

ROGER G. GERVAIS
PATSY V. GERVAIS

IBLA 91-372

Decided December 1, 1993

Appeal from a decision of the California Desert District Office, Bureau of Land Management, denying right-of-way application CACA 27448.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976: Wilderness

An application for a right-of-way for transportation of water across a WSA was properly rejected by BLM because it was inconsistent with purposes for which the land was managed. A right-of-way for water facilities was not shown to have existed prior to initiation of wilderness review by title documents that made no reference to facilities to transport water, nor did traces of an old pipeline at the proposed right-of-way location tend to show the existence of a continuing right-of-way for such facilities.

APPEARANCES: Roger G. Gervais, Manhattan Beach, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Roger G. Gervais and Patsy V. Gervais have appealed from a May 29, 1991, decision of the California Desert District Office, Bureau of Land Management (BLM), filed in accordance with section 501 of the Federal Land Policy and Management Act (FLMPA), 43 U.S.C. § 1761 (1988), denying their application to construct and maintain a water diversion and pipeline on public land in the Saline Valley, California (right-of-way application CACA 27448). They had sought permission to construct a water diversion on public land in Hunter Canyon and to convey water by a pipeline (controlled by a radio antenna and receiver) to their private property across public lands in secs. 21, 22, and 28, T. 14 S., R. 38 E., Mount Diablo meridian, California. The May 1991 decision rejected their application because the proposed diversion point and part of the pipeline route were found to be within the Inyo Mountain Wilderness Study Area (WSA) and consequently their proposal could

not meet standards established for construction and reclamation of such rights-of-way by BLM's Interim Management Policy and Guidelines for Land under Wilderness Review (see 44 FR 72014 (Dec. 12, 1979)). A timely appeal was filed.

Appellants own property in Saline Valley that was once the site of a borax operation, apparently purchased by them on October 8, 1980. See Exhibit 2 to statement of reasons (SOR). On October 10, 1990, they applied for permission to develop a spring on public land in Hunter Canyon, a tributary of Saline Valley, and proposed to pipe the spring water approximately 6000 feet across public land to their private property. They stated that they had applied to the State for a water right in Hunter Canyon, and claimed use of up to 4,500 gallons of water daily from the source which would replace an existing water well. In support of their right-of-way application, appellants later provided BLM with a copy of California Small Domestic Use Registration Certificate No. R 69, dated November 15, 1990, granting them an appropriation. On November 26, 1990, a field inspection of the proposed right-of-way location was conducted by BLM together with the appellants. The field examiner reported concerning his observations of the site, that:

We first walked to the water diversion site in Hunter Canyon. The proposed diversion site is a small basin approximately one quarter mile up from the mouth of Hunter Canyon. We were able to drive within 50 yards of the mouth of Hunter Canyon.

There is a well defined trail leading up the Canyon all the way to the small basin. Water flows into the basin from some spring or springs located upstream. Water flows out of the basin downstream for approximately 1/4 mile before disappearing into the alluvial canyon bottom.

Mr. Gervais wants to divert water at the Basin because it is less likely to be contaminated by Burros and possible arsenic from natural sources. Mr. Gervais proposes to pipe the water from the basin in a 1&1/2 inch black plastic pipe. A radio transmitter mounted 100 foot above the basin on the south side of the canyon wall would control a valve in the basin.

There is historical evidence of prior water diversion from this location. The evidence consists of old metal pipe, small troughs and rock retaining walls evidently used to support and secure the pipe. At the mouth of the Canyon, there is evidence of a small rock pond.

Next we visited the Gervais' private land in Saline Valley. The Gervais own the property on which the old Conn and Trudo Borax mill site operated. From the mill site we walked sought west along an old path that was apparently the route of an old pipeline. Bits and pieces of the old pipeline are evident for approximately 1/3 mile. At that point there are two old ponds which

apparently provided water to the pipeline. The ponds are located approximately 1/2 mile from the mouth of Hunter Canyon. Although there is no clearly defined wash, it appears the Hunter Canyon drainage flowed to these old ponds. There was no evidence of any pipe upstream from the ponds. There is little doubt though, that water from Hunter Canyon somehow reached the ponds and was then piped to the Borax millsite.

(Field report of Tom Gey dated Jan. 8, 1990, at 1).

