

RECEIVED

FEB 16 2006

WATER RESOURCES
WESTERN REGION

November 26, 1999

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

NOTICE OF PROTEST

This form may be used to file a protest with the department under sections 42-108B, 42-203A, 42-203C, 42-211, 42-222, and 42-224, Idaho Code. The department will also accept a timely protest not completed on this form if it contains the same information.

1. Matter being protested

Application for Transfer No. 72408 in the name of Idaho Farmway, Inc.

2. Name of protestant

**United States Department of the Interior
Bureau of Land Management
Idaho State Office
1387 South Vinnell Way
Boise, Idaho 83719**

3. Protestant's Representative for service (If different than protestant)

Gary A. Madenford

4. Service mailing address

**United States Department of the Interior
Bureau of Land Management
Idaho State Office
1387 South Vinnell Way
Boise, Idaho 83719**

5. Service telephone no.

(208) 373-3839

3828

6. Basis of protest (including statement of facts and law upon which the protest is based).

Idaho Farmway, Inc. is not authorized to use the public land described in Transfer No. 72408 as a point of diversion within Township 04S Range 07E Section 9 SWSE.

On April 26, 2000, BLM sent notice to Idaho Farmway, Inc. entitled "Right of Way Held for Termination: Notice to Show Cause" regarding ROW IDI-012598 based on verified evidence of non-use.

On December 5, 2000, BLM sent Idaho Farmway, Inc. the Decision terminating his water facility ROW IDI-012598 for non-use.

On February 26, 2004, the United States Department of the Interior Office of Hearings and Appeals upheld BLM's termination of ROW IDI-012598 to Idaho Farmway, Inc. based on BLM's verified evidence of non-use for many years; refer to IBLA 2001-241.

Idaho Farmway's, Inc., Transfer No. 72408, is endeavoring to transfer water rights from a diversion on public land to private land that has not been exercised in years. I.C. Section 42-222(2) provides in relevant part: "All rights to the use of water acquired under this chapter or otherwise shall be lost and

forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated."

7. What would resolve your protest?

Withdrawal of Transfer No. 72408 by Idaho Farmway, Inc.

I hereby, acknowledge that if I, or my designated representative, fail to appear at any regularly scheduled conference or hearing in the matter of which I have been notified at the address above, the department may issue a notice of proposed default against me in this matter for failure to appear. I also verify that I have served a copy of this protest upon the applicant.

Signed this 16th day of February 2006.


Protestant

Gary A. Madenford
Protestant's Representative

Attachments:

Right of Way Held for Termination: Notice to Show Cause dated April 26, 2000

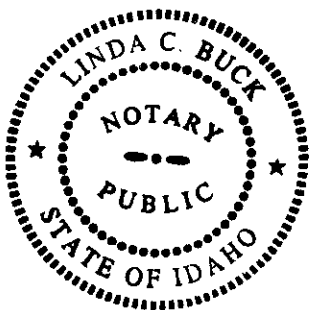
Decision terminating ROW IDI-012598 dated December 5, 2000

IBLA 2001-241 dated February 26, 2004

Master Title Plat for Township 04S Range 07E Section 9 SWSE

NOTARY:

Subscribed and sworn to before me on this 16th day of February 2006



Seal



Linda C. Buck
Notary Public in and for: State of Idaho
Residing at: Mountain Home, Idaho
My Commission expires: December 21, 2011

FOR DEPARTMENT USE ONLY

Received by DB Date February 16, 2006 Time 10:38 AM

\$25.00 fee Receipted by DB # W033831 Date February 16, 2006

CERTIFICATE OF SERVICE

I certify that on February 16, 2006, I served a true and correct copy of the "**Protest for Transfer Application #72408, with enclosures**" upon the following individuals by placing the documents in the United States mail in Boise, Idaho, postage paid, and addressed as follows:

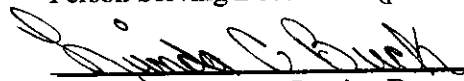
Original to: Mr. John Westra, Administrative Office Manager
Idaho Department of Water Resources (IDWR)
Western Regional Office
2735 Airport Way
Boise, ID 83705-5082

Copies to: Idaho Farmway, Inc.
c/o Mr. Dan Weitz
PO Box 854
Baker, Oregon 97814

Mr. Mike Austin, Realty Specialist
Bureau of Land Management
Boise District Office
Four Rivers Field Office
3948 Development Avenue
Boise, Idaho 83705

Mr. Mike Truden, Resource Management Supervisor
Bureau of Land Management
Boise District Office
Four Rivers Field Office
3948 Development Avenue
Boise, Idaho 83705

Linda C. Buck
Person Serving Documents (print name)


