

JAMES W. SMITH  
(ON RECONSIDERATION)

IBLA 80-57, 80-67

Decided June 30, 1981

Reconsideration of the Board's decision styled James W. Smith, 46 IBLA 233 (1980), sua sponte.

James W. Smith, 46 IBLA 233 (1980), involving IBLA 80-57, reaffirmed. IBLA 80-67 dismissed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Act of Mar. 4, 1911 -- Rights-of-Way: Cancellation

Sec. 506 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1766 (1976), affords certain due process procedural protections to the holder of a right-of-way; however, sec. 506 is not applicable to the holder of a pre-FLPMA easement for a right-of-way granted under the Act of Mar. 4, 1911, as amended, 43 U.S.C. § 961 (1976), who has not conformed the right-of-way to a FLPMA right-of-way pursuant to sec. 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), because such an easement for a right-of-way was not granted, issued, or renewed pursuant to Title V of FLPMA.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Regulations: Interpretation -- Words and Phrases

"Right-of-way grant" is defined in the regulations, 43 CFR 2800.0-5(h), as an instrument issued pursuant to Title V of the Federal Land Policy and Management

Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976). By implementing regulation, 43 CFR 2803.4, the Secretary has limited the applicability of sec. 506 of FLPMA, 43 U.S.C. § 1766 (1976), to "right-of-way grants."

Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164 (1978), modified.

APPEARANCES: Lawrence W. Campbell, Esq., San Diego, California, for appellant; Robert D. Conover, Esq., and Lawrence A. McHenry, Esq., Office of the Solicitor, Riverside, California, for appellee, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

In James W. Smith, 46 IBLA 233 (1980), the Board affirmed a decision by the California State Office, Bureau of Land Management (BLM), dated September 14, 1979, canceling appellant's communications site right-of-way LA 0163131 and directing appellant to remit certain charges in past annual rental due on his right-of-way. 1/

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1/ Our decision in 46 IBLA 233 indicated that it was disposing of two appeals before the Board, IBLA 80-57 and IBLA 80-67. Actually, the only appeal decided in that case was IBLA 80-57, the appeal from the Sept. 14, 1979, BLM decision canceling appellant's right-of-way LA 0163131. Docket No. 80-67 involves an "appeal" from a notice of the California State Office, BLM, dated Sept. 21, 1979, entitled "Notice of Filing of Application." That notice stated that on July 26, 1979, the Western Regional Office of the Immigration and Naturalization Service (INS), U.S. Department of Justice, had filed an application for a communication site right-of-way, CA 6386. The letter accompanying the application stated that INS had "entered into a lease agreement with James Smith, DBA Mountain Relay Company, for space in his radio facility on Otay Mountain," with regard to right-of-way LA 0163131. INS requested a "secondary use permit for the Otay Mountain Site." In the Sept. 21 notice, BLM further stated: "In accordance with Instructions, all valid existing users in the area are hereby provided a copy of the communication site request and are afforded the opportunity to make substantive comments to this office within 30 days of receipt of this notice regarding the proposed new facility." Appellant was one of the "existing users" notified.

By letter dated Oct. 15, 1979, counsel for James Smith responded to BLM's notice stating that Smith "protests and appeals the Bureau of Land Management's requiring [INS] \* \* \* or any other potential user of his site, which merely uses the existing facilities, and making no additions thereto, from registering or otherwise being required to apply for a separate site application as a secondary user." The

The September 1979 decision held that appellant had been in default since 1976 for failure to pay sufficient annual rental. It also charged appellant with other violations of the terms of his grant.

