

JAMES L. MORRISON SR., ET AL.

IBLA 84-39

Decided June 19, 1985

Appeal from a decision of the Boise District Office, Bureau of Land Management, cancelling right-of-way grant I-7234.

Affirmed.

1. Act of March 3, 1891 -- Rights-of-Way: Act of March 3, 1891 -- Rights-of-Way: Cancellation

BLM may properly cancel a right-of-way granted pursuant to the Act of March 3, 1891, 43 U.S.C. § 946 (1970), for violation of the terms of the grant where the grantee has failed to file proof of construction, has failed to maintain a fence around the pump site (including the planting of vines thereon to screen the fence), and has failed to maintain a performance bond pending acceptance of proof of construction. Such cancellation may be effected without a hearing where no material factual issue is in dispute.

APPEARANCES: Roderick B. Wood, Esq., Homedale, Idaho, for appellant; Robert S. Burr, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

James L. Morrison, Sr., Dolly V. Morrison, Joseph A. Morrison, and Thomas M. Timbers appeal from a decision of the Boise District Office, Bureau of Land Management (BLM), dated August 31, 1983, cancelling right-of-way grant I-7234. In this decision, BLM stated that cancellation was caused by appellants' failure to submit proof of construction for their irrigation pump site, pipeline, and ditch. Additional grounds were appellants' failure to maintain the fence around the pump site (including the planting of vines thereon to screen the fence) and the failure to maintain a performance bond in the amount of \$ 10,000.

Prior to this decision, on June 20, 1983, BLM had issued another decision reciting these same deficiencies, granting appellants 30 days within which to correct them, and informing them that, if they failed to comply,

right-of-way I-7234 would be cancelled. BLM noted that, in such an eventuality, appellants would no longer enjoy the benefits of the Act of March 3, 1891, repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, section 706(a), 90 Stat. 2743, 2793, and instead would be given the option of continuing their right-of-way under the provisions of section 501 of FLPMA, 43 U.S.C. § 1761 (1982), or removing all their facilities from the right-of-way. This decision was sent by certified mail, and the return receipt card attached thereto indicates that it was signed for by Jim Morrison and was, presumably, received by appellants. 1/ No correspondence

1/ It seems reasonably likely that the Jim Morrison who signed for the decision was not appellant but rather his son. The return receipt card bearing Jim Morrison's name indicates that this decision was sent to all appellants at a single address, viz., P.O. Box 41, Grandview, Idaho 83624. This address first appears in the file on an earlier return receipt card, dated Nov. 5, 1981, signed by Chris Morrison, the daughter-in-law of appellant James L. Morrison, Sr. The decision attached to this card had been sent to all appellants c/o James Morrison, Grandview, Idaho 83624. BLM appears to have used the Grandview address after it failed to reach appellants at their record address, P.O. Box 137, Mountain Home, Idaho 83647. The envelope returned to BLM bearing the Mountain Home address bears the words "Moved to Grandview over 2 yrs ago." The source of this information and the source of the more complete address (P.O. Box 41, Grandview, Idaho 83624) is unknown.

These facts become relevant in adjudicating BLM's motion to dismiss the instant appeal. BLM points out that its decision of Aug. 31, 1983, was received by Chris Morrison on Sept. 9, 1983, and that appellants' notice of appeal, dated Oct. 12, 1983, was filed with BLM on Oct. 13, 1983. Relying on 43 CFR 4.411, BLM maintains that the notice of appeal was untimely because it was not transmitted within 30 days of receipt of the decision on appeal. Appellant contends that he did not actually receive the notice until Sept. 16, 1983.

We deny the motion to dismiss. Had BLM mailed the decision on appeal to appellants' address of record, P.O. Box 137, Mountain Home, Idaho 83647, its motion would have been granted. Victor M. Onet Jr., 81 IBLA 144 (1984). If, alternatively, appellants had designated Chris Morrison as their agent for receipt of service, its motion would also have been granted. Neither factual premise, however, is apparent from the case file. Indeed, the contrary appears. Appellants' opposition to BLM's motion to dismiss is an affidavit from James L. Morrison, Sr. Therein at paragraphs 5 through 7, appellant states:

"5. That such Chris Morrison was not your affiant's agent, and did not have authority to receive such letter on your affiant's behalf, but apparently did in fact accept it but did not deliver such letter to your affiant until 9-16-83.