Appellants have submitted a number of exhibits with their SOR and supplemental SOR to support the contention that their right-of-way application should have been approved by BLM. These exhibits consist of copies of certificates of a patent and mineral patent and surveyor's plats and supporting documentation, together with extracts from publications dealing with borax works that were in existence around the turn of the century on the land now owned by appellants. Appellants also point to a limitation appearing in escrow instructions for their 1980 land purchase to support the position that they acquired an appurtenant water system when they bought the Saline Valley property. See SOR at 2, exhibit 2. They seek to bolster this position by reference to language appearing in a copy of patent certificate No. 504, issued to their predecessor-in-interest Frederick Conn in 1891, providing that patent was issued "subject to any noted and acquired water rights * * * and rights to ditches and reservoirs." For the same purpose, appellants rely on similar language appearing in Mineral Certificate No. 228 issued to Edward Trudo (another predecessor-in-interest) in 1892 stating the same exception from the mining grant as did the patent issued to Conn. See Supplemental SOR at 1, and exhibits attached. Appellants conclude that they "have submitted proper proof that the easement is ours as granted with the land back in 1891." Id. Essentially the same documentation as has been furnished by appellants on appeal was before BLM at the time the right-of-way application was denied in May 1991.

BLM rejected the contention that the copies of original title documents provided by appellants supplied proof of the existence of water facilities appurtenant to the grant (Decision at 2). The May 1991 decision also determined that there had been no showing by appellants that they acquired an existing right-of-way for water facilities obtained under provisions of law applicable before passage of section 501 of Title V of FLPMA. As a consequence, BLM found that FLPMA section 501 controlled the application by appellants and determined that the right-of-way should be denied because:

The proposed diversion site and pipeline are located within the Inyo Mountains Wilderness Study Area. * * * because the proposed diversion site is located within the Wilderness Study Area, consideration of alternate pipeline routes is irrelevant. Any feasible diversion site would be within the Wilderness Study Area, since water does not consistently flow beyond the mouth of Hunter Canyon.

(Decision at 2). Based on this finding, BLM concluded that the right-of-way sought could not be granted because the diversion works and pipeline

proposed by appellants would impair the suitability of the WSA for preservation as wilderness. Id. at 3. Appellants do not dispute the finding that the diversion point for their proposed water system would be within the Inyo Mountains WSA, which was included in a wilderness inventory completed on March 31, 1979 (area 122).

Their principal argument on appeal rests on a fundamental error in the way appellants read the title documents provided in support of their application. They seek to find a grant of an easement for a water system appurtenant to their land in language found in the original conveyance documents that refers to (and excludes or excepts from the grant) prior existing rights of others. If there were any such conflicting uses at the time of patent, however, they would have diminished (rather than increased) the estate granted by the patent. The references to water rights, ditches, and reservoirs in the 1891 and 1892 certificates are clearly exclusions from the grant, which is made "subject to" any such rights (it is not known if there were any such rights). The phrase "subject to" means to subordinate or make subordinate or inferior to. See Black's Rurr Dictionary, 4th Ed. (1951). Because of this basic error in interpretation, the title records offered by appellants do not support their position that they acquired by deed, in addition to described lands purchased by them in Saline Valley, a prior existing appurtenant water system on Federal land. Similarly, the language in their escrow agreement excepting coverage from a purported grant in their deed for "water rights, ditches and ditch rights" does not suggest that there are any such rights, but is a simple declaration that there will be no title insurance coverage for them. It neither suggests or denies that any such rights exist.

Nonetheless, it is apparent that at some past time there was a water system that ran from Hunter Canyon to a portion of the land owned by appellants. Appellants have offered no proof, however, to show when that system was in operation, and it appears that it has not functioned for a very long time, much of it having vanished altogether. The record establishes that the system proposed by appellants is to be an entirely new system comprised mainly of new plastic pipe and a new diversion mechanism that will be operated by radio controls, all of which facilities must be supplied by appellants. They therefore propose to construct a new water transportation system within the WSA.

The arguments advanced by appellants indicate they have confused water rights (which they seek to appropriate by application to the State) with the right-of-way that they seek from BLM. These things are, however, separate: the right-of-way across BLM lands for a pipeline is a matter apart from claims to water rights that appellants may seek to appropriate. See, generally, Lidstone v. Block, 773 F. 2d 1135 (10th Cir. 1985) (finding that questions about water rights were not relevant to litigation over a right-of-way granted by the Forest Service for transportation of water across forest lands). Grant of a right-of-way to transport water across public land is exclusively regulated by the Federal Government under FLPMA Title V. See Desert Survivors, 96 IBLA 193, 196 (1987). The question on appeal is

therefore whether BLM correctly determined that the proposed right-of-way would be inconsistent with the purpose for which the Inyo Mountains WSA is managed (see 43 CFR 2802.4(a)(1), providing for denial of rights-of-way applications that conflict with BLM planning).

