

Appeal from a decision of the Carlsbad Resource Area Manager, Bureau of Land Management, requiring payment of right-of-way rental fees and terminating right-of-way NM 36791.

Affirmed in part; vacated and remanded in part.

1. Administrative Procedure: Administrative Review--Res Judicata--Rights-of-Way: Appraisals--Rules of Practice: Appeals: Generally

Where, in a previous appeal, this Board found that rental charges for a right-of-way were proper, and where that decision was not appealed, the grantee's challenge to the rental in a subsequent appeal is barred by the doctrine of administrative finality.

2. Administrative Authority: Generally--Appeals: Jurisdiction--Board of Land Appeals--Rights-of-Way: Generally

In accepting a right-of-way grant for salt water disposal, the grantee agrees to be bound by all applicable State and Federal laws, including those related to water quality. Where the United States Environmental Protection Agency determines that the grantee is polluting waters of the United States in violation of Federal law and orders the grantee to cease and desist, this Board has no jurisdiction to review such an order.

3. Board of Land Appeals--Rights-of-Way: Cancellation

Under 43 CFR 2803.4(d), before suspending or terminating a right-of-way grant for failure to comply with applicable law or regulations, BLM must give the holder written notice that such action is contemplated and the grounds therefor and must allow the holder a reasonable opportunity to cure such noncompliance. When, by decision, BLM terminates a right-of-way grant without providing the required notice, that decision will be set aside and the case remanded to BLM.

APPEARANCES: Michael R. Comeau, Esq., Santa Fe, New Mexico, J. W. Neal, Esq., Hobbs, New Mexico, for appellant; Margaret Miller Brown, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Laguna Gatuna, Inc. (Laguna), has appealed from a June 17, 1992, decision by the Carlsbad Resource Area Manager, Bureau of Land Management (BLM), requesting rental charges for right-of-way NM 36791 and terminating that right-of-way.

On October 19, 1979, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1988), BLM issued right-of-way NM 36791 to Pollution Control, Inc., effective May 29, 1979, for a 30-year term. The grant authorized the use of approximately 450 acres of public land in Lea County, New Mexico, including parts of Laguna Gatuna, a naturally occurring salt lake, as a salt water disposal facility for waste water produced from oil and gas wells in the vicinity. Paragraph 9 of the terms and conditions of the grant specifically provided: "The right-of-way herein granted shall be subject to the express covenant that if other administrative costs and/or rentals are due, as indicated by an appraisal, they shall be paid upon request."

In March 1980, BLM appraised right-of-way NM 36791 to determine its fair market rental value, concluding that rental should be \$990 per annum or \$6,930 for a 10-year period, based on a per-acre fee. On July 3, 1980, Pollution Control, Inc., submitted a check for \$6,930 for the 10-year period.

In a report entitled "Market Survey Salt Water Disposal Well Leases in Southeastern New Mexico," dated November 28, 1989, a BLM appraiser, utilizing the comparable lease appraisal method, analyzed 13 salt water disposal well leases with rentals based on a per barrel fee. ^{1/} The appraiser recommended that the rental for salt water disposal wells on BLM land should be a minimum of \$1,800 per year or \$0.015 per barrel, whichever was larger.

Thereafter, in a decision dated March 15, 1990, BLM found that the appropriate rental for NM 36791 for the period from May 29, 1989, to May 29, 1990, was \$11,104. After crediting \$6,930, which Laguna, as the assignee of Pollution Control, Inc., had submitted as payment of rental for the next 10 years at the original rental rate, BLM requested payment of \$4,174 from Laguna.

^{1/} The appraiser noted that the most common means of salt water disposal was by injection into an abandoned well, and that the alternative, disposal via an evaporation pond, was rare. Consequently, the market survey focused on disposal well leases.

Laguna appealed, and in Laguna Gatuna, Inc., 121 IBLA 302 (1991), issued on December 3, 1991, this Board affirmed that decision, concluding that Laguna had failed to show error in BLM's appraisal method or that the rental charges were excessive.

In the decision now before us, the Area Manager requested Laguna to remit a rental balance of \$22,644, including the \$4,174 balance previously requested and affirmed by the Board, \$10,313 for the period June 1, 1990, to May 31, 1991, and \$8,157 for the period June 1, 1991, to May 31, 1992. The Area Manager noted that rental was calculated based on a rate of \$0.015 per barrel and that the number of barrels of salt water disposed of at the site was obtained from the New Mexico Oil Conservation Division. The Area Manager also terminated the right-of-way based on Administrative Order, Docket No. VI-92-1061, issued on May 22, 1992, by the United States Environmental Protection Agency (EPA), Region 6, which he stated required Laguna "to immediately cease and desist from all discharge of wastewater pollutants, including produced water into Laguna Gatuna."

The file contains a copy of that order styled In the Matter of Laguna Gatuna, Inc., in which EPA stated at page 4:

EPA has not authorized the Respondent's discharges of pollutants in accordance with Section 402 of the Clean Water Act, 33 U.S.C. Part 1[3]42. EPA has in fact prohibited discharges of Onshore Subcategory wastewater pollutants to waters of the United States through issuance of National Pollutant Discharge Elimination System (NPDES) permit GNM320000. The Respondent nevertheless continues to discharge said pollutants to Laguna Gatuna, thus violating Section 301(a) of the Clean Water Act, 33 U.S.C. Part 1311(a). [2/]

In its order, EPA made a finding that Laguna Gatuna satisfied the definition of "waters of the United States," as set forth in 40 CFR 122.2.