As authority for canceling the right-of-way, BLM cited 43 CFR 2802.1-7(d) (1979), which provides: "If a charge required by this section is not paid when due, and such default shall continue for 30 days after notice, action may be taken to cancel the permit, right-of-way or easement \* \* \*." 2/

On appeal, appellant challenged the September 1979 decision contending that BLM's appraisal of the fair market rental value for his right-of-way, established at a January 1979 hearing, was inappropriate. The Board's decision in James W. Smith, supra, held that appellant had failed to demonstrate by convincing evidence that the BLM appraisal was in error or that the charges imposed were excessive. It also held that the right-of-way was properly canceled pursuant to 43 CFR 2802.1-7(d) where the grantee was in default for having failed to pay the proper amount of rental for 4 years. Accordingly, the Board did not reach the other elements of noncompliance.

By order dated April 8, 1980, the Board, sua sponte, decided to reconsider the decision in James W. Smith, supra, on the narrow issue of procedural due process as mandated by section 506 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1766 (1976). That section provides in relevant 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

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fn. 1 (continued)

"appeal" was forwarded to this Board and docketed as IBLA 80-67. BLM, in notifying existing users of the filing of such an application, took no action from which an appeal would lie. See 43 CFR 4.410. BLM did not issue a decision. At best, Smith's appeal was premature. IBLA 80-67 is dismissed. 2/ 43 CFR Part 2800 was revised effective July 31, 1980 (45 FR 44518 (July 1, 1980)). The following language appears at 43 CFR 2802.1-2(e): "If a charge required by this section is not paid when due, and such default shall continue for 30 days after notice, action may be taken to terminate the right-of-way grant."

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.

Thus, the only issue for consideration is whether BLM's action in canceling appellant's right-of-way was proper.

Appellant was granted his easement for right-of-way pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), in September 1959. <sup>3/</sup> The grant stated that it was made pursuant to the Act of March 4, 1911, "and regulations thereunder \* \* \* subject to the terms and conditions as set forth therein (43 CFR 244.9)." One of the regulations in effect at that time, 43 CFR 244.16 (1954), provided:

All rights-of-way approved pursuant to this part, \* \* \* 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.

Subsection (e) of 43 CFR 244.21 (1954), revised, 23 FR 4699 (June 26, 1958), governing rental charges, also provided, in part:

The holder of the right-of-way \* \* \* shall pay, on or before the first day of each calendar year, the rental charges for that calendar year in accordance with paragraphs (a) and (b) of this section. If the rental charge is not paid when due, and such default shall continue for thirty days after the first day of January, action may be taken to cancel the right-of-way \* \* \*.

Appellant argues on reconsideration that under the Act of March 4, 1911, his grant may not be canceled without "appropriate judicial action." In support, appellant cites the "initial regulations" issued by the Department on January 6, 1913, with respect to grants of rights-of-way made pursuant to the Act of March 4, 1911, supra, which provide in part for cancellation "by a suit for that purpose in any court of competent jurisdiction."

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<sup>3/</sup> This Act was subsequently repealed by section 706(a) of FLPMA, 43 U.S.C. § 1701 (1976). However, existing rights-of-way were continued under the terms of their issuance. See section 509(a), FLPMA, 43 U.S.C. § 1769(a) (1976).

At the very least, appellant argues, he is entitled to an "administrative hearing," citing Western Aggregates of Mineral & Rock, Inc., 34 IBLA 164 (1978). Finally, appellant argues that the September 1979 decision should have given him a time period "to either take the corrective action or be in default." The effect of the decision would have been stayed by any appeal, and upon resolution of the appeal he would have been given that same period to cure the default. Appellant argues that a time period was set forth in the BLM decision of October 4, 1978, but that BLM improperly provided for no right of appeal therein, terming the decision "interlocutory."

For the purposes of this decision, it is necessary to briefly state the chronological history of this case. Appellant's right-of-way was issued on September 2, 1959, for a term of 50 years at an annual rental of \$55. Pursuant to notice and an opportunity for a hearing, the annual rental was increased, effective January 1, 1969, to \$400, based on a reappraisal of the right-of-way. For the years 1969-75 appellant paid the increased rental.