"6. That the address of Chris Morrison (and her husband, James Morrison) is Box 41, Grandview, Idaho 83624.

"7. That the address of your affiant (the appellant) is Box 182D, Star Route B, Bruneau, Idaho 83604."

between BLM and appellants appears in the case file during the 2-month period between BLM's decisions.

Although FLPMA repealed the Act of March 3, 1891, section 701(a) of FLPMA, 90 Stat. 2786, expressly provided that nothing in FLPMA should be construed as terminating any valid right-of-way existing on October 21, 1976. Right-of-way I-7234 was so existing, having been issued on April 2, 1974. It is, therefore, appropriate to examine the Act of March 3, 1891, as amended, 43 U.S.C. §§ 946-949 (1970), to understand the statutory basis for this right-of-way.

That Act provided, in part:

The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage * * * to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; * * *.

Any canal or ditch company desiring to secure the benefits of sections 946-949 of this title shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, * * * file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way.

The provisions of sections 946-949 of this title shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, * * * on the filing of the certificates and maps therein provided for. * * * Provided [emphasis in original], That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture. [Emphasis supplied.]

In Kern River Co. v. United States, 257 U.S. 147, 152 (1921), Justice Van Devanter held that the right-of-way granted by the Act was neither "a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the act." In so ruling, he followed an earlier Supreme Court decision styled Rio Grande Western Ry. v. Stringham, 239 U.S. 44, 47 (1915), which had interpreted grants under the

General Right-of-Way Act of 1875, 43 U.S.C. § 937 (1970), as granting limited fees. See also Northern Pacific Ry. v. Townsend, 190 U.S. 267 (1903).

Under the Court's analysis in Kern River, the grant became effective upon approval by the Secretary, and this approval, once given, could not be recalled or annulled by the Secretary, either for fraud practiced in its procurement or for mistake in its issuance. To do that, the Court held, it was necessary to resort to a suit in equity. Kern River Co. v. United States, *supra* at 151-52.

More than 20 years later, the Supreme Court in Great Northern Ry. v. United States, 315 U.S. 262, 279 (1942), reexamined the analysis in Stringham and rejected it, deciding that the 1875 Act granted an easement, not a fee. ^{2/} Following Great Northern Ry., *supra*, this Department, noting that the Stringham case was the only authority cited by Justice Van Devanter in support of his "limited fee" characterization, held that grants under the 1891 Act should be deemed to be easements and that previous decisions of the Department based upon a repudiated contrary construction should no longer be followed. E. A. Wight, A-24101 (Nov. 5, 1945).

One consequence of the holding in Great Northern Ry. became apparent in Clarence A. Nichols, Jr., Denver 033460 (Aug. 22, 1957), when the Acting Director, Bureau of Land Management, concluded that cancellation of a grant under the 1891 Act could be effected by the Secretary without the need for a court proceeding. Indeed, Departmental regulations had been changed in 1943 to reflect this position. Solicitor's Opinion, M-36500 (May 5, 1958).

The instant case is before the Board because BLM, without resort to court proceedings, has cancelled right-of-way I-7234. Such administrative cancellation is consistent with Nichols, *supra*, and Fred Markle, 6 IBLA 52 (1972). ^{3/} The Markle decision is also germane for its discussion of whether BLM should have afforded appellants a hearing on the grounds for cancellation:

Ordinarily where a federal statute creates a property right in a grantee subject to the completion of certain statutory requirements, and the grantee's right is challenged by the Government on grounds raising factual questions disputed by the grantee, notice of such grounds and the opportunity for a hearing is afforded to satisfy due process. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337-38 (1963); United States v. William A. McCall and R. J. Kaltenborn, 1 IBLA 115 (1970); Claude E. Crumb, 62 I.D. 99 (1955). Cf. Clayton E. Racca, 72 I.D. 239 (1965). But, as stated in United States v. Consolidated Mines and Smelting Co., Ltd.,

^{2/} The tangled history of the General Right-of-Way Act of 1875 is explored in greater detail in Champlin Petroleum Co., 68 IBLA 142, 89 I.D. 561 (1982).

