

CITIES OF COLORADO SPRINGS AND AURORA

IBLA 82-1292

Decided December 9, 1983

Appeal from letter of the Colorado State Office, Bureau of Land Management, holding appellants' right to construct facilities to be suspended on right-of-way C-013867.

Appeal dismissed without prejudice as premature.

1. Rights-of-Way: Generally--Rights-of-Way: Act of February 1, 1905--Rights-of-Way: Cancellation

Suspension of the right to construct facilities on a right-of-way granted pursuant to the Act of Feb. 1, 1905, ch. 288, § 4, 33 Stat. 628 (repealed 1976), is tantamount to cancellation of the right-of-way. Such a right-of-way may be canceled only after notice and an opportunity for a hearing have been afforded the holder of the right-of-way.

2. Rules of Practice: Appeals: Standing to Appeal

Standing to appeal is limited to a party to a case adversely affected by a decision of the Bureau of Land Management. An appeal may be dismissed without prejudice as premature where it is filed prior to an adverse adjudication of appellant's rights by BLM.

APPEARANCES: Michael J. Gianunzio, Esq., Colorado Springs, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Cities of Colorado Springs and Aurora, Colorado, have appealed from a letter of the Colorado State Office, Bureau of Land Management (BLM), dated July 30, 1982, wherein BLM stated that pursuant to its unappealed decision of June 5, 1974, appellants' right to construct facilities for the transmission of water on right-of-way C-013867 had been suspended indefinitely. BLM noted that in order to reinstate the right of construction appellants were required to file an application for reinstatement.

In their statement of reasons on appeal appellants contend inter alia that BLM violated regulatory procedures concerning suspension of right-of-way

authorizations. Specifically, appellants contend that BLM violated the provisions of 43 CFR 2803.4 regarding the suspension and termination of rights-of-way.

Right-of-way C-013867, granted pursuant to the Act of February 1, 1905, ch. 288, § 4, 33 Stat. 628, repealed by Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 706(a), 90 Stat. 2743, 2793, is one of four acquired by the appellants by assignment in 1962. The assignments were approved by this Department by decision of January 29, 1963, subject to stipulations requested by the Forest Service. Rights-of-way C-08843, C-013867, C-016262, and C-016468 were issued by BLM in connection with the development of the Homestake Water Project, a joint venture between the Cities of Colorado Springs and Aurora, Colorado, leading to the construction in two phases of water diversion systems in the Homestake Creek, Cross Creek, and Eagle River drainage areas.

By decision dated June 3, 1974, the Colorado State Office, BLM, suspended the right of appellants to construct facilities for the transmission of water on rights-of-way C-08843, C-016262, and C-016468. By a later decision dated June 5, 1974, the Colorado State Office suspended appellants' right to construct facilities on the right-of-way which is the subject of this appeal, C-013867. Appellants filed a timely notice of appeal of the decision suspending rights-of-way C-08843, C-016262, and C-016468, but no appeal was filed objecting to the suspension of right-of-way C-013867.

By letter dated July 2, 1982, appellants requested a clarification from the Colorado State Office of the status of right-of-way C-013867. The BLM letter of July 30, 1982, in response to appellants' inquiry, stated in part:

Right-of-way number C-013867 has been treated separately by the Forest Service and this Bureau for the last several years because of the possibility that the Forest Service lands involved would qualify for wilderness designation. For this reason, a separate Forest Service report was submitted and a case specific decision was issued. Since the June 5, 1974, Decision suspending the right to construct right-of-way number C-013867 was not appealed to IBLA, the subsequent Board ruling on the other three cases has no effect on this particular right-of-way. Thus, we must look to the June 5, 1974, Decision to determine the status of right-of-way number C-013867. That Decision did not cancel the right-of-way, but did suspend indefinitely the right of the cities to construct facilities on the right-of-way. To reinstate the right of construction, you merely need to file a formal application. Upon receipt of the application for reinstatement of the right to construct facilities on the right-of-way, we will request recommendations from the Forest Service. Our acceptance of a progress report on May 14, 1976, cannot be construed as a modification or waiver of the June 5, 1974, decision, since the latter decision by its own terms required the continued submission of progress reports.

