

CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION

IBLA 98-286

Decided May 30, 2000

Appeal from a decision of the Palm Springs, California, Field Office Manager, Bureau of Land Management, requiring submission of a plan for removing an abandoned communications building and reclaiming the associated communications site. CACA-75.

Set aside and remanded.

1. Communication Sites--Rights-of-Way: Generally--Rights-of-Way: Cancellation

The holder of a right-of-way which has terminated because it is no longer used for communication site purposes and has been abandoned is generally responsible for removal of structures erected on the right-of-way and reclamation of the site. When the record on appeal from a decision requiring removal of improvements presents a question of whether the right-of-way has been abandoned and whether appellant is the owner of the improvements thereon, the case will be remanded.

APPEARANCES: J. Fred Lambert, Real Property Manager, California Department of Forestry and Fire Protection, Sacramento, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The California Department of Forestry and Fire Protection (CDF) has appealed from a decision of the Manager, Palm Springs, California, Field Office, Bureau of Land Management (BLM), dated March 26, 1998, addressing communications site right-of-way grant CACA 75 which is situated atop Whitewater Hill in Riverside County, California. The BLM decision asserted that the right-of-way is not currently being used for purposes of a communications site and that it has remained unused for more than 5 years. Noting the regulatory responsibility of right-of-way holders for disposition of improvements upon termination of the right-of-way, the decision found that CDF is the owner of the building constructed on the site. Accordingly, the decision required CDF to submit a plan for removing the building and reclaiming the associated communications site.

In the April 24, 1998, statement of reasons for appeal, CDF disputes the BLM finding that it is the owner of the building on the right-of-way. Appellant asserts that it rented space in a building at a Whitewater Hill site owned by Riverside County. Recognizing a history of cooperation between CDF and BLM, CDF requests verification of ownership of the building prior to reclamation.

The history of this right-of-way is quite convoluted. On February 29, 1960, the Federal Aviation Administration (FAA) requested BLM recognition of a right-of-way to embrace a tract of public land in the NE1/4SW1/4SE1/4 of sec. 12, T. 3 S., R. 3 E., San Bernardino Meridian, California, on which an air navigation beacon had previously been constructed. By letter dated July 11, 1960, BLM recognized FAA appropriation of the tract for purposes of the air navigation beacon site pursuant to the Departmental Instructions of January 13, 1916, 44 L.D. 513. ^{1/} Further, BLM notified FAA that the appropriation of the right-of-way had been noted on the public land records under serial number LA 0166826.

According to a letter to BLM dated August 2, 1972, the beacon facility on the site was subsequently "decommissioned" and FAA sought to relinquish its right-of-way. In a letter to CDF dated November 9, 1972, FAA advised that it had applied to BLM to relinquish the right-of-way and removed its improvements from the site.

A BLM memorandum dated January 31, 1973, recommended approval of the FAA's relinquishment and discussed the status of the improvements to the right-of-way. The memorandum explained that:

FAA improvements on the site consisted of a steel tower and beacon light. FAA also issued permits to both the [CDF] and the California Highway Patrol for radio communication facilities. The improvements on the land for those facilities consisted of two small buildings and several power poles.

The [CDF] will continue to maintain their communication facility on the site. Notation of a 44 L.D. 513 appropriation

^{1/} In these instructions, the Department established procedures for recognizing the existence on the public lands of authorized improvements constructed by Federal agencies. Thus, the "Instructions" of the First Assistant Secretary of the Interior, published at 44 L.D. 513, directed the General Land Office (BLM's predecessor) to note, on the public-land records, the existence of physical improvements constructed, operated, and maintained by a Federal agency on the public domain pursuant to statutory authority, where they were deemed to constitute a devotion or appropriation of the land to a public use or purpose. The purpose of a 44 L.D. 513 notation was to provide notice on the public record of an authorized Government improvement and to except it from any ensuing patent or conveyance of the underlying public land. See Federal Aviation Administration, 83 IBLA 382, 395-96 n.10 (1984); Heirs of Carrie Bethel, 29 IBLA 210, 216-17 (1977); A. W. Schunk, 16 IBLA 191, 193 (1974).

for this use, under the provisions of the Cooperative Fire Protection agreement between the [BLM] and the [CDF] (contract #53500-CIT-296) was made January 15, 1973.

(BLM Memorandum of January 31, 1973, at 1.) Relinquishment of the FAA right-of-way was subsequently approved in a BLM decision of February 28, 1973.

During the same time period in which FAA was seeking to relinquish its right-of-way, BLM advised CDF that in order to recognize "a 44 L.D. 513 Right-of-way for the CDF communications facility on Whitewater Hill," CDF would need to provide a map of the facility and a request for such a right-of-way pursuant to the Cooperative Fire Protection Agreement. (Letter of September 22, 1972.) In response, CDF provided a survey plat of the site and applied for a right-of-way. (Letter of November 30, 1972.) In a letter dated January 4, 1973, BLM recognized appropriation of the site by CDF pursuant to 44 L.D. 513 and the public land records were noted accordingly. This right-of-way is identified by the serial number CACA 75. ^{2/}

The factual context of this case is complicated by another right-of-way issued by BLM. On June 14, 1955, BLM approved a communications site right-of-way (LA 0133452) to Riverside County for radio repeater stations on Whitewater Hill in the S1/2NE1/4NE1/4SE1/4 of sec. 12, T. 3 S., R. 3. E., in the vicinity of CACA 75. The location of this communications site is actually shown for reference on the survey plat of CACA 75 signed by R. A. Drage. On January 13, 1964, CDF entered into a lease with Riverside County of a site called the "Whitewater Radio site" in order to "install and operate radio transmitting and receiving equipment." (Lease attached to facsimile (FAX) transmission of March 2, 1998, from CDF to BLM.) The lease states that the County, which controls part of a mountaintop "locally known as the Whitewater Radio Site," agrees to permit CDF to install and operate its radio receiving/transmitting and related equipment in the "County's vault" at that site and, in connection therewith, to use any available space on its associated antenna structure. Id. at 1. The lease does not identify the right-of-way on which the leased site is located.

