

Appeal from a decision of the Grand Junction District Office, Colorado, Bureau of Land Management, providing that right-of-way application C-40238 would be considered withdrawn if the right-of-way grant with attached stipulations were not executed and returned.

Affirmed.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Regulations: Binding on the Secretary--Rights-of-Way:
Applications--Rights-of-Way: Conditions and Limitations

BLM may condition approval of a right-of-way for an access road upon acceptance by the right-of-way applicant of stipulations imposing liability for any damage or injury incurred by the United States or third parties in connection with use of the right-of-way area by the applicant, where those stipulations reflect regulatory requirements which are binding on the Department.

APPEARANCES: Carl H. Alber, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Carl H. Alber, Jr., has appealed from a decision of the Grand Junction District Office, Colorado, Bureau of Land Management (BLM), dated August 8, 1985, providing that his right-of-way application, C-40238, would be considered withdrawn and the case closed if the right-of-way grant with attached stipulations were not executed and returned to BLM.

On March 11, 1985, Alber filed an application for a right-of-way over an existing road which would provide access across public lands in secs. 19 and 30, T. 13 S., R. 99 W., sixth principal meridian, Mesa County, Colorado, from Colorado Highway 141 to his private land situated in UnawEEP Canyon. In his application Alber stated that he intended to upgrade and maintain the existing road:

Road will be graded, constructing borrow ditches to crown road bed with 12' top width. Culverts will be installed where needed. The surface will be graveled as needed to provide year long all

weather road. * * * Once project is completed, normal maintenance can be done with farm equipment.

On April 22, 1985, after conducting an environmental analysis of the right-of-way application, BLM issued a decision offering a right-of-way grant to Alber. 1/ BLM required him to execute and return the grant to BLM, stating that failure to comply would result in his application being considered "withdrawn and closed on the records of this office." Alber failed to comply. In its August 1985 decision, BLM afforded him an additional opportunity until August 23, 1985, to execute and return the right-of-way grant. It stated that, if he did not, it would consider the application withdrawn and the case closed. Alber has appealed that decision. 2/

In his statement of reasons for appeal, appellant objects only to paragraphs 5 and 6 of the standard stipulations attached to his right-of-way grant as Exhibit B. These stipulations provide:

5. The holder shall be fully liable to the United States for any damage or injury incurred by the United States in connection with the use and occupancy of the right-of-way area by the holder, its employees, contractors, or employees of the contractors.

6. The holder shall be fully liable for injuries or damages to third parties resulting from activities or facilities on lands under Federal jurisdiction in which the damage or injury occurred. The holder shall fully indemnify the United States for liability,

1/ The right-of-way grant authorizes the holder to construct, operate, maintain and terminate an access road. The grant does not specify the construction requirements, other than to limit the road surface to 12 to 15 feet in width and require installation of a particular culvert, but it does provide for a preconstruction conference. The grant requires the holder to maintain the road, including blading the roadway and cleaning ditches and drainage facilities. The right-of-way is limited to 3,500 feet in length and 30 feet in width, encompassing about 2.4 acres. The right-of-way is deemed to be "nonexclusive, nonpossessory."

2/ BLM's Aug. 8, 1985, decision was not a final decision; it was an interlocutory decision. See Fortune Oil Co., 71 IBLA 153 (1983). It directed him to execute and return the stipulations prior to a date certain and stated that failure to do so would result in the case being closed without further notice. The decision incorrectly stated that Alber had 30 days from receipt of the decision in which to appeal. Since the decision could not have become final until the expiration of the time established for compliance, the appeal period should have commenced the day after the end of the compliance period. See Carl Gerard, 70 IBLA 343, 346 (1983). When Alber filed his "appeal," it was actually an objection to an action proposed to be taken (the case had not been closed). Under 43 CFR 4.450-2, BLM should have treated it as a protest. See Randall Gerlach, 90 IBLA 338 (1986); Goldie Skodras, 72 IBLA 120 (1983). No useful purpose would be served by remanding the case to BLM for consideration of the "protest," however. Therefore, we will adjudicate it as an appeal. See Beard Oil Co., 97 IBLA 66 (1987).

damage, or claims arising in connection with the holder's use and occupancy of the right-of-way area.