Signature of Person Serving Documents

February 16, 2006
Date



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Lower Snake River District
Boise Field Office

3948 Development Avenue

Boise, Idaho 83705-5389

<http://www.id.blm.gov>

In Reply Refer To:

IDI-012598

2800

APR 25 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

Dan Weitz
Idaho Farmway Inc.
Box 615
McCall, ID 83638

Right-of-Way IDI-012598

Right-of-Way Held for Termination Notice to Show Cause

On January 18, 1962, Harvey Groefsema was granted Right-of-Way IDI-012598 for an irrigation ditch, well, and access road, under the authority of the Act of March 3, 1891 (26 Stat. 1101), as amended.¹

In the fall of 1999, site inspections revealed the water facility has not been functional, as granted. The ditches have deteriorated to a point of disrepair that they are barely recognizable as ditches at all. Other places where they are discernable, they are full of weeds, trash and debris. The concrete head gates are broken, washed out, and completely non-functional. In at least one place a Russian olive tree, 15' in height, is growing in the middle of the ditch making it unusable. The banks have been breached in places and worn down in other locations. For the most part, the water delivery system via the above ditch is not a viable, functioning part of this water facility right-of-way and poses a safety concern to the public that may frequent the area. (See the attached photographs)

¹The Act of March 3, 1891, as amended, was enacted for the purpose of reclamation and irrigation of desert land. Section 4 states "That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, **which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops**, and shall also show the source of the water to be used for irrigation and reclamation."

CM
4/14/00
4-17-00
Beb
4/18/00

The well is in the same state of disrepair. Although still connected to a power source, the pump is full of debris from ground squirrels and mice. The head pipeline lead into the well is stuffed full of twigs, weeds and debris making it impossible to use at this time. There is excessive leakage of oil around the pump making for an undesirable situation of the public land.

Provisions of the 1891 Act state that there must be continued and unobstructed use, and if the facilities were ever abandoned or fell into non-use they could be terminated with proper notification. Regulations under which these grants are administered clearly state, "... rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and **for abandonment or non-use**" (43 CFR §2234.1-4(b)(2), 1969 edition and 43 CFR §244.1-15 prior to 1964). *Emphasis added.*

Section 20 of said act states ... "*Provided*, That if any section of said canal, or ditch, shall not be completed within **five years** after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of forfeiture." *Emphasis added*

Based upon our field review and the noted state of disrepair of your ditches and well, we contend that you have not used these facilities for the last five years or more, for the purpose of irrigation to raise ordinary crops.

You have 30 days in which to show cause as to why we should not terminate the right-of-way. You should send your written response within 30 days of receipt of this notice. Failure to do so will result in the termination of the right-of-way

15/Del Bale

for Jenna Whitlock
Bruneau Field Manager

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY											
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. - Print your name and address on the reverse so that we can return the card to you. - Attach this card to the back of the mailpiece, or on the front if space permits.		<table border="1"><tr><td>A. Received by (Please Print Clearly)</td><td>B. Date of Delivery</td></tr><tr><td><i>Dan Weitz</i></td><td>5-31-00</td></tr><tr><td colspan="2">C. Signature</td></tr><tr><td colspan="2"><i>[Signature]</i></td></tr><tr><td colspan="2">D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No</td></tr></table>		A. Received by (Please Print Clearly)	B. Date of Delivery	<i>Dan Weitz</i>	5-31-00	C. Signature		<i>[Signature]</i>		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
A. Received by (Please Print Clearly)	B. Date of Delivery												
<i>Dan Weitz</i>	5-31-00												
C. Signature													
<i>[Signature]</i>													
D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No													
1. Article Addressed to: Dan Weitz Idaho Farmway Inc. Box 615 McCall, ID 83638 IDI-012598.int.dec		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.											
2. Article Number (Copy from service label) 7099 3220 0006 2263 3354		4. Restricted Delivery? (Extra Fee) ☐ Yes											

o/c Mike



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Lower Snake River District

Boise Field Office

3948 Development Avenue

Boise, Idaho 83705-5389

<http://www.id.blm.gov>

In Reply Refer To:

IDI-012598

2800

DEC 5 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

DECISION

Dan Weitz
Idaho Farmway Inc.
Box 615
McCall, ID 83638

Right-of-Way IDI-012598

Right-of-Way Terminated

On January 18, 1962, we granted Harvey Groefsema Right-of-Way IDI-012598 for an irrigation ditch, well, and access road, under the authority of the Act of March 3, 1891 (26 Stat. 1101), as amended. We accepted proof-of-construction on July 29, 1966. We were notified by telephone on February 5, 1991, that Idaho Farmway Incorporated had obtained the interest in this right-of-way. Since then, we became aware of the disrepair of the ditches and well authorized under this right-of-way.

