation. Thus, although we stated in James L. Morrison Sr., supra at 242 n.7, that failure to file proof of construction was a violation that supported cancellation of the right-of-way, there was other noncompliance presented in that case not shown here, including failure to maintain the right-of-way site as required and to maintain an adequate performance bond. See also Fred Markle, supra at 54. Also, as noted above, the provisions of the right-of-way in Morrison expressly required the filing of proof of construction.

states that it presumed that no construction has occurred, based on the admitted failure both of Owens and, more recently, Urquidi to file proof of construction. However, Urquidi has directly asserted in his statement of reasons that construction has been completed. ^{4/} In such circumstances, the right-of-way holder is entitled to a fact-finding hearing prior to cancellation, as provided by 43 CFR 4.415. Cf. Fred Markle, supra at 55-56 (ruling that no hearing was required in that case, as there was no dispute that improvements had never been constructed, but observing that the right-of-way holder has a right to a hearing if that fact were disputed).

Accordingly, BLM's decision is set aside and the matter is referred to the Hearings Division to convene a factfinding hearing. BLM, as the proponent of the invalidity of the right-of-way, shall have the burden of proving that the authorized improvements have not been constructed as required by section 20. ^{5/} The Administrative Law Judge to whom the case is assigned shall issue a decision which, if not appealed, shall be final for the Department.

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 set aside, and the case is referred to the Hearings Division as discussed above.

David L. Hughes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{4/} We note that this dispute could have been avoided if appellant had responded as requested to BLM's repeated requests for confirmation that improvements had been constructed.

^{5/} BLM should confirm forthwith appellant's statement that construction was completed. It would appear that BLM's decision could be summarily affirmed if, at this late date, no improvements have been constructed.