Authority for rights-of-way for water transmission lines across public lands is provided by FLPMA Title V, which empowers the Secretary to "grant, issue, or renew rights-of-way * * * for pipes, pipelines * * * and other facilities and systems for the impoundment, storage, transportation or distribution of water." 43 U.S.C. § 1761(a)(1) (1988). It is clear that FLPMA was designed to replace prior acts, providing as it does that "[e]ffective on and after October 21, 1976, no right-of-way for the purposes [listed, including water pipelines] shall be granted, issued, or renewed over, upon, under, or through [public] lands except under and subject to the provisions, limitations, and conditions of this subchapter [V]." 43 U.S.C. § 1770 (1988). Approval of applications for rights-of-way is a matter committed to agency discretion. See Desert Survivors, supra, at 196, 197. When exercising the discretionary power of the Secretary, BLM must consider all factors known to affect the application and apply Departmental regulations governing issuance of rights-of-way with due regard for the public interest. Id. at 197.

In the instant case, BLM has considered the effect the proposed right-of-way would have on the Inyo Mountains WSA, and has determined that there is a conflict between management of the WSA for preservation of wilderness and the pipeline that does not permit a right-of-way grant in this case. In so doing, BLM has considered FLPMA section 603, 43 U.S.C. § 1782(a) (1988), sanctioning wilderness inventory and review of certain lands. When wilderness review is in progress, section 603(c) requires that lands within a WSA must be managed "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1988). A proviso to the Act allows for continuation of "existing mining and grazing uses and mineral leasing," but this limitation applies to preserve an existing use only "in the same manner and degree in which the same was being conducted on October 21, 1976." Id. Although appellants were offered numerous opportunities to do so, they have been unable to show the right-of-way they seek was an existing use on October 21, 1976, nor have they shown (nor contended) that the use they proposed was compatible with the WSA. The 1990 BLM decision found that the pipeline and associated works would disturb the WSA and leave traces that could not be reclaimed by the deadline for such activities in California, which was then already past (Decision at 3).

The burden to show that a proposed right-of-way is consistent with the purposes for which affected public lands are managed rests with the applicant. Otherwise stated, it is the applicant who must prove error in a BLM decision that has rejected a right-of-way application because it is inconsistent with BLM management purposes. See King's Meadow Ranches, 126 IBLA 339, 342 (1993). Appellants have failed to make such a showing in this case. Nor do they deny the conclusion by BLM that construction of the right-of-way would be impossible without impairment of the wilderness

quality of the WSA, arguing instead that they have a prior existing right that entitles them to construct the right-of-way regardless of any effect it might have on the WSA.

We therefore conclude that BLM correctly found that issuance of a right-of-way for water facilities within the Inyo Mountains WSA was inconsistent with wilderness preservation, the purpose for which those lands were managed (see 43 CFR 2802.4(a)(1)). A right to maintain water transportation facilities on the public lands was not shown to exist by title documents that made no reference to any such facilities, nor did traces of an old pipeline at the proposed right-of-way site tend to show there was an existing right-of-way for such facilities.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

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DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS CONCURRING:

In its decision in this case, BLM denied the right-of-way application filed by appellants pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1988). It also denied any claim to a pre-FLPMA right-of-way based on the authority of the Act of July 26, 1866 (Revised Statutes 2339 and 2340), 43 U.S.C. § 661 (1970).

On appeal, appellants do not point out any errors in BLM's conclusions regarding impairment to the Inyo Mountain Wilderness Study Area which served as the basis for rejection of their FLPMA right-of-way application, and those conclusions are supported by the record in this case. Thus, BLM properly denied appellants' FLPMA right-of-way application.

The appeal in this case is directed solely to establishing the existence of a pre-FLPMA right-of-way based on the actions of Frederick Conn, the original patentee of patent No. 504. Appellants assert that the rights initiated by Conn passed to them upon their acquisition of the land described in patent No. 504.

