

H. L. TOWNSEND

IBLA 76-536

Decided August 6, 1976

Appeal from decision of the Colorado State Office, Bureau of Land Management, canceling right-of-way D-037177-RW and requiring restoration of area.

Affirmed.

1. Rights-of-Way: Act of February 15, 1901 -- Rights-of-Way: Cancellation

A right-of-way granted pursuant to the Act of February 15, 1901, may, in the discretion of the Secretary of the Interior, be canceled for either abandonment or nonuse; the holder of the right-of-way may be required to restore the area.

APPEARANCES: H. L. Townsend, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

H. L. Townsend appeals from the February 18, 1976, decision of the Colorado State Office, Bureau of Land Management (BLM), canceling the right-of-way for his Lucky Chance Pipeline and Reservoir and requiring him to clean up the right-of-way area, restore the land, and breach the dam. The right-of-way for the reservoir and pipeline, granted in 1906 for the production of electricity, is located in T. 43 N., R. 6 W., N.M. Principal Meridian, Hinsdale Country, Colorado. Appellant seeks "a year's time * * * to put the pipeline in shape * * *."

[1] The Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 (1970), provides that rights-of-way may be granted for, among other things, pipelines and reservoirs used for the production of electricity. It is very clear that the act grants a license revocable at any time by the Secretary of the Interior:

* * * [A]ny permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

43 U.S.C. § 959 (1970).

A few months after enactment of the law, the Department promulgated regulations for granting rights-of-way. Circular, 31 L.D. 13 (1901). The Department noted that the Act "authorizes a mere permission in the nature of a license, revocable at any time * * *" 31 L.D. at 14. The Department also stated in those regulations that:

[A]ny permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department.

31 L.D. at 17. The Supreme Court dealt with that provision in Swendig v. Washington Water Power Co., 265 U.S. 322, 329, 331 (1924), and clearly approved of it.

Current regulations of the Department provide that a right-of-way may be canceled for abandonment or nonuse. 43 CFR 2802.2-3. They also provide that the holder of the right-of-way may be required to restore the land to its original condition upon revocation of the right-of-way. 43 CFR 2801.1-5(i).

The BLM stated in its decision of February 18, 1976, that the right-of-way had not been used for many years and had obviously been abandoned. Appellant argues that he never abandoned the right-of-way but continues up to the present time to pay taxes on the property associated with the right-of-way. Nevertheless, it is clear from the field report, the accompanying photographs, and appellant's own statements that the right-of-way has not been used for many years. The pipes are very rusty and large sections are simply missing. A great deal of sediment has collected behind the dam; in fact, the dam would have to be reconstructed and the sediment dredged out before the reservoir would be of any use. Because the right-of-way has not been used for many years, the BLM was correct in canceling the right-of-way. 1/

1/ Because the right-of-way was properly canceled for nonuse, we need not rule directly on the abandonment issue.

Moreover, the BLM also acted correctly in requiring appellant to restore the area. ^{2/} 43 CFR 2801.1-5(i). The manager of the Montrose, Colorado, District Office, BLM, stated in a letter to the State Director that:

There were two other dams of similar construction located on Henson Creek that have failed in the past, one of which occurred during 1973, causing extensive damage to the Lake City water supply.

If this dam and reservoir were dredged and allowed to fill, there is a strong likelihood of its failure. [Ed.: Appellant applied for surface water storage rights on this property in August, 1973.] There could be extensive damage to the subdivision in Capitol City, the Lake City water-shed, the Henson Creek Road, Lake City, and to Henson Creek itself.

Though appellant disagrees that the dam is now, or would with dredging be, in dangerous condition, the BLM apparently does not share appellant's conviction that the dam would be safe. While the evidence is not crystal clear on this point, the decision of the BLM will be allowed to stand, as appellant has not submitted any evidence that would tend to substantiate his assertions. The BLM denial of the one-year extension is reasonable under the circumstances.

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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Martin Ritvo
Administrative Judge

^{2/} In an October 23, 1975, memorandum from the District Manager, BLM, to the State Director, BLM, the District Manager recommended that the pipeline be left in place and that, perhaps, the sediment behind the dam could be released by removing the dam's metal release gates. The regulation does give the BLM considerable discretionary latitude in choosing the appropriate action.

