

FRED MARKLE

IBLA 70-641

Decided May 18, 1972

Appeal from decision of Utah land office, Bureau of Land Management, canceling appellant's right-of-way for an irrigation pipeline.

Affirmed as modified.

Rights-of-Way: Cancellation -- Rights-of-Way: Nature of Interest Granted -- Act of March 3, 1891

Rights-of-Way:

The right-of-way granted under the Act of March 3, 1891, is an easement only, and does not vest in the holder a limited fee in the land. It is subject to cancellation by the Department of the Interior for failure to comply with the conditions under which it is issued.

Rights-of-Way: Cancellation -- Rights-of-Way: Conditions and Limitations -- Act of March 3, 1891 -- Rules of Practice: Hearings

Rights-of-Way:

As section 20 of the right-of-way Act of March 3, 1891, requires forfeiture of the grant to the extent improvements are not completed within five years from the grant, this Department cannot extend the time to construct the right-of-way improvements.

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

To cancel a right-of-way granted under the Act of March 3, 1891, the grantee should be given notice of the grounds for the cancellation and the opportunity for a hearing if he disputes the facts.

APPEARANCES: Fred Markle, pro se.

## OPINION BY MRS. THOMPSON

This appeal by Fred Markle is from a decision of the Utah land office, Bureau of Land Management, dated May 25, 1970, 1/ which canceled appellant's right-of-way U-0142557 granted effective October 21, 1964, pursuant to sections 18-21 of the Act of March 3, 1891, 43 U.S.C. §§ 946-949 (1970), for an irrigation pipeline to be constructed across public land. The land office decision was based upon appellant's failure to file proof of construction of such pipeline within five years from issuance of the right-of-way, and a finding that no pipeline had been constructed.

The land office decision specifically stated that "[a] recent field examination of the lands affected by this right-of-way shows that no pipeline has ever been constructed."

In his appeal, appellant does not dispute this statement. Instead, he merely requests an extension of the grant for an additional five years for the reason:

Permission to construct storage pond has not been granted by the Utah Department of Natural Resources. As soon as this is granted, work will begin and processed [sic] to completion.

Because appellant purported to appeal while making this request the Bureau has not ruled on the request. Even though appellant's appeal fails to point to any error in the decision below, merely requesting alternative relief, we see no useful purpose for postponing a ruling on this request by returning the case to the Bureau.

The Act of March 3, 1891, grants rights-of-way through the public lands and reservations of the United States to individuals, associations, and corporations, for canals, ditches, and reservoirs. 2/ Section 20 of the Act (43 U.S.C. § 948 (1970)) contains the following proviso:

Provided, That if any section of said canal or ditch shall not be completed within five years of the location of said section, the rights therein granted shall be forfeited as to any uncompleted

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1/ The appeal was addressed to the Director, Bureau of Land Management. Jurisdiction over appeals pending before the Director was transferred by the Secretary of the Interior to this Board, effective July 1, 1970. Cir. 2273, 35 F.R. 10009, 10012.

2/ The Act of March 3, 1891, has been interpreted by this Department as applicable to rights-of-way for pipe lines, flumes, or other conduits, although they are not specifically mentioned in the Act, if water is conveyed primarily for irrigation or drainage purposes. 43 CFR 2871.0-3(a)(5) (1972).

section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

Since the decision of the Supreme Court in Great Northern Railway Co. v. United States, 315 U.S. 262, 275-277 (1942), rights-of-way granted under the March 3, 1891, Act have been considered by this Department to be easements rather than limited fees in the land, (E. A. Wight, A-24101 (November 5, 1945)) and, therefore, subject to cancellation through administrative proceedings for failure to comply with the conditions under which they issued. Solicitor's Opinion, M-36500 (May 5, 1958).

As stated in the regulations:

Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse. (43 CFR 2802.2-3 (1972)).

All rights-of-way approved pursuant to this part, except those granted for pipelines pursuant to section 28 of the Act of February 25, 1920, as amended August 21, 1935 (49 Stat. 678; 30 U.S.C. 185), shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation. (43 CFR 2802.3-1 (1972)).

As section 20 of the Act of March 3, 1891, quoted above, requires forfeiture of the grant to the extent the improvements are not completed, and as the implementing regulations quoted above provide for cancellation of the grant for failure to comply with the conditions of the grant, no extension of the original grant may be authorized. Therefore, appellant's request for the extension must be denied.