On May 22, 2000, you received notice of our intention to terminate the above-referenced right-of-way for your failure to use the right-of-way to transport water for agricultural purposes. We allowed you 30 days to respond to the notice.

On June 22, 2000, we received your response by facsimile, in which you asserted that: 1) our site inspection had been done at the wrong time of year, 2) the pump was in good repair, and 3) you had been using the well in your farming operation. You provided a copy of your water right from the Idaho Department of Water Resources (IDWR) as proof of your water consumption. You also sent copies of your road right-of-way IDI-32852, a phone conversation record, the decision accepting proof-of-construction, and a copy of the right-of-way in question.

The water right form you provided shows how much water IDWR allows you to use and does not report water consumption. You failed to submit anything that showed that you used the subject right-of-way to transport water for agricultural purposes.

CM
11/30/00

12-4-00

During our investigation, we discussed this issue with Idaho Power Company and the USDA Farm Service Agency. We learned from Idaho Power Company that your well pump has consumed no electric power since April 1996. Before then, the only appreciable amount of power usage coincides with the time that Western Construction used your well and water to support their interstate highway construction project. The USDA Farm Service Agency informed us that, for more than eight years, you have not farmed the 440 acres that the well and associated ditches under this right-of-way serve.

The right-of-way was subject to the regulations then in effect. Regulations found at 43 CFR 244.23 (d) state that Section 21 of the act of March 3, 1891 (26 Stat. 1102; 43 U.S.C. 949) provides that nothing in this act shall authorize the occupancy of such right-of-way except for the purpose for which it was approved, and then only so far as may be necessary for the construction maintenance and care of the project. The purpose of the act was to provide for rights-of-way for the reclamation and irrigation of desert land.

Furthermore, 43 CFR 244.15 (b) states that the authorized officer may terminate a right-of-way grant if he determines that the grant holder has failed to use the right-of-way for any continuous five-year period. It is clear from field visits conducted by BLM staff specialists that you have not used the well and ditches to support agricultural production on your adjacent property for more than five years. Records from Idaho Power Company and the USDA Farm Service agency support our findings. As such, we have determined the right-of-way to be abandoned, and hereby terminated.

Regulations found at 43 CFR § 244.9(i) require holders of rights-of-way to rehabilitate the land upon its termination. Therefore, you are required to remove the head gates and pump; fill-in and smooth over what is left of the ditch; and cap the well head. You do not need to rehabilitate the road attached to this right-of-way. However, if you wish to continue to have legal access to your property, you should amend your road right-of-way IDI-32852 to include the portion of the road formerly authorized under IDI-012598.

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form ID-1840-3. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21 (58 FR. 4939, January 19, 1993) or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed in item eight of the attached Form. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to

the appropriate Office of the Solicitor (see 43 CFR 4.413) at the time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

/s/ Daryl L. Albiston

John Sullivan
NCA Manager

Enclosure

uc: RF, CF

CMiracle:clm:11/30/00:i-012598.dec

U.S. Postal Service
CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

Article Sent To:

Dan Weitz

Postage

\$

Certified Fee

\$

Return Receipt Fee
(Endorsement Required)

\$

Restricted Delivery Fee
(Endorsement Required)

\$

Total Postage & Fees

\$

12 3-✓
Postmark
Here

IDI-012598.dec

Name (Please Print Clearly) (To be completed by mailer)

Idaho Farmway Inc.

Street, Apt. No., or PO Box No.
Box 615

McCall, ID 83638

PS Form 3800, July 1999

See Reverse for Instructions

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Idaho State Office

INFORMATION ON TAKING APPEALS AND STAYS TO THE BOARD OF LAND APPEALS

DO NOT APPEAL UNLESS

1. This decision is adverse to you,
AND
2. You believe it is incorrect

IF YOU APPEAL, THE PROCEDURES DESCRIBED BELOW MUST BE FOLLOWED OR YOUR APPEAL WILL BE SUBJECT TO DISMISSAL (SEE 43 CFR 4.402). BE CERTAIN THAT ALL COMMUNICATIONS ARE IDENTIFIED BY THE SERIAL NUMBER OF THE CASE BEING APPEALED.

1. When to File . . .
An Appeal (Notice of Appeal)
and
Request to Stay the Decision (Petition for Stay)

Your appeal of a BLM decision **must** be filed within 30 days of receipt of the decision. Your appeal **may** be accompanied by a statement describing the reasons for an appeal at this time. You also have the right to file a petition for stay (suspensions) of the decisions. Your petition for stay must accompany your notice of appeal (see standards for obtaining a stay under item 8).

2. Where to File . . .
An Appeal and Stay

Your appeal must be filed with the office that issued the decision (see decision letter for address). The appeal can be mailed or delivered in person during normal working hours.

