

ST SERVICES

IBLA 2004-123

Decided June 27, 2006

Appeal from a decision of the Las Cruces, New Mexico, Field Office, Bureau of Land Management, denying request for a refund of rental payments made with respect to right-of-way cancelled because it was issued, without authority of the Department, for lands subject to a railroad easement. NMNM 40601.

Reversed.

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

Section 304(c) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1734(c) (2000), authorizes a refund when “any person has made a payment under any statute relating to the * * * use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary * * * .” For lands subject to a railroad easement under the General Right-of-Way Act of March 3, 1875, the railroad obtained authority to issue rights-of-way. Where BLM compels an entity which has obtained a proper right-of-way from the railroad to obtain a right-of-way from the Department and pay annual fees to the Government for the right-of-way, and then determines the Federal right-of-way was invalid, BLM abuses its discretion by denying a refund of amounts paid for the unauthorized right-of-way.

APPEARANCES: D. Walter Matich, Dallas, Texas, for ST Services.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

ST Services (ST) appeals from a January 20, 2004, decision of the Las Cruces, New Mexico, Field Office, Bureau of Land Management (BLM), denying ST's request for a refund of rental payments made with respect to right-of-way NMNM 40601, prior to its cancellation by BLM in 2002. BLM cancelled the right-of-way because it concluded that it had no authority to issue a right-of-way on lands subject to a railroad easement.

The following facts are not in dispute. On September 2, 1965, the Southwestern Transmission Corporation of Cushing, Oklahoma, entered into an agreement with the Southern Pacific Railroad Company for an easement to construct and maintain a pipeline between Bunsen, Texas, and Omlee, New Mexico. The purpose of the pipeline was to supply jet fuel to Holloman Air Force Base. It was to be located on lands granted as an easement to a predecessor of that railroad pursuant to the General Right-of-Way Act of March 3, 1875 (1875 Act), Chapter 152, 18 Stat. 482, 43 U.S.C. §§ 934-939 (2000).

In 1978, BLM discovered the pipeline and determined that, given that the land was subject to easement for railroad purposes only, the pipeline was likely in trespass on Federal lands. (Aug. 17, 1978, Memorandum from the Director, Denver Service Center, BLM, to State Director, New Mexico, BLM.) BLM communicated with the railroad about the potential trespass. See Dec. 14, 1978, letter from Las Cruces, New Mexico, District Office, to Southern Pacific Railroad Co. Over the ensuing year, representatives of the railroad and the pipeline owner met with BLM and, at BLM's insistence, see draft letter from BLM to attorneys for Standard Transmission Corporation (notation: "done 3-26-80"), the Standard TransPipe Company (now ST) submitted a right-of-way application on April 11, 1980. After completion of an environmental assessment, appraisal, and appropriate land reports, BLM approved the right-of-way on December 12, 1980. ST has paid rentals of approximately \$78,000 on the right-of-way since its issuance in 1980.

At some point undisclosed in the record, the railroad easement was transferred to the Union Pacific Railroad (UP). UP continues to hold the easement over the lands in question.

In 1989, Acting Solicitor Howard H. Shafferman issued an Opinion entitled "Proposed Installation of MCI Fiber Optic Communications Line Within Southern Pacific Transportation Co.'s Railroad Right-of-Way." M-36964, 96 I.D. 439 (Jan. 5, 1989). This opinion expressly considered the question of whether the railroad or BLM had the authority to issue communications rights-of-way over lands subject to railroad easement grants issued under the 1875 Act. In rendering his conclusion, the Acting Solicitor expressly stated that the opinion "is intended to provide general

guidance in similar situations.” *Id.* at 439. The Acting Solicitor dealt extensively with “limited fee” land grants to railroads under statutes in existence prior to 1871. With respect to the issuance of railroad easements under the 1875 Act, however, he noted that the Supreme Court treated those grants as “easements” rather than limited fee rights. Nevertheless, he noted that the Supreme Court had stated that such easements gave use and occupancy rights to the railroad. *Id.* at 447, citing *Great Northern Railway Co. v. U.S.*, 315 U.S. 262 (1942).

With respect to easements granted under the 1875 Act, the Acting Solicitor concluded:

Under the 1875 Act, railroads were granted an “easement.” The scope of this easement, unlike ordinary common-law easement, is an interest tantamount to fee ownership, including the right to use and authorize others to use (where not inconsistent with railroad operations) the surface, subsurface, and airspace. The grantee’s rights to use and occupy the surface are exclusive.