[1] The Board decision to which BLM refers, The Cities of Aurora and Colorado Springs, Colorado, 18 IBLA 51 (1974), states in part:

It is apparent that suspension of the right to construct additional facilities is tantamount to cancellation of the right-of-way, as the essence of the right-of-way is the right to construct facilities thereon. The BLM Manual specifically provides that rights-of-way granted pursuant to the Act of February 1, 1905, 16 U.S.C. § 524 (1970), shall be canceled only as the result of contest proceedings. V BLM Manual 3.8.50 (October 16, 1964). For that reason alone the BLM decision is nugatory. 1/

* * * Moreover, even though the pertinent regulation, 43 CFR 2802.2-3, seems to suggest that rights-of-way may be canceled solely for failure to construct facilities thereon within a five-year period, such conclusion is not tenable in every case. The Act of February 1, 1905, 16 U.S.C. § 524 (1970), provides no time limit for the construction of facilities on rights-of-way. The regulation, 43 CFR 2802.2-3, provides only that such rights-of-way are subject to cancellation for failure to construct facilities within a five-year period. The purpose of the five-year limitation is simply to aid the BLM and the Forest Service in proper administration of the lands by preventing holders of such rights-of-way from permanently interfering with other legitimate uses of the land. If, in fact, those who hold such rights-of-way have not diligently pursued the completion of their projects, their rights-of-way should be canceled, after notice and an opportunity for a hearing. Some projects, however, require a great deal of advance planning and an extensive period of time before they may be brought to fruition. If those projects are pursued with due diligence, it would be capricious to cancel rights-of-way required for completion of the project. To determine whether such projects have been pursued with due diligence, the Forest Service may, in appropriate cases, request that contest proceedings be initiated.

1/ Our conclusion that such a right-of-way may be canceled only after due notice and opportunity for hearing is based solely upon the prescribed internal procedures of the BLM. We do not decide the question of whether a right-of-way granted pursuant to the Act of February 1, 1905, is an interest which falls within the ambit of the adjudicatory procedures required by the Administrative Procedure Act, 5 U.S.C. § 554 (1970). Nevertheless, we note that in an appellate decision the Director of the Bureau of Land Management held that the hearing must be conducted in accordance with the applicable provisions of the Administrative Procedure Act. H. Schundler, Sr., Buffalo Placer Corp., Denver 029057 (October 14, 1958).

[2] As we noted above, however, no appeal was filed concerning right-of-way C-013867. Thus, absent affirmative action on the part of BLM to reconsider its position in light of the Board's decision in The Cities of Aurora and Colorado Springs, Colorado, supra, construction rights under that right-of-way continued suspended. The proper method by which appellants could obtain reconsideration by BLM would be a petition for reinstatement. Indeed, BLM expressly so advised appellants of the existence of this option. Rather than pursue this remedy, appellants sought a direct review by this Board.

It is too late to directly review the decision issued by BLM on June 5, 1974, suspending construction rights under C-013867. Nor has BLM yet issued a new decision refusing to reinstate construction rights which could be the subject of an independent review by this Board. We will not assume, as a matter of course, that BLM would ignore relevant legal precedent and refuse to vacate its earlier decision where it has not been accorded an opportunity to do so in the first instance. The instant appeal is premature as there is no decision adverse to appellants which may properly be appealed at the present time. Appellants must first petition BLM to reinstate construction rights under the right-of-way. A refusal to grant reinstatement would, at that time, be subject to review by this Board. Accordingly, we hereby dismiss this appeal as premature. 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed without prejudice as premature.

C. Randall Grant, Jr.
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Will A. Irwin
Administrative Judge

1/ We note that Vail Valley Consolidated Water District has filed an answer to appellants' statement of reasons for appeal and has requested leave to intervene as a party to the appeal or, alternatively, as an amicus curiae. In light of disposition of the instant appeal, this issue is moot.