3. Where to send copies of the Appeal and Stay

- a. Interior Board of Land Appeals

Office the Secretary
Board of Land Appeals
4015 Wilson Boulevard
Arlington, VA 22203

- b. Office of the Solicitor

Office of the Solicitor
Federal Building
550 W Fort Street, MSC 020
Boise, ID 83724

- c. Parties Named in the Decision

Copies of your appeal must be filed with each adverse party named in the decision.

4. When to send copies of Appeal and Stay

Copies of the appeal and petition for stay must be sent within 15 days to the offices/individuals listed under item 3 if not sent at the same time the appeal is filed with the office issuing the decision.

Note: A document is not filed until it is actually received in the proper office (43 CFR 4.401(a)).



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
801 N. Quincy St. Suite 300
Arlington, VA 22203

CERTIFIED

703 235 3750

703 235 8349 (fax)

February 26, 2004

IBLA 2001-241	:	IDI-012598
	:	
IDAHO FARMWAY, INC.	:	Irrigation Canal Right-of-Way
	:	
	:	Affirmed as Modified

ORDER

Dan Weitz, d.b.a. Idaho Farmway, Inc., has appealed from a December 5, 2000, decision of the Boise Field Office, Bureau of Land Management (BLM), terminating his right-of-way (ROW) IDI-012598 for an irrigation ditch, well, and access road across public lands on grounds of nonuse and of occupancy of the ROW outside the purposes for which it was granted. The ROW was issued to Weitz's predecessor in interest pursuant to the Act of March 3, 1891, 26 Stat. 1101, for purposes of an irrigation canal to irrigate private farmland.

The Act of March 3, 1891, codified at 43 U.S.C. §§ 946-949 (2000), authorizes individuals (see 43 U.S.C. § 948 (2000)), and other entities to obtain ROWs across the public lands of the United States for the purpose of establishing irrigation canals, ditches, and reservoirs. Fred Markle, 6 IBLA 52, 53 (1972). Section 21 provides that nothing in the Act of March 3, 1891, authorizes the holder of a canal or ditch ROW issued thereunder to "occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch." 43 U.S.C. § 949 (2000). Since the decision of the Supreme Court in Great Northern Railway Co. v. United States, 315 U.S. 262, 275-277 (1942), "rights-of-way granted under the March 3, 1891, Act have been considered by this Department to be easements rather than limited fees in the land." Fred Markle, 6 IBLA at 54, citing E. A. Wight, A-24101 (Nov. 5, 1945). As such, they are "subject to cancellation through administrative proceedings for failure to comply with the conditions under which they issued." Fred Markle, 6 IBLA at 54, citing Solicitor's Opinion, M-36500 (May 5, 1958); see also James L. Morrison Sr., 87 IBLA 236, 239 (1985).

ROWs are no longer available under the Act of March 3, 1891. Congress repealed that statute in section 706(a) of Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. 94-579, 90 Stat. 2793 (Oct. 21, 1976). Section 509 of

Pass

FLPMA provided, however, that nothing in the Act should be construed as terminating any valid ROW existing on the date of its passage. 43 U.S.C. § 1769 (2000). ROW IDI-012598 was issued on January 18, 1962, and thus survived FLPMA's passage.

Weitz is the successor in interest to property in Elmore County, Idaho, once owned by Harvey Groefsema. In 1962, Groefsema applied for and was granted ROW IDI-012598 for an irrigation ditch, well, and access road under the authority of the Act of March 3, 1891. The ROW was granted subject to 43 CFR Part 244 (1954) and BLM Circular No. 1915, which consisted of a reprint of Part 244 in effect in 1962.^{1/} (IDI-012598, Jan. 18, 1962.)

For purposes relevant here, Part 244 provided:

Nonconstruction, abandonment, or nonuse. Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse.

43 CFR 244.15(b) (1954).

Revocation for violation of regulations or terms or conditions. All rights-of-way approved pursuant to this part * * * shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be cancelled except on the issuance of a specific order of cancellation.

43 CFR 244.16 (1954).

A condition of any ROW grant under the Act of March 3, 1891, was that the grantee submit proof to the Federal government that the grantee constructed his irrigation canal or ditch within 5 years of receiving the ROW grant, lest the grant be forfeited. The record shows that Groefsema timely filed his proof of construction with the Idaho Land Office, BLM, on June 13, 1966. 43 U.S.C. § 948 (2000); see 43 CFR 244.15 (1954).

^{1/} The regulations in place at the time of the ROW grant had most recently been published in the 1954 volume of the Code of Federal Regulations; hence that publication will be cited here.