96 I.D. at 450. The Acting Solicitor concluded that the railroad had the exclusive right to authorize MCI to utilize the easement lands for fiber-optic lines and associated facilities without the grant of an additional permit or right-of-way from BLM. *Id.* at 451, citing *Kansas City Southern Ry. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829, 834 (10th Cir. 1973).

On November 7, 1990, the District Manager of the Las Cruces District Office, BLM, forwarded to the State Director, BLM, a memorandum documenting an inquiry from the pipeline owner regarding the “rental charges for their pipeline right-of-way.” The memorandum asked whether BLM should continue to administer the right-of-way and whether it should charge rent for this right-of-way or similarly situated rights-of-way.

On December 12, 1990, the Acting Deputy State Director responded with the “following guidance”:

We were informed * * * that the acting Solicitor’s memorandum dated January 5, 1989, * * * has not been incorporated into Bureau policy. Therefore, it is our opinion that Standard TransPipe Corporation’s R/W No. NM 40601 should be administered in accordance with the terms of the original grant and the regulations and statues in effect when it was issued. If Standard TransPipe Corporation applies for a R/W’s relinquishment, the issue of how to administer R/W No. NM 40601 shall be decided at that time. In the interim, continue to: * * * [c]harge rent to Standard TransPipe Corporation * * * .

(Dec. 12, 1990, Memorandum entitled “Jurisdiction Over Rights-Of-Way.”) BLM continued to charge and accept rentals from ST for the ensuing dozen years without resolving the questions acknowledged in this memorandum.

By letter to BLM dated July 12, 2002, ST advised BLM it had conducted a survey and found the pipeline to be located exclusively within the railroad easement. ST asked BLM how the Government had acquired jurisdiction over the land, such that it was administering a right-of-way for it. On November 6, 2002, BLM responded: “Your ROW is within the Union Pacific Railroad. * * * Therefore, we are terminating ROW NMNM 40601.”

By letter to BLM dated November 15, 2002, ST requested a reimbursement of any and all fees with interest. In the absence of any answer to this request, ST sent a letter to BLM on April 25, 2003, asking the status of the refund.

On January 20, 2004, the Field Manager of the Las Cruces Field Office issued a decision entitled “Request for Refund Denied.” The entire substance of her analysis is as follows:

Standard TransPipe Corporation (aka ST Services) was issued the ROW grant in 1980, prior to the January 1989, MCI Solicitor’s Opinion M-36964; therefore, the ROW was issued within the laws and guidelines in effect at the time the grant was issued. Since 1980, the holder of the ROW has enjoyed a reasonable and usual enjoyment of having an approved BLM ROW grant. Therefore, your request for a refund is denied.

(Jan. 20, 2004, Decision at 1.)

ST appealed. ST argues that the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1734(c) (2000), requires refunds of fees not required by applicable law. BLM did not make an appearance in this matter.

[1] Section 304(c) of FLPMA states:

In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

43 U.S.C. § 1734(c) (2000); see also 43 CFR 1823.12(b). We have held that the decision to issue refunds is within the discretion of the Secretary. Elaine D. Berman, 140 IBLA 173, 179 (1997). We have also noted, however, that an appellant must show that a fee was “not required or * * * in excess of the amount required by applicable law” to obtain a refund. Creole Corp., 146 IBLA 107, 116 (1998). Where the payor has made such a showing, it would be difficult to find that the Secretary has not committed an abuse of discretion to retain fees.

Such a showing is established by the record. There appears to be no dispute that the pipeline in question lies exclusively within the lands subject to the UP easement. ST’s predecessor-in-interest properly obtained the requisite legal authorization from the predecessor railroad. It was only at BLM’s insistence that ST submitted the right-of-way application to avoid being charged in trespass. The Acting Solicitor’s opinion makes clear that it is the position of the Department that easements granted under the 1875 Act conveyed an exclusive right of use and occupancy (subject to mineral reservations) to the railroad, and that the railroad has the exclusive right to issue rights-of-way to those lands.

On this record, the right-of-way was not legally authorized by BLM in 1980, whether or not the Solicitor had rendered, at that time, an opinion about the state of the law under the 1875 Act. Once the Acting Solicitor’s opinion was issued, the Acting Solicitor established the Department’s position on governing law. This position was that the right-of-way was issued improperly by BLM, and therefore the fees were “not required or * * * in excess of the amount required by applicable law.” On these facts, we cannot sustain the Field Manager’s conclusion that ST “has enjoyed a reasonable and usual enjoyment of having an approved BLM ROW grant,” when it paid over \$70,000 for a right-of-way that was unnecessary.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is reversed.

Lisa Hemmer
Administrative Judge

I concur:

R. Bryan McDaniel
Administrative Judge