There remains the question of the status of appellant's right-of-way. One of the terms and conditions stated in the land office decision of October 22, 1964, granting the right-of-way was the filing of proof of construction within five years of date of the grant. The grantee failed to file such proof. Two notices requiring the proof of construction were sent to the grantee, but the return receipt cards were signed by other persons. We do not know whether they were authorized agents to sign for his mail. In any event, the significant fact is that the grantee was served with the land office decision canceling the right-of-way.

Ordinarily where a federal statute creates a property right in a grantee subject to the completion of certain statutory requirements, and the grantee's right is challenged by the Government on grounds raising factual questions disputed by the grantee, notice of such grounds and the opportunity for a hearing is afforded to satisfy due process. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337-38 (1963); United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970); Claude E. Crumb, 62 I.D. 99 (1955). Cf. Clayton E. Racca, 72 I.D. 239 (1965). But, as stated in United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971):

It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory -- even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks. See FPC v. Texaco, 377 U.S. 33, 39-44, 84 S.Ct. 1105, 12 L.Ed.2d 112 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 205, 76 S.Ct. 763, 100 L.Ed. 1081 (1956); Dyestuffs and Chemicals Inc. v. Flemming, 271 F.2d 281, 286-287 (C.A. 8, 1959), cert. den. 362 U.S. 911; Sun Oil Co. v. FPC, 256 F.2d 233, 240-241 (C.A. 5, 1958), cert. den. 358 U.S. 872, 79 S.Ct. 111, 3 L.Ed. 2d 103.

This discussion of the law is applicable to the rights created under the Act of March 3, 1891. The problem in this case is whether or not there is any factual dispute on the issue of the construction of improvements so as to warrant a hearing. Appellant has now been apprised by the land office decision of the grounds for canceling the right-of-way, i.e., the nonconstruction of improvements. This is sufficient notice of such grounds and there is no necessity to return this case to the land office for the meaningless task of issuing a contest complaint, although normally a contest procedure is employed by this Department when challenging asserted property rights. Claude E. Crumb, supra, holds that a field report by Departmental employees is not a sufficient basis for rejecting a desert land entry proof where the claimant denies the facts asserted in the report, although it is a proper basis for bringing the contest charges. If, as the above quotation from United States v. Consolidated Mines & Smelting Co., Ltd., points out, however, a claimant agrees with the facts, no hearing is required. This is also true if final proof on its face shows the requirements of the law have not been met. Ruby M. Connor, A-30962 (April 29, 1969); Stanley L. Mead, A-30824 (November 13,

1967); Arlin R. Godderidge, A-30214 (March 30, 1965). Appellant has not expressly denied the facts asserted in the land office decision based on the field report. His statement with respect to his request for an extension of time suggests he has not constructed the required improvements. If he has not, his entry must be canceled.

To remove any doubt in this matter, this decision gives notice to appellant of his right to a hearing if he disputes the factual assertions in the land office decision. In order to afford appellant full opportunity to request a hearing if he disputes the facts, this decision modifies the land office decision to this extent. This decision will not become final until 30 days after service thereof upon him. Within that time, appellant may submit to this Board his denial of the factual assertions in the land office decision and request a hearing on the factual issues of whether or not improvements have been constructed and, if so, to what extent. If he does not do so within that time, the facts stated in the land office decision will remain undisputed and taken as admitted by him and the cancellation of his right-of-way will become final. 3/

We note that cancellation of the previously existing right-of-way does not preclude appellant from filing an application for a new right-of-way. Since, according to appellant, pipeline construction is contingent upon the granting of permission by the State of Utah to build a storage pond, appellant is advised to comply with the provisions of 43 CFR 2802.1-5(b) (1972), 4/ if he seeks to make a new application.

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3/ The action taken in this case should not be construed as the procedure to be followed by the Bureau where final proof (or a similar showing) asserting full compliance with applicable law is filed. As we pointed out, supra, generally the Bureau should issue a contest complaint setting forth its allegations of non-compliance with the law, and giving notice of the right of a hearing if the contestee disputes those allegations.

4/ This regulation reads as follows:

"Evidence of water right. If the project involves the storage, diversion, or conveyance of water, the applicant must file a statement of the proper State official, or other evidence, showing that he has a right to the use of the water. Where the State official requires an applicant to obtain a right-of-way as a prerequisite to the issuance of a water right, if all else be regular, a right-of-way may be granted conditioned only upon the applicant's filing the required evidence of water right from the State official within a specified reasonable time. The conditional right-of-way will terminate at the expiration of the time allowed."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed with the modification stated above.

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Joan B. Thompson, Member

We concur:

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Frederick Fishman, Member

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Martin Ritvo, Member