Since Groefsema's 1966 filing of proof of construction, no significant activity appears in BLM's record for the ROW until 1991, when BLM learned that it had been assigned to Idaho Farmway. BLM inspected the site in July 1998 and concluded that the irrigation canal was abandoned. BLM determined that it "needed to close the case file." (Conversation Record, July 1, 1998.) In November of 1998, BLM conducted another site visit, this time photographing the state of disrepair of the canal and pumping equipment found at the well site. In its record, BLM stated that

the water facility has not been functional, as granted, it is believed for more than 15 years. The ditches have deteriorated to a point of disrepair to a point that they are barely recognizable as ditches at all. Other places where they are discernable they are full of weed, debris and trash. The concrete headgates are broken, washed out, and completely nonfunctional. In at least one place a Russian olive tree, 15' in height, is growing in the middle of the ditch making it unusable. The banks have been breached in places and worn down in other locations. For the most part, the water delivery system via the above ditch is not a viable, functioning part of this water facility R/W * * *.

(BLM Right of Way Inspection Record, Nov. 18, 1998). BLM documented this written description with photographs depicting an olive tree in what appears to have once been a broad ditch, and a well site containing what looks like abandoned equipment.

BLM sent a notice entitled "Right of Way Held for Termination: Notice to Show Cause" to Idaho Farmway c/o Dan Weitz on April 26, 2000. Weitz received the notice in late May 2000. The notice reiterated findings made in the November 1998 site inspection record, and provided Weitz with 30 days to show cause as to why the ROW should not be terminated for abandonment or nonuse, pursuant to 43 CFR 244.15(b), which specified that the consequence of abandonment or nonuse would be cancellation. Weitz objected to BLM's assertions in a written response, but conceded that he had "not used the ditch in many years, as [he had] found running water for any great distance above ground in the desert [to be] very inefficient. For many years, we have" run aluminum mainline to transport water. (Letter of Dan Weitz, June 22, 2000, at 1 (emphasis added).) Weitz stated that that he had used and continued to use the well in his farming operations and that the well "would not be allowed to be connected to a power source if it were in [disrepair]." *Id.* Weitz argued that the inspection should "more appropriate[ly]" have been conducted in the summer irrigation season. *Id.* Conceding that small animals had made nests in the well's motor, he argued that they "must be removed before operation in the spring." *Id.* Weitz failed, however, to provide any affirmative response regarding his irrigation use of the canal to rebut BLM's documentation of nonuse.

On December 5, 2000, BLM sent its decision to terminate ROW IDI-012598 for nonuse to Weitz by certified mail. In its decision, BLM provided information it had obtained from Idaho Farmway's power service provider indicating that no appreciable power had been delivered to the pump at the diversion point for the ROW during the previous 5 years. (BLM Decision, Dec. 5, 2000, at 2; see also Inspection Report, Nov. 13, 2000, detailing inquiry with Idaho Power Company on Nov. 9, 2000.) According to this inspection report, an Idaho Power Company representative had "confirmed that this specific well/pump has not been turned on since April 1996, and that no production from this well has significantly occurred since [a construction project permitted to another company] in 1994 and 1995." Id. at 1. In addition, BLM had contacted the County Executive Director of the Idaho Farm Service Agency, who advised BLM that Idaho Farmway had leased 440 acres of the farm to a local farmer for years. Id. at 2. BLM conducted a site inspection on November 12, 2000, and discovered no changes in the use of ROW "such as ongoing repairs, upgrading of the system, or alterations of the physical character of the site." Id.

Despite two attempts by BLM's Boise Field Office to serve a certified copy of the decision to Weitz's address of record, Weitz did not permit acceptance of service by the person opening his post office box. BLM was ultimately compelled to effectuate personal service by a BLM ranger on February 6, 2001.

Weitz submitted a letter objecting to the decision within 30 days of his personal service, which BLM properly construed to be a notice of appeal and statement of reasons (SOR). Weitz again argued that BLM was wrong on its facts, but failed to provide any refutation of BLM's documentation. BLM submitted an answer to the notice of appeal and SOR, adding additional information in support of its conclusions of nonuse. As with the decision, BLM properly served the answer by certified mail on Weitz's address of record, but he did not accept service. Weitz has made no subsequent filings with the Board. ^{2/}

Administrative cancellations of ROWs issued under the Act of March 3, 1891, have been previously upheld by this Board. Fred Markle, 6 IBLA at 54; James L. Morrison Sr., 87 IBLA at 239. At issue in this appeal is whether BLM's decision to terminate ROW IDI-012598 for an irrigation ditch, well, and access road was "supported by a rational basis and that such basis is stated in the decision, as well as being demonstrated in the administrative record accompanying the decision." Burnett Oil Company, Inc., 122 IBLA 330, 332 (1992). Should an appellant raise

^{2/} Weitz refuses to accept BLM mail at his peril. Where BLM "uses the mails to send a * * * communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record." 43 CFR 1810.2(b).

sufficient grounds of factual debate in the case of an ROW cancellation, a hearing may be called for but is not compelled in all circumstances.

