

Cefalo, James

From: Price, Fredric W <fwprice@blm.gov>
Sent: Thursday, March 25, 2021 12:06 PM
To: Cefalo, James
Cc: merrill@plmw.com
Subject: Pre-FLPMA ROWs: Trans-84613 (13-00057 et. al.), Merrill Ranch Partnership, LLC
Attachments: 146-IBLA-38_PHILIP L ANGELL dba PLATRONICS COMMUNICATION.pdf; 156-IBLA-089_12-14-2001_Wilson-Bowman_post-FLPMA-upgrades-are-trespass.pdf; White-Bros-and-Crum-Co-v-Watson_64-Wash-666_117-P-497_1911.pdf; 174-IBLA-35_MATANUSKA ELECTRIC ASSOCIATION.pdf; 167-IBLA-327_SOUTHWEST WIRELESS NETWORKS.pdf; 77-IBLA-80_R W OFFERLE.pdf; 65-IBLA-391_BUMBLE BEE SEAFOODS INC.pdf; 128-IBLA-43_Gervais_12-01-1993_new-ROW-denied-in WSA.pdf; 43-CFR-9239-7-1_ROW-application-is-not-permission-to-proceed.pdf; 133 Pac 655 CRANE FALLS POWER IRRIGATION CO LTD v SNAKE RIVER IRRIGATION COMPANY LTD.pdf; Statutes-At-Large_Act-of-Mar-3-1891_ch561-sec18_26-Stat-1101.pdf; 31Stat790-791_1901Feb15.pdf

James,

RE: Pre-FLPMA ROWs: Trans-84613 (13-00057 et. al.), Merrill Ranch Partnership, LLC

Sorry, it took me a while to put this together.

Location:

When it comes to moving an existing diversion, it is not a distance test. The diversion that existed prior to 1976 defines the area disturbed. The historical diversion can be maintained and can even be replaced, provided it is the same type of structure and materials; and it is placed in the same spot. If a diversion is moved, then this disturbs a new area which must be analyzed under NEPA and authorized under FLPMA. Even though there is an historical ditch and there was an original diversion, IDWR can't simply change the point of diversion (POD) location in its records. A transfer application is required to fix the water right description; so to, BLM has to view the new diversion through a new process.

Upgrades:

Even if Merrill had put the new diversion in the same original historic location, the type of diversion structure, and materials used were upgraded. An upgraded diversion structure is considered to be a substantial deviation of the existing right-of-way (ROW).

For example: In the Lemhi River drainage, they are upgrading irrigation diversions from rock & berm diversions to fancy cement structures and fish screens. Each of those new upgraded diversion structures (with fish screens) on BLM had to be authorized under a new FLPMA ROW even though the location did not change; because, the method of diversion, type of diversion structure, and materials used were not like the historical diversion. The diversions were upgraded.

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ACT OF 1866 (RS-2339):

Many IBLA/court cases have established what constitutes a substantial deviation. An RS-2339 ROW becomes fixed and limited upon repeal by FLPMA. According to BLM's Manual, the introduction of a new water right within an existing grant is grounds for terminating the grant. Lining of a previously unlined ditch is a substantial deviation. Conversion from ditch to a pipe is a substantial deviation. Modifications which take the conduit outside of the granted corridor is a deviation. Using the conduit for new purposes or periods during the year are deviations. Upgrading the ditch or diversion is a substantial deviation.

Easements on private land are governed by state law and are subject to state regulation. Rights-of-way (ROW) are federal grants. Federal Land Policy and Management Act (FLPMA) of October 21, 1976 (Pub. L. 94-579, 90 Stat. 2743, as amended) repealed prior right-of-way authorities.

The purpose of the grant is to provide for the collection and transportation of vested appropriated water (Manual 2809.22.E.1). Only vested appropriated water may be transported. The transportation of non vested appropriated water may be grounds for forfeiture or the grant of ROW (Manual 2809.22.E.3). The level of normal operation and maintenance is that which was occurring or necessary at the time of repeal of the grant authority (Manual 2809.22.F.). Substantial deviation is an action not within the scope of the ROW and requires an appropriate authorization such as a FLPMA ROW (Manual 2809.22.G.).

"Establishment of a vested water right for R.S. § 2339 required." 65 IBLA 391.