By letter to CDF dated August 8, 1995, BLM noted "there is no longer any equipment" on the site identified as CACA 75 and nobody "has been using this site for a long period of time." Hence, BLM inquired of CDF whether it wished to continue using the communications site, requesting CDF to respond in writing within 30 days, and stating that, absent a response, "we will assume this site is no longer useful to CDF and close the casefile." There is no evidence in the case file that CDF replied to that letter. Next, by notice dated October 23, 1997, BLM required CDF to show cause, within 15 days from receipt of the notice, why its right-of-way

^{2/} The precise boundaries of the original FAA right-of-way are unclear from the record before us. We find this to be immaterial, however, as the boundary of the CDF right-of-way is defined by the surveyor's plat signed by Robert A. Drage which was provided to BLM by appellant.

grant for the communications site (CACA 75) should not be cancelled, noting that the failure to provide "compelling reasons" in opposition would result in cancellation. (Notice to Show Cause, dated Oct. 23, 1997, at 1.)

On November 20, 1997, CDF filed a "Use Inventory Worksheet" (Worksheet) with BLM, in which it stated that it wished to "relinquish" its right-of-way grant (CACA 75) and remain as a "tenant or customer" of Riverside County, the "primary facility owner," since it still operated communications equipment at the communications site. ^{3/} (Worksheet, dated Nov. 17, 1997.) In a subsequent March 2, 1998, FAX message to BLM, CDF enclosed a copy of the 1964 lease agreement with the County referred to above.

In its March 1998 decision, BLM informed CDF that it had reviewed the case file and correspondence regarding the communications site under right-of-way CACA 75 and found that the building is owned by CDF. Specifically, BLM cited the transfer of the right-of-way from FAA and the site map of the right-of-way prepared on behalf of CDF by Robert A. Drage. After finding that right-of-way CACA 75 was not in use and had been unused for more than 5 years, BLM held that CDF, as the holder of a terminated right-of-way, is responsible for removal of the building and reclamation of the site.

As a threshold matter, we note that it appears that CDF held an interest in two communications site rights-of-way on Whitewater Hill. At the time right-of-way CACA 75 issued, the Department had established procedures for recognizing the existence on the public lands of authorized improvements constructed by Federal agencies under the "Instructions" of the First Assistant Secretary of the Interior, published at 44 L.D. 513. See note 1, *supra*. Although CDF itself is not a Federal Government agency, it appears from the record that CDF was using the site for fire protection communications pursuant to a cooperative contract with BLM for the mutual benefit of CDF and BLM. Thus, the BLM District Manager, in a memorandum to the State Director received January 9, 1973, requested that the public-land records be noted to reflect that, under 44 L.D. 513, the Whitewater Hill "Radio Repeater Site" had been "appropriated by BLM through * * * [c]onstruction pursuant to BLM-CDF fire contract." (Emphasis added.)

[1] The relevant regulations governing rights-of-way provide that the failure of the holder to use the right-of-way for the purpose for which the authorization was issued for any continuous 5-year period shall give rise to a rebuttable presumption of abandonment. 43 C.F.R. § 2803.4(c). The regulations further require the holder of a terminated right-of-way to remove structures and improvements and reclaim the site to a satisfactory condition within a reasonable period of time. 43 C.F.R. § 2803.4-1. Although the existence of right-of-way CACA 75 is established by the record

^{3/} The Worksheet had been enclosed in a Sept. 26, 1996, letter to CDF requesting certain information needed to assist BLM in determining the proper rental due for calendar year 1997, under the new rental fee schedule which went into effect on Dec. 13, 1995. See 60 Fed. Reg. 57058 (Nov. 13, 1995).

before us, it is unclear whether the BLM decision and the CDF appeal are addressing the same right-of-way and BLM's decision does not clarify the confusion. Indeed, as noted above, BLM has indicated in a letter to CDF dated August 8, 1995, that there is no equipment on the site and the site has not been used for a long period of time.

Appellant has asserted conflicting facts. Appellant's November 1997 use inventory worksheet purporting to address usage of CACA 75, indicated that it is operating communications equipment in a facility owned by Riverside County. There is no evidence of a right-of-way authorization to Riverside County for CACA 75. However, the presence of a nearby communications site right-of-way (LA 0133452) on Whitewater Hill issued to Riverside County for purposes of a radio repeater site suggests that CDF's equipment may be located in a building on this site rather than on CACA 75. When it is unclear from the record that the facts relied upon by BLM are correct, it is appropriate to remand the case to BLM to clarify the record before proceeding.

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 decision appealed from is set aside and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