Appellant argues that:

This road is used by many other people as an access to the Public Lands, and I am sure this traffic will increase with any road upgrading. I have no problem with this, although I will do the upgrading and maintenance at my own expense and also pay an annual rental fee. I do however feel that it is inconsistent to be held liable for something over which I have no authority or control.

[1] Pursuant to section 501(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a) (1982), BLM has authority to issue rights-of-way across public lands for roads. Under section 504(c) of FLPMA, 43 U.S.C. § 1764(c) (1982), BLM may condition those grants upon the execution of stipulations. See 43 CFR 2801.2(b); Donald R. Clark, 56 IBLA 167, 169 (1981); Ute Water Conservancy District, 47 IBLA 71 (1980). With respect to liability incurred in connection with right-of-way grants, section 504(h)(1) of FLPMA, 43 U.S.C. § 1764(h)(1) (1982), provides that the Secretary

shall promulgate regulations specifying the extent to which holders of rights-of-way under this subchapter shall be liable to the United States for damage or injury incurred by the United States caused by the use and occupancy of the rights-of-way. The regulations shall also specify the extent to which such holders shall indemnify or hold harmless the United States for liabilities, damages, or claims caused by their use and occupancy of the rights-of-way.

The Departmental regulations governing liability incurred in connection with right-of-way grants are set out at 43 CFR 2803.1-4. With respect to the holders of right-of-way grants, these regulations provide in relevant part that:

(a) * * * each holder shall be fully liable to the United States for any damage or injury incurred by the United States in connection with the use and occupancy of the right-of-way or permit area by the holder.

* * * * *

(d) * * * holders shall be fully liable for injuries or damages to third parties resulting from activities or facilities on lands under Federal jurisdiction in which the damage or injury occurred.

(e) * * * holders shall fully indemnify or hold harmless the United States for liability, damage or claims arising in connection with the holder's use and occupancy of rights-of-way or permit areas.

Thus, it is clear that the stipulations to which appellant objects merely reiterate the requirements set forth in Departmental regulations, which would apply even in the absence of inclusion of the stipulations in the right-of-way grant. ^{3/} The Board has no authority to declare invalid duly promulgated regulations of the Department. They have the force and effect of law and are binding on the Department. Chugach Alaska Corp., 94 IBLA 24 (1986), appeal filed, Chugach Alaska Corp. v. Hodel, No. A 87-066 (D. Alaska Feb. 18, 1987). Therefore, we, likewise, have no authority to preclude inclusion of standard stipulations 5 and 6 in appellant's right-of-way grant. ^{4/}

Accordingly, 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.

Bruce R. Harris
Administrative Judge

We concur

John H. Kelly
Administrative Judge

Will A. Irwin
Administrative Judge

^{3/} The only exception is in standard stipulation 5 where BLM states that appellant is liable for any damage or injury incurred by the United States in connection with use and occupancy by appellant's employees or his contractors and their employees. However, to the extent BLM interprets this language to mean that appellant will only be held liable for the actions of these other persons where he would otherwise be liable as the "holder" of the right-of-way under principles of agency law, the language conforms to 43 CFR 2803.1-4(a) and is proper.

^{4/} Should Alber again seek a FLPMA right-of-way, BLM should consider whether the existing access road constitutes a "public highway" under section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1976) (R.S. § 2477) (repealed by section 706(a) of FLPMA, 90 Stat. 2793, effective October 21, 1976), thereby precluding the necessity for a FLPMA right-of-way. See Dean R. Karlberg, 98 IBLA 237 (1987). We note that the Land Report, at page 2, states that the road has been "used for access to [appellant's] property for many years." This may have been sufficient to have created a "public highway" under State law. See Nick DiRe, 55 IBLA 151, 155 (1981) (citing Leach v. Manhart, 102 Colo. 129, 77 P.2d 652 (Colo. 1938)).