On April 11, 1975, appellant was notified that the annual rental would be increased, effective January 1, 1976, to \$1,500, based on a second reappraisal of his right-of-way. Appellant was advised of an opportunity for a hearing and on May 5, 1975, requested a hearing. The hearing was subsequently postponed in order that appellant might file an appeal with the Board. <sup>4/</sup> In James W. Smith, 34 IBLA 146 (1978), the Board held in part that BLM was entitled to reappraise appellant's right-of-way in order to reflect its current value. The case was remanded for "further appropriate consideration." Id. at 150. For the years 1976-78, appellant paid an annual rental of \$55.

By decision dated October 4, 1978, BLM rescheduled the hearing for November 8, 1978, and required appellant to pay, within 60 days, past rental due for the years 1976-78 at the new rate of \$1,500, "subject to a final determination resulting from the scheduled November 8, 1978 hearing." BLM noted that "[f]ailure to timely comply

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<sup>4/</sup> On Feb. 2, 1977, BLM issued a decision requiring appellant to pay, within 30 days, past annual rental due on his right-of-way for the years 1976-78 at the new rate of \$1,500 "subject to protest" or at the old rate of \$400 "subject to adjustment upon issuance of a decision by the Bureau as a result of a hearing to be held in the matter of the rental increase." The decision also noted that "[f]ailure to comply \* \* \* within the time provided shall subject the right-of-way to cancellation." On Feb. 28, 1977, BLM modified the decision stating, "This decision is interlocutory. Upon failure to comply with the requirement herein set forth within the time provided a decision shall be issued holding the right-of-way cancelled subject to the right of appeal."

shall result in the cancellation of Right-of-Way LA 0163131." On October 20, 1978, the decision was modified to give appellant an additional 30 days to comply.

On November 3, 1978, appellant filed an appeal from the October 4, 1978, BLM decision. This appeal was dismissed by the Board "without prejudice" to appellant's right to appeal after the scheduled hearing and final disposition of the case. "ORDER" dated January 5, 1979. The hearing, originally scheduled for November 8, 1978, was rescheduled by BLM and subsequently held on January 17, 1979. Appellant was represented at that hearing. Following the hearing, BLM issued its September 1979 decision, which was the subject of the Board's decision in James W. Smith, 46 IBLA 233 (1980).

Appellant challenges the authority of the Secretary or his duly authorized representative to cancel his right-of-way for nonpayment of the annual rental. The Act of March 4, 1911, supra, provided only that a right-of-way issued under that Act may be "forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse \* \* \* or for abandonment." It did not provide for cancellation based on nonpayment of the annual rental. In regulations issued on January 6, 1913, the Secretary provided that upon breach of any of the terms or conditions in the regulations, an approved application, or a grant "the United States may have and enforce appropriate remedy therefor by suit for specific performance, injunction, action for damages, or otherwise." Right of Way--Electrical, Telegraph, and Telephone Poles and Lines, 41 L.D. 454, 459 (1913). The regulations also provided that upon breach "continued or repeated after 30 days' notice \* \* \* the right of way granted \* \* \* may be forfeited to the United States by a suit for that purpose in any court of competent jurisdiction." Id. Those regulations, discretionary in nature, do not preclude the Secretary from seeking an appropriate administrative remedy. Similarly, the regulations under which appellant's right-of-way was issued are not so limiting. Moreover, the Secretary in promulgating such regulations has long recognized an implied authority to cancel rights-of-way, whether or not the applicable statute so provides. See, e.g., State of Alaska, Department of Highways, 20 IBLA 261, 268, 82 I.D. 242, 244-45 (1975).

[1] Accordingly, we reach the question whether appellant was entitled under section 506 of FLPMA, supra, to the due process considerations of that section prior to cancellation of his right-of-way.