^{3/} Unlike Nichols and Markle, no regulation applicable to cancellation of rights-of-way under the Act of Mar. 3, 1891, was extant at the time of BLM's adjudication. This was caused by a large scale revision of 43 CFR Part 2800 occasioned by FLPMA. The BLM Manual advises that in most instances, the October 1979 edition of 43 CFR may be used in governing actions and decisions for pre-FLPMA grants. BLM Manual Part 2804.41.

455 F.2d 432, 453 (9th Cir. 1971):

It is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory -- even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks. [Citations omitted.]

To discern whether material factual issues exist which would require that BLM afford appellants a hearing, we look to appellants' statement of reasons on appeal. The substance of this statement is as follows:

C. The appellants did construct their irrigation pump site, pipeline and ditch. BLM officials have seen this and this matter is adequately proved.

D. The fence around the pump site was built and maintained to the correct specifications and to the best of the Morrisons' ability. The fence has been subject to vandalism. On one occasion a fisherman backed into the fence and knocked it down. The Morrisons took the necessary materials to repair the fence back to the site. Before these could be replaced, these materials were stolen. Due to the vandalism and theft, which are all outside of the control of the Morrisons, the fence did not stay completely maintained. BLM officials have been made aware of these problems.

E. James Morrison planted wisteria as the plant vines to screen the fence. This wisteria was planted at the direct recommendation of a BLM Resource Manager. The wisteria did not take.

F. James Morrison alleges that he did in fact purchase, obtain and submit a performance bond in the amount of \$ 10,000.00. BLM officials should have a record of this in the file. It is the appellants' recollection that the bond was in force and effect and was outstanding for approximately three years. The bond was allowed to lapse because Morrisons had complied with all applicable requirements for the pumping station.

G. The right-of-way and pumping station is necessary to the irrigation of productive farm lands.

H. The ends of justice will be served by the reversal of the decision of cancellation of the right-of-way. [Emphasis in original.]

In response to BLM's charge that proof of construction has not been filed, appellants state only that the pumpsite, pipeline, and ditch have been built and viewed by BLM. This, however, does not contradict BLM's charge, nor does it satisfy section 3 of the right-of-way, which states that

the right-of-way is granted subject to the "[f]iling of proof of construction within 5 years of the date of grant." As BLM pointed out in an October 29, 1981, decision calling for proof of construction, such proof may be made by furnishing an engineer's statement and an applicant's certificate. The decision even indicates that samples of these documents were enclosed with the decision.

We read appellants' statement of reasons at paragraph D to indicate that appellants were unsuccessful in repairing the fence around the pump site after a fisherman knocked it down. Though appellants' intention to repair the fence is clear, it is also clear that repair has not taken place. We perceive no factual dispute on the issue of fence repair. Such repair was required by stipulations 8 and 10 to the grant. 4/

Stipulation 8 also required that any fence around the pump station be masked with perennial vines, shrubs, or willow trees. Appellants' acknowledged lack of success with wisteria only confirms BLM's charge.

Paragraph F of appellants' statement of reasons indicates that the performance bond purchased by James Morrison was allowed to lapse because the Morrisons believed that they had complied with all applicable requirements for the pumping station. As noted in stipulation 16 to the grant, this bond was to be maintained until "proof of construction and compliance inspection" had been satisfied. The file discloses that this bond was not maintained beyond March 7, 1983.

[1] We, thus, perceive no factual dispute that would require BLM to afford appellants a hearing. Although BLM may be procedurally correct in the instant case, we must also inquire whether BLM's charges support cancellation. Right-of-way I-7234 states that it was issued on April 2, 1974, and is subject to the regulations at 43 CFR Parts 2800 and 2870. Regulation 43 CFR 2802.3-1 (1974), in effect at the time of the grant, provides that all rights-of-way approved pursuant to Part 2800, as was I-7234, shall be subject to cancellation for violation of any provision of that part applicable thereto or for the violation of the terms and conditions of the right-of-way. 5/

Appellants' statement of reasons acknowledges violations of those provisions in the grant relating to the filing of proof of construction, fence maintenance (including screening), and bond. Indeed, as far back as October 29, 1981, BLM had notified appellants of the necessity of filing

4/ Stipulation 8 states: "A locked enclosure seven feet high, security type fence, will be placed around the pump station. The fence will be masked with perennial vines, shrubs, or willow trees, and warning signs will be posted on any gate." Stipulation 10 states in part: "The pumpsite will be kept clean at all times * * * and will be maintained so as not to detract from the area."

