

MARTIN HACKWORTH

IBLA 94-890

Decided November 18, 1997

Appeal from a decision of the Area Manager, Pocatello Resource Area, Idaho, Bureau of Land Management, requiring payment of processing fee for right-of-way application IDI-30489.

Set aside and remanded.

1. Act of July 26, 1866—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Applications—Rights-of-Way: Federal Land Policy and Management Act of 1976

Prior to the repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1970), by section 706(a) of FLPMA, 90 Stat. 2793, one who appropriated water pursuant to the 1866 Act could acquire a right-of-way for reservoirs, dams, pipelines, ditches, and canals crossing public land merely by constructing such improvements, no application to the Federal Government being necessary.

2. Act of July 26, 1866—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Federal Land Policy and Management Act of 1976

Repeal of the right-of-way provisions of the Act of July 26, 1866, 14 Stat. 253, as amended, 43 U.S.C. § 661 (1970), by section 706(a) of FLPMA, 90 Stat. 2793, did not affect rights-of-way previously acquired under the 1866 Act. A decision adjudicating a right-of-way application under Title V of FLPMA and assessing reimbursable costs and fees without consideration of the impact of a valid existing right-of-way will be set aside and remanded.

APPEARANCES: Martin Hackworth, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Martin Hackworth has appealed from a Decision of the Area Manager, Pocatello Resource Area, Idaho, Bureau of Land Management (BLM), adjudicating Appellant's application for a water pipeline right-of-way (IDI-30489). The Decision held that BLM had determined the processing level of the application to be Category II, requiring payment of a fee of \$300 for processing the application.

This proceeding commenced when, in response to an inquiry from Appellant concerning repair of the domestic water pipeline leading to his property, BLM informed him "that the previous owner did not have authorization for a culinary water pipeline across public lands." (Letter from BLM to Appellant dated Apr. 28, 1994.) Appellant was advised to file a right-of-way application to obtain authorization for the existing pipeline, after which he would be allowed to repair and maintain it as necessary.

On May 20, 1994, Appellant filed his application pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994). The requested 1.21-acre right-of-way comprised an area 20 feet wide and 2,640 feet long along the route of the existing water pipeline located in the SENW, SWNE, NWSE, sec. 32, T. 6 S., R. 35 E., Boise Meridian. On his application, Appellant explained that he needed to maintain and repair the pipeline yearly in order to irrigate his property. It has been noted by BLM that the pipeline supplied drinking water to his home. (BLM Decision Record at 1.)

On August 18, 1994, the Pocatello Resource Area Manager issued the Decision on appeal here determining that Appellant's application for a water pipeline right-of-way was within cost recovery Category II and requiring payment of a \$300 processing fee for his right-of-way application. The BLM Decision also stated that the right-of-way would require payment of annual rental and a one-time monitoring fee of \$75. Further, BLM noted that prior to issuance of an approved right-of-way grant, Appellant would be sent a copy of the grant for review and signature.

This appeal followed. In support of this appeal, Appellant stated:

The water right that I own and the works in question date back to 1924, preceding BLM acquisition of this land by a fair amount of time. I can see no reason why I should be charged a fee for inspection of works that preceded BLM acquisition of the

land. [1/] I believe that this fee has been levied by mistake. [2/]

The BLM Decision referred to three different costs: the processing fee, which was due within 30 days of the Decision; the monitoring fee, which would be due upon Appellant's signature on the right-of-way grant; and the annual rental. In the absence of a clear indication of which fee Appellant's objection is directed to, we will treat this as a challenge to all of the fees. The essential issue raised by this appeal is whether a right-of-way is required in view of Appellant's rights pursuant to his previously constructed water line and his water right.

[1] There is precedent for the recognition of a right-of-way for existing improvements conveying water across unreserved public lands. Congress provided by statute that

[w]hensoever, by priority 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 *

* *

Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253 (formerly codified at 43 U.S.C. § 661 (1970)) (emphasis supplied). ^{3/} As we noted in Bumble Bee Seafoods, Inc., 65 IBLA 391, 398 (1982), the reference to "ditches and

^{1/} Appellant asserts that his pipeline predates BLM acquisition of the land. However, the photocopy of the master title plat in the case file does not indicate that the public lands in sec. 32 outside the boundary of Mineral Survey 2661 (not involved in the right-of-way) have been patented. Therefore, it appears that this land has been continuously in Federal ownership.