[RS-2339] "merely provides for protecting such rights to the use of water as may have 'vested and accrued.'" *Taylor v. Abbott*, 103 Cal. 421, 37 P. 408.

"There is no intention evidenced by the statute [RS-2339] to make the grant subject to such water rights ... as may thereafter become necessary or convenient" and the "easement - became fixed." "No change can now be made in the character of the servitude." *White Bros v. Watson*, 64 Wash 666, 117 P 497 (1911).

"If no water right has vested and accrued, then it does not come within the scope and meaning of R.S. § 2339." *Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 133 P. 655, 661 (1913).

"As it is only the right to, or the right of way for, such ditches and reservoirs as are used in connection with a vested water right that the owner of the latter can assert, unless he first acquires a vested and accrued water right, he is not entitled to an easement over any public lands." *Nippel v. Forker*, 26 Colo. 74, 56 P. 577 (1899).

Courts that have considered disputes over regulation of RS-2339 have also held that federal right-of-way holders are subject to "reasonable regulation" by federal agencies, regardless of when the right-of-way was acquired. See, e.g., *Adams v. United States*, 3 F3d 1254, 1260 (9th Cir 1993) ("Forest Service still has the authority to reasonably regulate" a vested RS 2339 water easement); *Grindstone Butte Project v. Kleppe*, 638 F2d 100 (9th Cir 1981) (in exercising discretion to impose terms and conditions on pre-FLPMA rights-of-way, the Secretary of the Interior must comply with the National Environmental Policy Act).

2809.22.:

E.1. Purpose. The purpose of the grant is to provide for the collection and transportation of vested appropriated water. Thus the scope would include the area necessary for collection (reservoir, weir, or dam) and transportation (ditch, canal, flume, or pipeline).

E.3. Water. Only vested appropriated water may be transported. The transportation of non vested appropriated water may be grounds for forfeiture of the grant of ROW.

F. Operation and Maintenance. The level of normal operation and maintenance is that which was occurring or necessary at the time of repeal of the grant authority - October 21, 1976 - or an earlier date caused by a land status change.

G. Substantial Deviation is an action not within the scope of the ROW and requires an appropriate authorization such as a FLPMA ROW.

Code of Federal Regulations (

C

FR):

<https://www.ecfr.gov/cgi-bin/text-idx?tpl=%2Findex.tpl>

43 CFR

§2808.10 What is trespass?

(a) Trespass is using, occupying, or developing the public lands or their resources without a required authorization or in a way that is beyond the scope and terms and conditions of your authorization. Trespass is a prohibited act.

43 CFR §2808.12 May I receive a grant if I am or have been in trespass?

Until you satisfy your liability for a trespass, BLM will not process any applications you have pending for any activity on BLM-administered lands. A history of trespass will not necessarily disqualify you from receiving a grant. In order to correct a trespass, you must apply under the procedures described at subpart 2804 of this part. BLM will process your application as if it were a new use. Prior unauthorized use does not create a preference for receiving a grant.

43 CFR §9239.7-1 Public lands.

The filing of an application under part 2800, 2810, or 2880, of this chapter does not authorize the applicant to use or occupy the public lands for right-of-way purposes, except as provided by the definition of "Casual use" in §2801.5(b) and by §§2804.29 and 2884.25 of this chapter, until written authorization has been issued by the authorized officer. Any unauthorized occupancy or use of public lands or improvements for right-of-way purposes constitutes a trespass against the United States for which the trespasser is liable for costs,

damages, and penalties as provided in subpart 2808 and §§2812.1-3 and 2888.10 of this chapter. No new permit, license, authorization, or grant of any kind shall be issued to a trespasser until:

(a) The trespass claim is fully satisfied; or

(b) The trespasser files a bond conditioned upon payment of the amount of damages determined to be due the United States; or

(c) The authorized officer determines in writing that there is a legitimate dispute as to the fact of the trespasser's liability or as to the extent of his liability and the trespasser files a bond in an amount determined by the authorized officer to be sufficient to cover payment of a future court judgment in favor of the United States.

