

JOHN AND KATHERINE CATON

IBLA 93-394

Decided June 17, 1993

Appeal from a decision of the Redding Resource Area Manager, Bureau of Land Management, cancelling right-of-way CA 12441.

Vacated and remanded.

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

43 U.S.C. 1766 (1988) and 43 CFR 2803.4(d) require written notice that cancellation of a right-of-way is contemplated for failure to comply with a condition of its granting and a reasonable opportunity to cure the noncompliance. A BLM decision cancelling a right-of-way without providing notice and a reasonable time to comply will be vacated.

APPEARANCES: W. Leonard Wingate, Esq., Redding, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

John and Katherine Caton have filed a notice of appeal together with a petition for stay of the April 8, 1993, decision of the Area Manager, Redding Resource Area, Bureau of Land Management (BLM), cancelling right-of-way Grant CA 12441. See 43 CFR 2804.1(b).

This right-of-way was granted on June 15, 1984, for "an existing pipeline for the diversion, transportation, and use of water from Johnson Creek, across public land, to private property for domestic purposes." No. 13 of the Terms and Conditions of the Grant provides: "The holder is required to obtain an appropriative water right from the State of California within a reasonable period of time, which will be determined by the Authorized Officer. If State water rights are not obtained within this time, this grant is subject to cancellation." BLM's decision noted it had been over 8 years since the right-of-way was granted and no water right had been obtained from the State, and cancelled the right-of-way for failure to comply with this condition.

Appellants' notice of appeal and petition for stay were filed on May 11, 1993. Appellants' petition states they and other members of the Johnson Creek Ditch Water User's Association have filed an application with the State of California Water Resources Control Board (SWRCB) for a permit to appropriate water from a diversion point on BLM land. Water has been

diverted from Johnson Creek since before 1914, they state, and they claim a pre-1914 right to appropriate water under the laws of California. Although the SWRCB has ordered appellants and others to cease diverting water from Johnson Creek and render their diversion facilities inoperable, appellants state they anticipate the order will be rescinded as a result of their application. A substantial amount of work needs to be done to repair the ditch for the irrigation season, appellants state. If the work cannot be done now, "the property owners will be unable to irrigate to the detriment of their real property. In addition, several of the property owners rely upon the water for domestic use and will be without water unless a stay of this decision is granted. * * * Upon rescission of the [SWRCB] order, if this stay has not been granted the harm to petitioners will be irrevocable for the 1993 irrigation season," appellants conclude. No response has been filed by BLM.

In reviewing the record in connection with appellants' petition for stay, we note that BLM dismissed a protest of the proposed granting of this right-of-way filed by Georgene and William Rieck and we affirmed that decision. See Georgene E. Rieck, 76 IBLA 45 (1983). In our decision we stated: "When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law." Id. at 47. We concluded:

In the absence of evidence that the applicants do not have the right to appropriate water which they are presently using, the decision of BLM granting the right-of-way for the existing ditch and pipeline across public lands, conditioned upon proof by applicants of their right to appropriate the water, will be affirmed.

Id.

Upon receiving the Board's decision, BLM wrote the applicants for the right-of-way stating that before the right-of-way could issue they must provide BLM with a survey map showing the location of the right-of-way and "evidence of filing for a water right with the proper State official." The applicants did not respond to this letter or a February 1984 follow-up. BLM wrote the applicants again in April 1984 that it was "incumbent upon [them] to meet the requirements necessary to obtain the right-of-way grant," including submission of a survey map and proof of filing for a water permit with the State of California. 1/ Although the applicants subsequently

1/ BLM's Apr. 17, 1984, letter stated in part:

"We are aware there has been a civil suit filed against you for the use of the water, and you are counter-suing. * * * The outcome of the civil matter is a moot point as far as the necessity on your part to obtain authorization for the diversion and transportation of water across public land is concerned."

submitted the required map, it does not appear from the record that BLM received proof of filing for a water permit. On June 15, 1984, BLM granted the right-of-way with the condition set forth above.

In April 1985 BLM wrote the right-of-way holders requesting a copy of the appropriate water right from the State of California. A representative of the holders visited BLM and explained that the staff of the SWRCB had prepared an informal analysis of the various claimants' water rights but it was not agreeable to all parties and a meeting among SWRCB staff and the parties' attorneys was anticipated to attempt to resolve the situation. When BLM checked in June 1986 there was no change. In August 1987, BLM issued an authorization to a representative of the right-of-way holders to "walk" a backhoe across public lands to maintain the ditch and upgrade the diversion. "No disturbance or damage to the public land shall occur as a result of this one-time, casual use occurrence," BLM's letter stated.

In June 1988, Georgene Rieck complained to BLM that the previous structure had been upgraded from stone to concrete and trees on BLM land had been knocked down. BLM investigated, and opened a right-of-way trespass file for the work that exceeded what had been authorized the previous August. On August 16, 1988, the BLM Area Manager wrote the right-of-way holders, including appellants, stating:

Over four years has elapsed since right-of-way authorization, which I feel is approaching a reasonable time for resolution of water allocation. If a resolution to water allocation and water rights is not reached or under consideration of the Court system within 12 months, the rights-of-way may be cancelled for noncompliance.

In March 1989, the attorney for Georgene Rieck sent BLM a copy of a Stipulation for Preliminary Injunction entered by the Superior Court of California, County of Shasta, in Rieck v. Caton, No. 78611. The stipulation provided that the parties would install a siphon pipe and modify the diversion structure in order to provide water to the parties in accordance with an attached Schedule of Water Use Allotments to Various Claimants and the remaining terms of the stipulation.

Nothing subsequent to the March 1989 filing appears in the record until a March 8, 1993, letter from the attorney for Georgene Rieck that enclosed a copy of the SWRCB's February 11, 1993, order that ten "Upper Ditch Users," including appellants, "cease the diversion of water from Johnson Creek into the Upper Ditch and render [their] diversion facilities inoperable within 30 days." The attorney for Georgene Rieck requested BLM to "revoke its grant of right-of-way to [appellants] and the others" and immediately order them to remove the dam they had constructed.

BLM conducted a compliance check of the right-of-way. The report of the check notes the requirement of Condition No. 13 and the February 11, 1993, SWRCB letter and states: "8 years is reasonable time to secure a water right, especially when ST [state] water resources puts a stop order

on the diversion." The Redding Area Manager concurred with the recommendation to cancel the right-of-way for noncompliance on April 6, 1993, and issued the decision cancelling it on April 8, 1993.

[1] The Area Manager did not, however, give appellants written notice of their noncompliance with Condition No. 13 of the right-of-way grant and a reasonable time to comply with it before issuing the decision cancelling the right-of-way, as is required by 43 U.S.C. § 1766 (1988) and 43 CFR 2803.4(d). 2/ See Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164, 166 (1978); Frank A. Keele, 107 IBLA 296 (1989); BLM Manual § 2803.89.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's April 8, 1993, decision is vacated and the case is remanded.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

2/ 43 U.S.C. § 1766 (1988) provides in part:

"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 Secretary concerned determines that any such ground exists and that suspension or termination is justified. No 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. If the Secretary concerned determines that an immediate temporary suspension of activities within a right-of-way for violation of its terms and conditions is necessary to protect public health or safety or the environment, he may abate such activities prior to an administrative proceeding. Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give written notice to the holder of the grounds for such action and shall give the holder a reasonable time to resume use of the right-of-way or to comply with this subchapter, condition, rule, or regulation as the case may be."

43 CFR 2803.4(d) provides: "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."