5/ A similar regulation has been in effect at all relevant times. See, e.g., 43 CFR 2802.3-1 (1979).

proof of construction. 6/ In the absence of any showing of subsequent compliance, these violations clearly support BLM's action in this case. 7/ See Neil J. Cummins, 32 IBLA 384 (1977); Grace Belle Wilkerson, 10 IBLA 279 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Boise District Office is affirmed.

James L. Burski
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

6/ This notification was sent to appellants' address of record. Though it was returned because appellant James Morrison, Sr., had apparently moved without providing BLM with his new address, appellants are properly charged with constructive notice thereof by application of 43 CFR 1810.2(b).

7/ We note also that appellants' failure to timely file their proof of construction violated 43 CFR 2802.2-2 (1974) and its 1979 equivalent, 43 CFR 2802.2-2 (1979).

ADMINISTRATIVE JUDGE GRANT CONCURRING:

Although I concur with the decision of my colleagues herein, I would emphasize that the basis for cancellation of the right-of-way is the failure, after notice, to comply with the conditions thereof embraced in the stipulations attached to the grant, rather than the failure to construct the improvements authorized.

Section 20 of the Act of March 3, 1891 (formerly codified at 43 U.S.C. § 948 (1970)), ^{1/} clearly provided for the forfeiture of the right-of-way as to improvements not constructed within 5 years. Nevertheless, under the statute, it has been held that where "substantial improvements are made, which are of practical use to an irrigation company in its business of supplying water to the inhabitants of the particular territory, the requirements of the statute are satisfied and the rights obtained may not be disturbed." United States v. Tujunga Water and Power Co., 18 F.2d 120 (D. Cal. 1927). The Nichols, ^{2/} and the Markle case, ^{3/} cited by my colleagues as supporting administrative cancellation of a right-of-way involved improvements not actually constructed by the grantee or successors-in-interest. Thus, in Nichols the grantees of a reservoir right-of-way under 43 U.S.C. § 946 (1970) were required to relinquish that portion of the authorized right-of-way in excess of the smaller facility actually constructed subject to the threat of administrative cancellation of the right-of-way for failure to construct the authorized improvement. In the Markle case, administrative cancellation of the right-of-way was upheld where the authorized irrigation pipeline was not constructed. Similarly in the Cummins case ^{4/} cancellation of the right-of-way was upheld in the absence of construction of the pipeline. On the other hand, in Grace Belle Wilkerson, 10 IBLA 279 (1973), on appeal from a BLM decision holding a water pipeline right-of-way for cancellation for lack of proof of construction, the Board set aside and remanded the case upon the representation of appellant, concurred in by BLM, that the pipeline had in fact been constructed.

In the case at issue here the irrigation facility authorized by the right-of-way was constructed, although not in conformity with the conditions of the right-of-way. Despite receipt of notice to conform the improvements to the conditions stipulated in the right-of-way grant, appellants have failed to do so. It has been asserted in the past that the 1891 Act constitutes an in praesenti grant of a right-of-way for irrigation projects within its scope and that the Secretary of the Interior lacks authority to condition such grants. This contention was explicitly rejected by the court in Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981), cert. denied, 454 U.S. 965. In Grindstone Butte, the court held that entitlement to a right-of-way under the 1891 Act (43 U.S.C. §§ 946-948 (1970)) was qualified by the Act of February 15, 1901, ch. 372, 31 Stat. 790 (formerly codified at 43 U.S.C.

^{1/} Repealed, section 706(a), Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793.

^{2/} Clarence A. Nichols, Jr., Denver 033460 (Aug. 22, 1957).

^{3/} Fred Markle, 6 IBLA 52 (1972).

^{4/} Neil J. Cummins, 32 IBLA 384 (1977).

§ 959 (1970)) 5/ which authorized the Secretary to condition the grant of a right-of-way "upon compliance with reasonable regulations and terms designed to protect the public interest." 638 F.2d at 103. Thus, it must be concluded that the Secretary has the authority to cancel the right-of-way herein for violation of the conditions thereof. 43 U.S.C. § 959 (1970); 43 CFR 2802.3-1 (1974).

C. Randall Grant, Jr.
Administrative Judge.

5/ Repealed, section 706(a), FLPMA, supra.