Ordinarily where a federal statute creates a property right in a grantee subject to * * * certain statutory requirements, and the grantee's right is challenged by the Government on grounds raising factual questions disputed by the grantee, notice of such grounds and the opportunity for a hearing is afforded to satisfy due process. But, as stated in United States v. Consolidated Mines and Smelting Co., Ltd., 455 F.2d 432, 453 (9th Cir. 1971), "it is settled law that when no fact question is involved or the facts are agreed, a plenary, adversary administrative proceeding involving evidence, cross-examination of witnesses, etc., is not obligatory -- even though a pertinent statute prescribes a hearing. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks."

James L. Morrison Sr., 87 IBLA at 239, quoting Fred Markle, 6 IBLA at 54 (citations omitted). In order to meet this burden, an appellant must at a minimum allege an error of fact or law in a challenged BLM decision. Where an appellant alleges that BLM has made an error of fact, the fact must be relevant and probative of the appellant's argument that BLM erred in reaching its conclusion.

Turning to the SOR, Weitz makes no argument of legal error in BLM's decision. We examine the terms of the decision itself to ensure that it is supported in law. We note that BLM relies entirely on regulations in effect in 1962 and superceded at the time the ROW was terminated. The decision cites 43 CFR 244.15(b) for its finding of nonuse, and 43 CFR 244.22(d) for its conclusion that no ROW may be used for any purpose outside the scope of the grant for which it was approved.^{3/} Reliance on regulations no longer in existence is not appropriate, and BLM was required to base its decision on authority in regulations in effect in 2000.

The regulations at 43 CFR Part 244 (1954) are now replaced by rules with respect to ROWs promulgated by the Department to implement FLPMA. 43 CFR Part 2800. Those rules expressly provide that BLM may terminate "a right-of-way grant * * * if [it] determines that the holder has failed to comply with * * * terms, conditions or stipulations of the right-of-way grant * * * or has abandoned the right-of-way." 43 CFR 2803.4(b).

This is not to say that the content of the Part 244 regulations in effect and incorporated into the ROW is irrelevant at this juncture. While the regulations in

^{3/} BLM's decision erroneously cited 43 CFR 244.23(d).

effect in 2000 apply to ROWs permitted pursuant to sections 501-511 of FLPMA, 43 U.S.C. § 1761-71 (2000), they also apply to rights-of-way issued prior to FLPMA “unless administration under this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued * * *.” 43 CFR 2801.4; see also 43 U.S.C. § 1769 (2000). Thus we look to Part 244, expressly incorporated into the ROW, to make this determination.

We find that the express authority of BLM to terminate the ROW under 43 CFR 2803.4 does not “diminish or reduce” the rights conferred in ROW IDI-012598. To the contrary, the ROW was expressly issued pursuant to the terms of then existing Part 244 and BLM Circular 15. Those provisions became terms and conditions of the ROW. Those terms and conditions included the ability of BLM to cancel the ROW for “abandonment or nonuse” by “specific order of cancellation.” 43 CFR 244.15(b) and 244.16 (1963). BLM has not exceeded any authority to do so here. To the extent we find that BLM has properly exercised its authority under current BLM regulations at 43 CFR Part 2800, we must affirm the order as so modified.^{4/}

Weitz’s allegation that BLM committed errors of fact in its conclusions of nonuse is not persuasive. Through its field inspections and investigation reports, photographic evidence, and written documentation, BLM has documented that the irrigation canal ROW has fallen into a state of nonuse, and as such, became subject to termination under 43 CFR 2803.4 and cancellation under the term established by 43 CFR 244.15(b) as incorporated into the ROW grant. Weitz admitted as much in his letter stating that he had not used the ditch in many years, as he had found doing so to be “very inefficient.” (Letter of Dan Weitz, June 22, 2000, at 1). Nowhere in his SOR does Weitz attempt to disprove Idaho Farmway’s apparent nonuse of the irrigation canal for which ROW IDI-012598 was granted.