^{2/} Appellant also requested a stay of BLM's Decision. See 43 C.F.R. § 2804.1(b). By Order dated Jan. 9, 1995, the Board denied Appellant's request for a stay after concluding that irreparable harm was unlikely in view of the potential for refund of the disputed processing fee in the event Appellant prevails on appeal. See 43 C.F.R. § 2808.6(a). The Board determined that denial of a stay was in the public interest in light of both Appellant's apparent need for prompt access to the public lands in order to repair the pipeline and BLM's responsibility to ensure the absence of any unnecessary and undue degradation of the public lands in the exercise of valid existing rights.

^{3/} This Act was subsequently amended effective Oct. 21, 1976, to delete the underscored language. FLPMA, § 706(a), 90 Stat. 2793.

canals" in the Act of July 26, 1866, has been interpreted broadly so that a right-of-way could be acquired for reservoirs, dams, flumes, pipes, and tunnels pursuant to the Act. Peck v. Howard, 167 P.2d 753, 761 (Cal. App. 1946), citing Utah Light & Traction Co. v. United States, 230 F. 343, 345 (8th Cir. 1915).

The Board has previously analyzed the status of a right-of-way recognized under the 1866 Act subsequent to repeal of that Act by FLPMA. We found that a person who has established an appropriation of water on public land and the right to use the water is entitled to a right-of-way over lands to divert the water by one of the methods contemplated by statute respecting protection of vested water rights. R.W. Offerle, 77 IBLA 80, 84-85 (1983), citing Hunter v. United States, 388 F.2d 148 (9th Cir. 1967). Noting the case of John H. Hyrup, 15 IBLA 412 (1974), *rev'd*, Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976), *aff'd*, Nos. 76-1452 and 76-1767 (10th Cir. Nov. 7, 1977), we stated that

the 1866 Act's right-of-way provision is self-executing and requires no Departmental approval, provided, of course, that the right to the use of the water has vested. * * * Therefore, prior to FLPMA one availed himself of section 661 by merely constructing a ditch or canal, no application to any official of the United States beforehand being necessary for a right-of-way over public land. Clausen v. Salt River Valley Water Users' Assn., 59 Ariz. 71, 123 P.2d 172 (1942). See Bear Lake Irrigation Co. v. Garland, 164 U.S. 1 (1896). Section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976), provides in pertinent part: "Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted." Clearly, since no consent or permission is required under section 661 to initiate a right-of-way, one who has complied with section 661 on or before October 21, 1976, the effective date of FLPMA, has a valid "right-of-way heretofore permitted" within the meaning of section 1769(a). Bumble Bee Seafoods, Inc., 65 IBLA 391, 398 (1982).

R.W. Offerle, 77 IBLA at 85 (footnote omitted). Thus, Appellant has asserted facts which appear to give rise to a valid pre-FLPMA right-of-way for the water pipeline.

[2] To the extent that BLM adjudicates Appellant's right-of-way application filed under FLPMA, the legal effect of an existing right-of-way must be considered under the relevant regulations. A pre-FLPMA right-of-way is governed by the regulations at 43 C.F.R. Part 2800 "unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provisions of the grant or the then existing statute shall apply." 43 C.F.R. § 2801.4. The regulations generally require FLPMA right-of-way applicants to reimburse costs associated with processing the application depending on

the category of the right-of-way (i.e., Category I through V). 43 C.F.R. § 2808.3-1. Similarly, a holder of a right-of-way grant for which such a fee was assessed under 43 C.F.R. § 2808.3 is also generally liable for reimbursing monitoring costs. See 43 C.F.R. § 2808.4. The regulations, however, also allow reduction or waiver of reimbursable costs by the BLM State Director. 43 C.F.R. § 2808.5(a). Specifically, waiver or reduction of reimbursable costs is authorized where the holder of a valid existing right-of-way is required to secure a new right-of-way grant in order to relocate facilities. 43 C.F.R. § 2808.5(b)(8), (9). With respect to rental charges for the right-of-way which BLM advised would be charged, the regulations provide that no rental shall be required where the right-of-way was issued pursuant to a statute which did not require payment of rental. 43 C.F.R. § 2803.1-2(b)(1)(ii); see R.W. Offerle, supra. We find that it is an error for BLM to adjudicate Appellant's right-of-way application without consideration of the asserted pre-FLPMA right-of-way and the legal effect of rights acquired thereby. R.W. Offerle, supra; see Dean R. Karlberg, 98 IBLA 237 (1987).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the BLM Decision is set aside, and the case is remanded for further adjudication.

C. Randall Grant, Jr.
Administrative Judge

I concur.

R.W. Mullen
Administrative Judge