The Solicitor's Office argues that section 506 of FLPMA, supra, is "not applicable to the cancellation in issue here," because appellant refused to amend his right-of-way "subjecting it to the provisions under FLPMA" and because section 509(a) of FLPMA, supra, protecting existing rights-of-way, "exempts" it from the provisions of FLPMA. Section 506

of FLPMA is not limited by its language only to rights-of-way issued under FLPMA nor does section 509, by its language, necessarily prevent application of section 506 to the holder of an existing right-of-way who does not choose to accept the Secretary's offer of a new right-of-way under FLPMA.

However, further investigation of FLPMA and the regulations indicates that appellant was not entitled to the due process protections of section 506 prior to the cancellation of his right-of-way. The reason is that appellant holds a pre-FLPMA right-of-way. We find that section 506 of FLPMA does not apply to a pre-FLPMA right-of-way unless such a right-of-way has been conformed to a FLPMA right-of-way pursuant to section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976).

Section 501 of FLPMA, 43 U.S.C. § 1761(a) (1976), authorizes the Secretary to "grant, issue, or renew" rights-of-way over, upon, under, or through the public lands. Section 504(e), 43 U.S.C. § 1763(e) (1976), provides:

(e) The Secretary concerned shall issue regulations with respect to the terms and conditions that will be included in rights-of-way pursuant to section 505 of this title. Such regulations shall be regularly revised as needed. Such regulations shall be applicable to every right-of-way granted or issued pursuant to this title and to any subsequent renewal thereof, and may be applicable to rights-of-way not granted or issued, but renewed pursuant to this title. [Emphasis added.]

This section clearly states that regulations issued pursuant to FLPMA, relating to terms and conditions of a right-of-way, shall apply to every right-of-way granted or issued under FLPMA and to any renewal of such a right-of-way, and may apply to pre-existing rights-of-way "renewed pursuant to this title." Therefore, pre-FLPMA rights-of-way are not necessarily subject to such regulations.

[2] When the FLPMA right-of-way regulations, 43 CFR Part 2800, are examined, the interpretation that pre-FLPMA rights-of-way are not governed by such regulations is clear. 43 CFR 2800.0-5(g) defines "right-of-way" as "the public lands authorized to be used or occupied pursuant to a right-of-way grant." "Right-of-way grant" is defined in 43 CFR 2800.0-5(h) as "an instrument issued pursuant to Title V of the Act authorizing the use of a right-of-way over, upon, under or through public lands for construction, operation, maintenance and termination of a project." (Emphasis added.) The term right-of-way grant is used throughout the regulations in 43 CFR Part 2800, thereby limiting the application of the regulations to instruments "issued pursuant to Title V of the Act." Specifically, 43 CFR 2803.4 (Suspension and termination of right-of-way authorizations), which implements section 506

of FLPMA, refers to "right-of-way grant." Subsection (e) of 43 CFR 2803.4 provides for a hearing pursuant to 5 U.S.C. § 554 (1976) prior to suspension or termination of a "right-of-way grant that is under its terms an easement."

Through the implementation of these regulations, the Secretary has resolved the question of whether section 506 applies to pre-FLPMA rights-of-ways. Clearly, it does not. By regulation the protections of section 506 are extended only to "right-of-way grants," *i.e.*, rights-of-way issued, granted or renewed pursuant to the provisions of Title V of FLPMA.

Appellant has directed our attention to Western Aggregates of Mineral & Rock, Inc., *supra*, and urges that it requires an "administrative hearing" prior to suspension or termination of his right-of-way. We agree that Western interprets section 506 as applicable to a pre-FLPMA right-of-way; however, we note that Western was issued in 1978, more than 2 years before the promulgation of 43 CFR Part 2800. Although at the time Western was issued it represented a reasonable interpretation of section 506, its application has been subsequently limited by the Secretary's regulations.

We conclude that BLM's action in canceling appellant's right-of-way was proper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we reaffirm our decision in James W. Smith, 46 IBLA 233 (1980), involving IBLA 80-57. IBLA 80-67 is dismissed.

Bruce R. Harris  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