Nor are his arguments regarding use of the well persuasive. Weitz asserts that he has “run the pump on numerous occasions and received billing statements from [Idaho Power]. The last time we ran the pump was in September of 2001” when Weitz allegedly engaged in repairs which took a full day to make. (SOR at 1.) These

^{4/} BLM asserts that the Part 244 regulations required cancellation after 5 years of nonuse. This assertion impermissibly merges the 1954 regulations, which do not mention a time period, with the FLPMA regulations, which specify that nonuse for a continuous 5-year period constitutes presumptive abandonment. 43 CFR 2803.4; see also 43 U.S.C. § 1766 (2000). In light of Weitz’s admissions in this case that he had abandoned the irrigation canal, which was the purpose for which the ROW was established, we find that BLM’s termination for nonuse was a reasonable cancellation on the facts of this case.

allegations fall far short of refuting BLM's documentation from Idaho Power that Idaho's Farmway's account with the service provider was discontinued or rendered inactive in 1996. (BLM Answer Ex. A.) Moreover, Weitz's assertions that he has used the pump on numerous occasions falls entirely short of an allegation that he pumped water for transport via the irrigation canal for farming. That he had to spend a day to repair his well pump is not probative of use conforming to the ROW's purpose.^{5/}

Moreover, Weitz's arguments reflect his misunderstanding of the nature of the ROW grant assigned to him. As noted above, the Act of March 3, 1891, provides an ROW for purposes of the irrigation canal or ditch, "only so far as may be necessary for the construction, maintenance, and care of said canal or ditch." 43 U.S.C. § 949 (2000). Thus, the well and the road are ancillary to the use of the ROW for irrigation by use of the canal. Even had Weitz proffered some form of information to support his assertion of the use of the well's pump, BLM's charge that he has not used the irrigation canal right of way for the transport of water for agricultural purposes -- the purpose for which the ROW was granted -- stands unrefuted. The mere act of drawing water from a well on occasion does not fall within the purpose of the ROW. Thus, appellant has failed to meet his burden of demonstrating an error of fact on the part of BLM. Further, we perceive no factual dispute that would require BLM to afford Weitz a hearing.

Finally, Weitz asserts that he has water rights granted by the State of Idaho. (SOR at 1.) The ownership, or use, of water rights granted by the State of Idaho is separate and apart from utilization of an ROW across the public lands for which BLM authorized the construction and use of an irrigation canal. Should Weitz desire an ROW or permit for other uses, including roads or pipelines across public lands, he may submit an application for one to BLM under FLMPA. 43 U.S.C. §§ 1761-71 (2000).^{6/}

^{5/} Weitz's challenge to BLM's finding that 440 acres of the farm has been leased to others who did not use the irrigation canal, by asserting without explanation or support that his irrigation historically served other lands, likewise fails to support the relevant and necessary showing that BLM's finding of nonuse was error. (SOR at 1.)

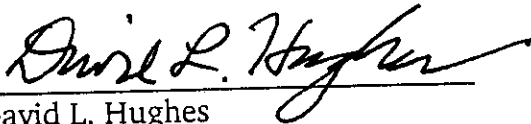
^{6/} Indeed, the record shows that Weitz has already done so. (IDI-32852, road ROW granted to Weitz, Dec. 22, 1999.)

Accordingly, 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 as modified to state that the ROW is terminated pursuant to 43 CFR 2803.4.



Lisa Hemmer
Administrative Judge

I concur:



David L. Hughes
Administrative Judge

APPEARANCES:

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Office of the Field Solicitor
U.S. Department of the Interior
550 W. Fort St., MSC 020
Boise, ID 83724-0020

TOWNSHIP 4 SOUTH RANGE 7 EAST OF THE BOISE MERIDIAN, IDAHO

ELMORE COUNTY 039

BOISE INSTRUCT SEE 3

STATUS OF PUBLIC DOMAIN
LAND AND MINERAL TITLES

MT PLAT

INDEX TO SEGREGATED TRACTS		
TRACT NO.	ORIGINAL SURVEY	REMARKS
1	1	
2	2	
3	3	
4	4	
5	5	
6	6	
7	7	
8	8	
9	9	
10	10	
11	11	
12	12	
13	13	
14	14	
15	15	
16	16	
17	17	
18	18	
19	19	
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22	22	
23	23	
24	24	
25	25	
26	26	
27	27	
28	28	
29	29	
30	30	
31	31	
32	32	
33	33	
34	34	
35	35	
36	36	

ED 10/29/1913 Mt Pl-5 Sec 406 B7B from line.
all land lying within SPT of center line
See Mt Pl-5 Sec 406 B7B from line
See Mt Pl-5 Sec 406 B7B from line
See Mt Pl-5 Sec 406 B7B from line

1 2000 Land for Hwy
See Mt Pl-5 Sec 406 B7B from line
See Mt Pl-5 Sec 406 B7B from line

FOR OWNERS EFFECTING DISPOSAL OR USE OF
UNIDENTIFIED LANDS REFER TO INDEX OF
MISCELLANEOUS DOCUMENTS.

