

MOUNTAIN BELL

IBLA 82-31

Decided September 26, 1984

Appeal from a trespass notice and decision of the District Manager of the Bureau of Land Management, Shoshone District, Idaho. ID-05-5908.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Revised Statutes Sec. 2477

Where the State of Idaho accepted a grant pursuant to sec. 8 of the Act of July 26, 1866, 43 U.S.C. § 932, otherwise known as R.S. 2477 (repealed, sec. 706(a) of FLPMA, 90 Stat. 2793), for a highway right-of-way over public lands, the State's right-of-way remains in effect pursuant to sec. 701(a) of FLPMA, 90 Stat. 2786.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Generally -- Rights-of-Way: Nature of Interest Granted -- Rights-of-Way: Revised Statutes Sec. 2477 -- Trespass: Generally

R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal law. By the time of the R.S. 2477 Idaho grant, Congress had already determined that telephone cables were not within the scope of an R.S. 2477 highway right-of-way. Thus, a telephone cable buried along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

APPEARANCES: Bruce G. Smith, Esq., Denver, Colorado, for appellant; A. Scott Loveless, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Mountain Bell (Bell) <sup>1/</sup> appeals a trespass notice and decision dated September 10, 1981, issued by the District Manager, Bureau of Land Management

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<sup>1/</sup> Appellant is also properly known as "The Mountain States Telephone and Telegraph Company."

(BLM), Shoshone District, Idaho. The trespass notice and accompanying decision note that Bell had recently buried telephone cable along the south side of State Highway 24 between the cities of Shoshone and Dietrich, Idaho, and state that portions of this new construction cross public land managed by BLM. 2/ Bell asserts that on April 15 and June 15, 1981, prior to the installation of the cable, it received permission from the State of Idaho to so place its facilities within the State's highway right-of-way, and that the trespass notice is therefore unwarranted and unauthorized. The BLM decision states in part:

The Federal Land Policy and Management Act of October 21, 1976 [FLPMA], \* \* \* 43 U.S.C. 1761 \* \* \* repealed the provisions of RS 2477 [43 U.S.C. § 932 (1982), repealed, effective October 21, 1976, FLPMA, section 706(a), 90 Stat. 2793] which previously made it possible for a utility to locate their lines within a road right-of-way without filing with BLM. This Act has also made it mandatory to file a right-of-way with the BLM on all previously constructed lines which do not presently have authorization. This should be completed under the new provisions of the 1976 Act.

Therefore, you should submit an as-built survey of the new buried cable in accordance with the right-of-way filing procedures outlined in the enclosed information bulletin #9. Until a right-of-way is granted on the subject line it will be considered in trespass. Other Mountain Bell lines and cables should also be filed on where they cross public lands, in or outside of road rights-of-way, if they do not have written authorization by the BLM.

BLM's trespass notice states Bell's action is a violation of FLPMA, 43 CFR 2800, and the BLM Manual. 3/ However, Bell argues that under the facts of this case BLM had no statutory or regulatory authority to require Bell to obtain a Federal right-of-way grant prior to laying the communication cable.

[1] State Highway 24, which crossed public lands, was first established as a roadway by public use in the early 1900's, and was designated a State

2/ The trespass notice describes the affected public land as:

"T. 6 S., R. 18 E., Boise Meridian, Lincoln County, Idaho  
Section 7: SE 1/4 NE 1/4  
8: SW 1/4 NW 1/4, NE 1/4 SW 1/4, NW 1/4, SE 1/4,  
S 1/2 SE 1/2  
9: SW 1/4 SW 1/4"

3/ The BLM manual covers the agency's internal operations only, and does not contain rules binding upon the general public. Therefore, Bell is not responsible for failing to abide by the manual's directives. Morton v. Ruiz, 415 U.S. 199, 232-36, 94 S. Ct. 1055, 1073-75 (1974) (the Bureau of Indian Affairs manual is not binding on the public); Bryner Wood, 52 IBLA 156, 161 n.2, 88 I.D. 232, 235 n.2 (1981) (BLM Organic Act Directives "are binding neither on this Board nor on the general public"). Of course, Bell must comply with any relevant statute and duly promulgated regulation.

highway by the State in 1919. Section 5 of the Act of July 26, 1866, 14 Stat. 253, former section 2477 of the Revised Statutes, 43 U.S.C. § 932 (1970 ed.) (R.S. 2477) (repealed by section 706(a) of FLPMA), provided that: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." No action by the Federal Government was necessary, because R.S. 2477 was "a present grant which [took] effect as soon as it [was] accepted by the State. \* \* \* All that [was] needed for acceptance [was] some 'positive act on the part of the appropriate public authorities of the State, clearly manifesting an intention to accept \* \* \*.' Hamerly v. Denton, Alaska, 359 P.2d 121, 123 (1961)." Wilderness Society v. Morton, 479 F.2d 842, 882 (D.C. Cir. 1973) (en banc), cert. denied, 411 U.S. 917 (1973) (footnotes omitted). Although R.S. 2477 was repealed by section 706(a) of FLPMA, sections 509(a) and 701(a) clearly protect rights-of-way existing on October 21, 1976. Section 509(a), 43 U.S.C. § 1769(a) (1982), states:

Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. However, with the consent of the holder thereof, the Secretary concerned may cancel such a right-of-way or right-of-use and in its stead issue a right-of-way pursuant to the provisions of this subchapter.

Thus, Idaho's highway right-of-way over Federal land is proper and secure.