On appeal, Laguna merely asserts that the increase in rental is contrary to an "agreement" it reached with BLM. It provides no details regarding such an agreement. It also contends, without elaboration, that the rental amounts are unjust, oppressive, arbitrary and capricious, not based on substantial evidence, and render its operations uneconomic. Regarding BLM's termination, Laguna argues that the EPA order and BLM's reliance thereon is erroneous because its discharge of salt water into Laguna Gatuna is not into "waters of the United States." Finally, Laguna argues that

2/ EPA explained at page 1 of the order that "Section 301(a) of the Act [Clean Water Act], 33 U.S.C. § 1311(a) prohibits the discharge of any pollutant into the waters of the United States except insofar as such discharge is regulated by a permit issued pursuant to Section 402 of the Clean Water Act."

termination of the right-of-way constitutes a taking of its private property without just compensation in violation of the Fifth Amendment to the United States Constitution.

BLM notes in its answer that the rental requested is based on the methodology and rate found to be proper in Laguna Gatuna, Inc., *supra*, and that Laguna's reference to an "agreement" is unclear.

BLM further responds that EPA's designation of Laguna Gatuna as "waters of the United States" is a matter within the province of that agency and cannot be considered by the Department. Moreover, BLM argues that since BLM has no authority to sanction activities prohibited by EPA, the right-of-way "can no longer be utilized without violating the EPA Administrative Order, and its cancellation is therefore required (Answer at 2). BLM also contends that the Office of Hearings and Appeals is not the proper forum to entertain Laguna's Fifth Amendment argument.

The case record shows that on September 6, 1990, during the pendency of its previous appeal, Laguna submitted to BLM an "Application for Reduction of Right-of-Way Charges," proposing a reduction in rental to \$1,800 per year or \$0.015 cents per barrel discharged in excess of 93,000 barrels per month, whichever was greater. In a memorandum dated September 27, 1990, the Area Manager recommended to the District Manager that BLM approve that reduction for a limited period of time. ^{3/} In an October 29, 1990, memorandum to the State Director, the District Manager also recommended approval of that reduction for the same period of time.

[1] Assuming Laguna's allegation concerning an agreement related to these memoranda, they do not constitute an agreement binding on BLM. The record fails to show any action by the State Director on Laguna's request prior to the Board's decision on December 3, 1991, or thereafter. The case record shows that the first action by BLM following our decision was its June 17, 1992, decision requesting back rental charges based on a rate of \$0.015 cents per barrel. In the absence of evidence that the State Director acted favorably on Laguna's application for reduction, BLM's demand for payment of rental fees must be affirmed. Reconsideration of the propriety of BLM's rental rate is barred in this case by the doctrine of administrative finality, the administrative counterpart of the doctrine of res judicata, which precludes reconsideration in a later case of matters resolved finally for the Department in an earlier appeal. See Mary Sanford, 129 IBLA 293, 298 (1994); Keith Rush, 125 IBLA 346, 351 (1993), and cases cited therein. The correctness of the rental rate in this case was previously decided finally by this Board in Laguna Gatuna, Inc., *supra*, and that decision was not appealed.

^{3/} That period was until the expiration of Laguna's 5-year contract with Conoco, Inc., which had been entered into on Nov. 1, 1988. That contract had no provision for an increase in the contract price due to additional costs attributable to the right-of-way grant.

[2] Turning to BLM's termination of the right-of-way, we find that BLM failed to act according to the procedures established by regulation. The regulation relating to suspension or termination of right-of-way authorizations, 43 CFR 2803.4, provides that the authorized officer may suspend or terminate a right-of-way grant "if he determines that the holder has failed to comply with applicable laws or regulations." 43 CFR 2803.4(b). By accepting the right-of-way, Laguna consented to be bound by "all State and Federal laws applicable to the authorized use and such additional State and Federal laws, along with the implementing regulations, that may be enacted and issued during the term of the grant or permit" 43 CFR 2801.2(a)(1).

In terminating the right-of-way in this case, BLM was acting on the basis of the EPA order cited in the decision. EPA issued that order in accordance with the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1311(a), 1319(a)(3) (1988), which provide that the Administrator of EPA must either issue a compliance or abatement order or file a civil action whenever he finds that there is a violation of the Act. South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118, 130-31 (D.S.C. 1978); United States v. Phelps Dodge Corp., 391 F. Supp. 1181, 1183 (D. Ariz. 1975). Herein, EPA issued a compliance order based on the facts recited in the order. Neither BLM nor this Board has any authority to review that EPA order. That order directed Laguna to cease disposing of salt water in Laguna Gatuna, which EPA had determined, pursuant to 40 CFR 122.2, to be "waters of the United States." Thus, in essence, EPA's action had the consequence of suspending Laguna's use of the right-of-way.

[3] However, BLM's action based on that order did not follow the requirements of 43 CFR 2803.4(d). That regulation provides: "Before suspending or terminating a right-of-way grant pursuant to paragraph (b) of this section, the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance."

In this case, BLM failed to provide Laguna with notice that it contemplated terminating its right-of-way on the basis of the EPA order and failed to allow Laguna a reasonable opportunity to cure. In such a situation, Laguna might have been able to come forward and show BLM that it had successfully overturned the order or that it had initiated a challenge to the order in an appropriate forum. Even though the case record and pleadings contain no evidence that Laguna sought administrative review of the order by EPA or judicial review by the courts, we must, nevertheless, vacate BLM's termination of the right-of-way because of its failure to provide the required notice. See John & Katherine Caton, 126 IBLA 335 (1993).

Laguna's constitutional argument cannot be considered by this Board. It is well established that the Department of the Interior, as an agency of the Executive branch of the Government, is not the proper forum to consider constitutional challenges. Organized Sportsmen of Lassen County, 124 IBLA 325, 330 (1992); Slone v. Office of Surface Mining Reclamation & Enforcement, 114 IBLA 353, 357-58 (1990).

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 in part and vacated and remanded in part.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

131 IBLA 174