

TUCSON RADIO INCORPORATED

IBLA 72-166

Decided December 27, 1972

Appeal from a decision by the Arizona State Office holding appellant's radio tower and transmitter site right-of-way application (A-855) for rejection.

Affirmed.

Rights-of-Way: Act of March 4, 1911 -- Rights-of-Way: Applications

A radio tower site right-of-way application may not be granted until approval for the proposed installation is received from the Federal Communications Commission.

APPEARANCES: Alvin L. Korngold, Esq., Tucson, Arizona, for appellant.

OPINION BY MR. GOSS

On April 6, 1967, appellant filed an application for a right-of-way for a 50-year term pursuant to the Act of March 4, 1911, 43 U.S.C. § 961 (1970). The application requested use of a portion of the SW 1/4 NW 1/4 sec. 33, T. 14 S., R. 13 E., G.S.R.M., Arizona, for use as a radio tower site.

The Bureau of Land Management by letter dated April 19, 1967, informed appellant that the right-of-way would be made available pending a favorable determination by the Federal Communications Commission concerning electromagnetic compatibility.

In May 1970, the lands were classified as suitable for state selection and on August 19, 1970, the State of Arizona filed selection application A-5854.

Tucson Radio Inc. operates a Spanish language radio station licensed by the Federal Communications Commission to broadcast from Tucson, Arizona. In connection with the present right-of-way application, appellant sought permission from the Federal Communications Commission to broadcast at night. The permission was denied. Appellant appealed the denial to the United States Court of Appeals, District of Columbia Circuit. The court on November 23, 1971, in Tucson

Radio, Incorporated (KEVT) v. F.C.C., 452 F.2d 1380 (1971) remanded the case to the Commission for a hearing as to whether the proposed new nighttime broadcast would provide first primary AM service to at least 25% of the population residing in the area. The Board has learned from the Commission that appellant failed to submit any further evidence. The Commission, therefore, denied the application and dismissed the case.

On October 8, 1971, the State Office decided that since (1) Tucson Radio had failed to complete their right-of-way application by filing the necessary Federal Communications Commission license and (2) the lands were classified for state selection, the State Office would hold the application for rejection.

Appellant contends on appeal that the use of the land in connection with a directional antenna array will best meet the needs of the American people. He also asserts that the Department of the Interior is authorized and empowered to grant rights-of-way for radio, television, and other forms of communication and that the particular land involved is essential due to the growth of Tucson, the special Federal Communications Commission requirements as to signal over the downtown area of Tucson and the directional antenna requirements.

It is clear that the Department is authorized and empowered to grant easements for rights-of-way "upon the public lands and reservations of the United States \* \* \* for radio, television, and other forms of communication \* \* \*." 43 U.S.C. § 961 (1970). However, the granting of an application is not automatic. An application will be rejected when "it does not conform with the law or regulations under which filed or the approval of which would be inconsistent with the public or Government interest, \* \* \*." 43 CFR 2802.2-1(b).

In the present case appellant has failed to obtain the necessary clearance for the proposed installation from the Federal Communications Commission. The policy of the Department has been to reject such applications when such approval has not been received. See Bureau Memorandum dated December 12, 1958, from the Director, Bureau of Land Management to all Area Administrators and State Supervisors, Re: Rights-of-way for radio transmitter stations; See also Charles Vanda, Nevada 06231, August 30, 1965. The imposition of a servitude upon the public lands in such a case is clearly not in the public interest under 43 CFR 2802.2-1(b), supra.

In addition, the Secretary of Interior has the authority to examine and classify public lands for disposal under the public land laws, and the general rule is that the first application filed for a tract of land will have first consideration over any subsequent application for the same land. Such priority, however, is

discretionary, not absolute. Nelson A. Gettula, 64 I.D. 225, 228 (1957), aff'd sub nom. Carl v. Udall, 309 F.2d 653 (1962).

While both a right-of-way application and a State selection application could be granted in the proper case, appellant herein has failed to comply with the essential condition precedent to the granting of the right-of-way application. If appellant should in the future receive Federal Communications Commission approval of the proposed installation, it may apply to the State of Arizona for an easement.

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 and the application is rejected.

Joseph W. Goss, Member

We concur:

Anne Poindexter Lewis, Member

Edward W. Stuebing, Member.