[2] The issue before this Board, however, is the scope of the right-of-way granted under R.S. 2477. This issue was recently resolved in United States v. Gates of the Mountains Lakeshore Homes, Inc., 732 F.2d 1411 (9th Cir. 1984), wherein Mountain Bell was defendant-intervenor-appellee. The appeals court held that R.S. 2477 does not provide for the construction of the grant according to the law of the state in which the land subject to the grant is situated; rather, its construction is a question of Federal Law. Citing Humboldt County v. United States, 684 F.2d 1276, 1280 (9th Cir. 1982), the court noted that any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the Government. In Gates of the Mountains, the question presented was whether a powerline without a Forest Service right-of-way, which had been laid along an R.S. 2477 road traversing public land, trespassed upon the rights of the United States. The Ninth Circuit held it did, reversing an opposite holding by the United States District Court for the District of Montana, reported at 565 F. Supp. 788.

Applying the rationale of Gates of the Mountains, supra, to the subject case, by the time of the Idaho grant Congress had already determined that lines for telephone communication were not within the scope of an R.S. 2477 highway right-of-way and had excluded any implied borrowing of state law on this point. See the Act of February 15, 1901, 31 Stat. 790, 43 U.S.C. § 959 (1982), which authorized the Secretary of the Interior to permit the use of rights-of-way through public lands for telephone lines; and the Act of March 4, 1911, 36 Stat. 1253, 43 U.S.C. § 961 (1982), 4/ which authorized the Secretary to grant easements for telephone lines for stated

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4/ The 1901 and 1911 statutes were repealed by section 706(a) of FLPMA, supra, effective Oct. 21, 1976.

periods. The earlier rights-of-way regulations stated that these Acts should control insofar as they pertained to the granting of permission to use rights-of-way for purposes therein specified. See, e.g., 43 CFR 244.32 (1940); 41 L.D. 532 (1913). The earlier regulations pertaining to R.S. 2477 explained how a state acquired an R.S. 2477 right-of-way. The regulations did not authorize a state to grant third-party rights-of-way on R.S. 2477 roads. In fact, in 1946 at 43 CFR 244.10 a trespass regulation was promulgated. 5/ Then, in 1952, language was added to the R.S. 2477 regulations. The applicable regulation, 43 CFR 244.58, provided in part that:

Rights-of-way granted by R.S. 2477 do not include rights-of-way for facilities with respect to which any other provision of law specifically requires the filing of an application for a right-of-way. Where the holder of the highway right-of-way determines that such facility will not seriously impair the scenic and recreational values of an area and its consent is obtained, the Department waives the requirement of an application for a right-of-way for all facilities usual to a highway along a highway right-of-way granted by R.S. 2477 \* \* \*. [Emphasis added.] [6/]

Thus, the Federal Government waived exercise of its right to control third-party uses, conditional upon state approval of any new third-party uses. 7/

On May 20, 1972, BLM proposed revisions to the highway right-of-way regulations. The basis for the proposed change was stated as follows (37 FR 10379):

The purpose of this amendment is to delete those provisions of the Code of Federal Regulations whereby holders of highway rights-of-way granted under title 23 U.S.C. and R.S. 2477 may grant other parties rights-of-way within the highway rights-of-way. Under the proposed amendment, such additional uses of highway rights-of-way would be granted by the Government. This would allow establishment of appropriate terms and conditions to protect environmental values within and outside the highway rights-of-way and assure an appropriate monetary return to the Government for the use of its property.

The United States reasserted its right to exercise its control over these third-party rights-of-way by proposing that 43 CFR 2822.2-2 be revised to read in pertinent part:

A right-of-way granted pursuant to R.S. 2477 confers upon the grantee the right to use the lands within the right-of-way

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5/ This regulation provided in part that "[a]ny occupancy or use of the public lands without authority will subject the person occupying or using the land to prosecution and liability for trespass."

6/ This regulation was later renumbered 43 CFR 2234.2-5(b)(1), but remained substantially unchanged in content. In 1970 the regulation was redesignated 43 CFR 2822.2-2(a). 35 FR 9646 (June 13, 1970).

7/ It is questionable whether this waiver was appropriate. See Schechter Corp. v. United States, 295 U.S. 495 (1935).

for highway purposes only. Separate application must be made under pertinent statutes and regulations in order to obtain authorization to use the lands within such rights-of-way for other purposes.

The above-quoted language of 43 CFR 2822.2-2 was finalized without change on November 7, 1974, 39 FR 39440. See Penasco Valley Telephone Cooperative, Inc., 55 IBLA 360 (1981).

Beginning in 1901 Congress expressly authorized the Federal Government to grant telephone rights-of-way on public lands. This congressional stance was also taken in 1976 through FLPMA, which repealed both the 1901 and 1911 Acts and replaced them with Title V of FLPMA. It is clear that Congress fully intended for the Federal Government to continue granting rights-of-way for systems for the transmission or reception of telephone communications. See 43 U.S.C. § 1761(a)(5) (1982). The FLPMA language at 43 U.S.C. § 1770(a) (1982) allows no doubt on this point:

Sec. 510. (a) Effective on and after the date of approval of this Act, no right-of-way for the purposes listed in this title shall be granted, issued, or renewed over, upon, under, or through such lands except under and subject to the provisions, limitations, and conditions of this title \* \* \*.

Based on the foregoing, we conclude that at least since 1901 the scope of an R.S. 2477 right-of-way grant has not encompassed the legal right to grant third-party rights-of-way. §/ Consequently, we find that appellant's telephone cable laid along an R.S. 2477 highway with a right-of-way from the State of Idaho but without the requisite BLM right-of-way is in trespass.

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.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

James L. Burski  
Administrative Judge.

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§/ There is nothing in R.S. 2477 which invested the state with any right to create rights-of-way over public lands for third parties. During the period when the Federal waiver was operative, the state merely exercised the delegated power of the United States. We therefore disagree with some of the rationale provided in the BLM decision, but not with the result of the decision.