[54 FR 25855, June 20, 1989, as amended at 70 FR 21090, Apr. 22, 2005]

CASES:

1. FLPMA repealed prior authorities (146 IBLA 38);
2. BLM has not authority to modify expired authorities (146 IBLA 38);
3. "Change in approved use of a site" requires new ROW (146 IBLA 38);
4. "Use it for additional purposes" requires new ROW (146 IBLA 38);
5. "Construct additional facilities" requires new ROW (146 IBLA 38);
6. FLPMA is the only current authority available (146 IBLA 38);
7. RS-2339 ROW does not authorize post-FLPMA upgrades or improvements (156 IBLA 89);
8. Necessity does not authorize relocation of pre-FLPMA facilities after FLPMA (White Bros v. Watson, 64 Wash 666, 117 P497 (1911));
9. A ROW "amendment is required when there is a proposed substantial deviation in location or use ... maintenance does not include upgrades" (174 IBLA 35);
10. A com-site ROW for television/wireless internet service does not authorize an additional use for cellular telephone as this was considered new facilities, expansion or an improvement (167 IBLA 327);
11. Blading a roadway post-FLPMA next to an RS-2339 ditch requires authorization under FLPMA (77 IBLA 80);
12. Establishment of a vested water right for RS-2339 required (65 IBLA 391);
13. Conversion from metal pipeline to plastic pipeline requires authorization (128 IBLA 43);
14. Facilities constructed after FLPMA are a trespass even if water right established pre-FLPMA (156 IBLA 89).

A pipeline cannot be substituted for a ditch and flume, nor the right of way changed or lengthened." Weil's Water Rights in the Western States (2d Ed.) pp. 285, 286, sections 179-180; *White Bros v. Watson*, 64 Wash 666, 117 P 497 (1911).

***White Bros v. Watson*, 64 Wash 666, 117 P 497 (1911):**

"There is no intention evidenced by the statute [RS-2339] to make the grant subject to such water rights or rights to ditches and reservoirs as may thereafter become necessary or convenient."

"The manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way -in short, the easement - became fixed and determined by the facts as they existed..."

"No change can now be made in the character of the servitude. A pipeline cannot be substituted for a ditch and flume, nor the right of way changed or lengthened." Weil's Water Rights in the Western States (2d Ed.) pp. 285, 286, sections 179-180 as cited by *White Bros v. Watson*, 64 Wash 666, 117 P 497 (1911).

***Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 133 P. 655, 661 (1913):**

R.S. § 2339 provides that "whenever rights to the use of water have vested and accrued, 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." "For the purposes herein specified" unquestionably means for the purpose and maintaining and protecting the owners and possessors of water rights which have vested and accrued."

"If no water right has vested and accrued, then it does not come within the scope and meaning of R.S. § 2339."

"The provisions of R.S. § 2339 refer to the right of way for ditches as are used in connection with vested water rights, and unless one has a vested and accrued water right, he is not entitled to an easement over any public land for the construction of ditches."

***Taylor v. Abbott*, 103 Cal. 421, 37 P. 408:**

[RS-2339] "merely provides for protecting such rights to the use of water as may have 'vested and accrued.'"

***Nippel v. Forker*, 26 Colo. 74, 56 P. 577 (1899)**

"As it is only the right to, or the right of way for, such ditches and reservoirs as are used in connection with a vested water right that the owner of the latter can assert, unless he first acquires a vested and accrued water right, he is not entitled to an easement over any public lands."

IBLA 95-211, 09-30-1998, 146 IBLA 38, pg 3:

"Under the regulatory system in effect in 1975, a right-of-way authorized the use or uses it specified and construction of the buildings and structures identified in an application. A right-of-way holder wishing to change the approved use of a site, use it for additional purposes, or construct additional facilities was required to file an application to amend the authorization. After repeal of the Act of Mar. 4, 1911, BLM did not have authority to modify a previously issued grant to allow a use not previously authorized. BLM's authority to modify a previously issued grant to allow a use not previously authorized.

BLM's authority to amend a prior grant to change use, grant a right to use additional land, or to authorize construction was thereafter governed instead by Title V of FLPMA."

Court Cases:

Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 Pac. 819

Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408

Nippel v. Forker, 26 Colo. 74, 56 Pac. 577

Cleary v. Skiffich, 28 Colo. 362, 89 Am. St. 207, 65 Pac. 59, 21 Morr. Min. Rep. 284

Jennison v. Kirk, 98 U. S. 453, 25 L. ed. 240, 4 Morr. Min. Rep. 504

Bear Lake & River Water Works & Irr. Co. v. Garland, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. ed. 327

Reno v. Richards, 32 Idaho 1, 8, 178 P. 81, 83 (1918).