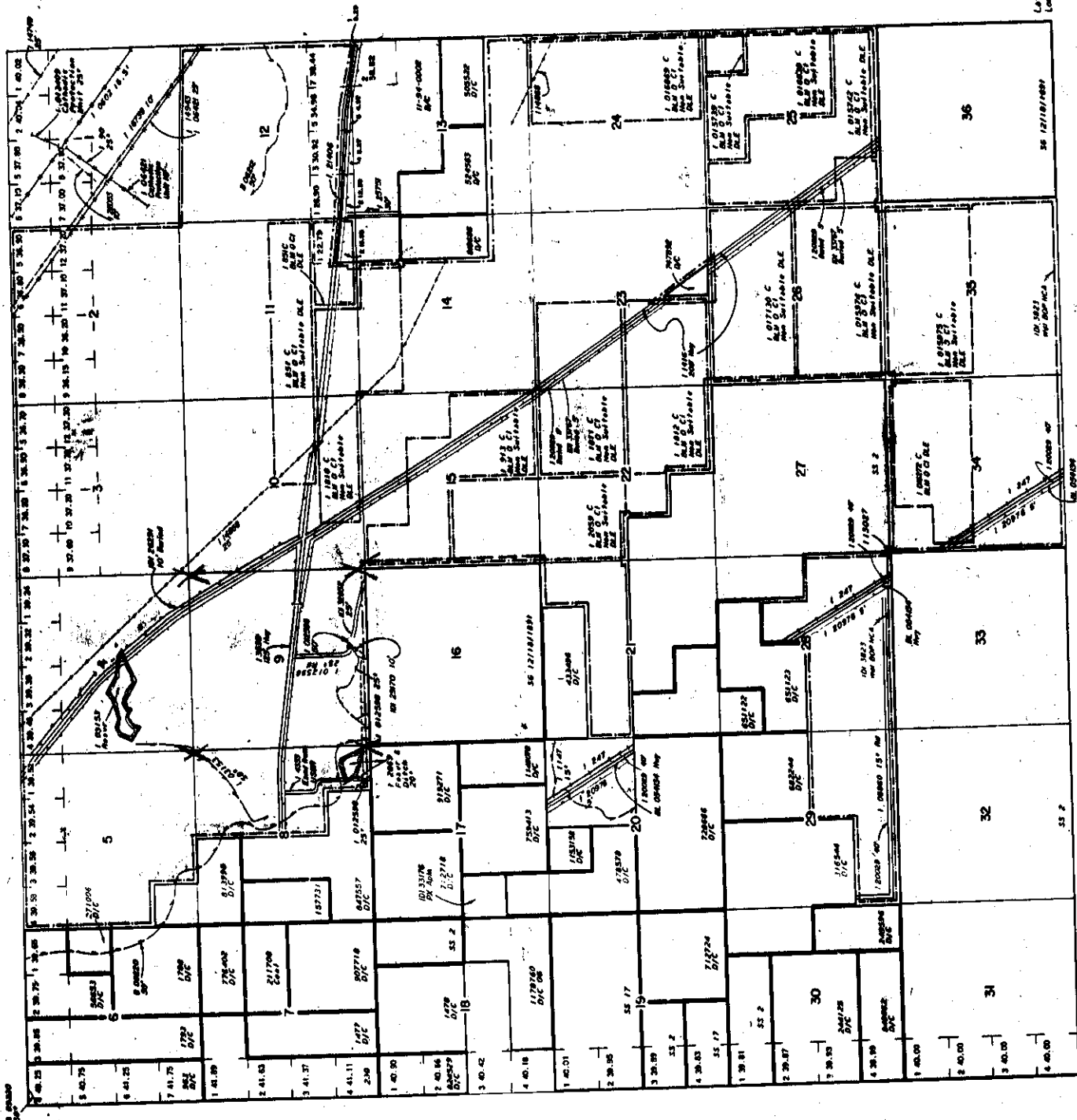
COMMENT TO	COMMENT TO
DATE 7-7-30	DATE 7-7-30
USE PLATS	USE PLATS

LAT 43° 11' 30" N
Long 115° 34' W

THE NOTATION SHOWN ON WITHDRAWS REPRESENTS THE LAST
ACTION TAKEN BUT MAY NOT BE THE EFFECTIVE DATE. SEE
THE HISTORICAL INDEX FOR THE DATE OF THE ORIGINAL ORDER.
ORIGINAL ORDER.

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Idaho Department of Water Resources Receipt

Receipt ID W033831

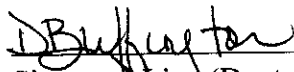
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Payment Type	Check	Check Number	518				

Payer OLENDORFF, SHARON / BLM

Comment NOTICE OF PROTEST: TRANSFER # 72408

Fee Detail

Amount	Description	Fund	FD	PCA	SO
\$25.00	PROTESTS	0229	21	62103	1155



Signature Line (Dept. Representative)