In its decision, BLM provided three reasons for denying the claim to a pre-FLPMA right-of-way. First, BLM stated that appellants had failed to provide evidence that Conn was vested with water rights in Hunter Canyon, and that even if such rights had vested, no beneficial use of such rights have been made for at least 30 years, and, therefore, they had been lost through abandonment or nonuse. BLM concluded that "[t]he loss or absence of a water right terminates any claim to a right-of-way under 43 U.S.C. 661." Second, BLM stated that although there was circumstantial evidence that water may have, at one time, been diverted from Hunter Canyon to patent No. 504, there was no conclusive proof that water used on patent No. 504 originated in Hunter Canyon, rather than some other source. Third, BLM found:

Any water diversion probably began about 1889 for use on the Conn and Trudow Borax Millworks located in SE1/4NW1/4, sec. 22, T.14 S., R. 38 E., M.D.M. Any diversion of water to this location ceased at least 30 years ago. Failure to make use of a right of way for so long that it cannot be relocated on the ground constitutes conclusive proof of abandonment.

(Decision at 2).

Prior to the passage of FLPMA, one could obtain a right-of-way across public lands for "ditches and canals," under the Act of July 26, 1866, 43 U.S.C. § 661 (1970). That act provided:

Whenever, by priority of possession, rights of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are

recognized, and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed * * *

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section. [Emphasis added.]

Section 706(a) of FLPMA, 90 Stat. 2793, amended 43 U.S.C. § 661 (1970), by deleting those clauses underlined above relating to rights-of-way. Historically, the reference to "ditches and canals" in the 1866 Act was interpreted broadly to encompass rights-of-way for reservoirs, dams, flumes, pipes, and tunnels. Peck v. Howard, 167 P.2d 753, 761 (Cal. App. 1946). In addition, no application to the Federal Government was required, mere construction constituted the right-of-way grant. Hansen v. Galiger, 208 P.2d 1049 (Mont. 1949); Clausen v. Salt River Valley Water User's Association, 123 P.2d 172, 175 (Ariz. 1942). Subsequent grants were made subject to such rights-of-way.

In their supplemental statement of reasons, appellants included a copy of several pages from a 1892 Department of the Interior, United States Geological Survey, publication entitled, "Mineral Resources of the United States, Calendar Years 1889 and 1890." Page 505 thereof contains a description of the borate of soda deposit in the Saline Valley stating:

The owners of this more fertile section, Messrs. Conn & Trudo, have erected here a plant after the usual style, having a capacity of 40 tons concentrated per month. A working force of thirty men is employed here. Water for these works is brought through iron pipes from the mountains to the west, a distance of 1 1/2 miles. [Emphasis added.]

In addition, in a January 8, 1990, memorandum from Tom Gey, Realty Specialist, to the Ridgecrest Resource Area Manager, describing his field investigation of the proposed right-of-way during which he found evidence of an old pipeline, Gey stated that "[t]here is little doubt though, that water from Hunter Canyon somehow reached the ponds and was the[n] piped to the Borax millsite."

Therefore, while the record in the case may be sufficient to conclude that Conn appropriated water from Hunter Canyon and transported that water by means of a water pipeline across public land to the millworks in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 22, there is no evidence of the period of time during which Conn or his predecessors in interest continued to appropriate water and use the pipeline. There is no question, however, that the pipeline was

not in use at the time of the field investigation; nor had it been utilized for quite sometime prior thereto. 1/

In a 1895 case decided by the Supreme Court of California, Smith v. Hawkins, 42 P. 453, 110 Cal. 122 (1895), that court considered a situation where a person had appropriated water to a beneficial use and constructed a ditch across public land thereby establishing a right-of-way in accordance with Revised Statutes 2339 and 2340 and had thereafter ceased such use. The court held at 454 that

a continuous nonuser for five years will forfeit the right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude.

See Wright v. Best, 121 P.2d 702, 710 (Cal. 1942).

Therefore, it is clear that any right to appropriate water and utilize a pipeline ceased in this case following the passage of a significant period of nonuse. 2/

Appellants do not dispute the period of nonuse; rather they attempt to show that a right-of-way was part of the bundle of rights they acquired when they purchased the land embracing the old millworks. That attempt must fail, however, because even assuming a right-of-way existed at the time Conn received patent to the land in question, that right-of-way was lost through nonuse. Accordingly, BLM properly determined that appellants have no claim to a 1866 Act right-of-way.

Bruce R. Harris
Deputy Chief Administrative Judge

1/ In a note to the file, dated Jan. 28, 1991, Gey recounted a conversation with a BLM employee in the California State Office concerning this case in which he stated: "I told her the use probably terminated 50 years ago."

2/ Although the BLM decision states that diversion of water to the millworks ceased "at least 30 years ago," the only reference in the case file to any such time period is that contained in footnote 1, supra.