Denver Law Review

Volume 23 | Issue 4 Article 1

July 2021

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Vol. XXIII APRIL, 1946 No. 4

Reservation for Rights of Way for Canals and Ditches in Favor of United States Over Former Public Lands of the United States West of the 100th Meridian

BY CHARLES J. BEISE*

On October 2, 1888,[1] Federal funds were appropriated for the survey of western lands for reservoirs, ditches, and canals and all sites were reserved from entry and sale. As a result of the Attorney General's ruling of May 27, 1890, that no land west of the 100th meridian could be entered until such survey was made, Congress determined to repeal that portion of the act,[2] and the surviving portion of the 1888 Act, together with the 1890 Act are codified today as 43 U. S. C. 662, 43 U. S. C. 945. However, it still retains the following provision:

> That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

The provision granting a free canal right of way to Uncle Sam has been extensively utilized in the past and will be increasingly used in the future as the trend of reclamation projects swings from creation of a primary water supply for raw public lands, to development of supplemental waters for existing irrigated areas.[3]

All those lands taken up under any of the public land laws of the United States subsequent to October 2, 1888, are subject to rights of way for ditches or canals constructed by authority of the United States,[4] and since a large proportion of western lands have been entered after that date the reservation accordingly affects a vast acreage west of the 100th meridian in private ownership.

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*Of the Denver bar.

[1]25 Stat., 505.

[2]Act of August 30, 1890, 26 Stat., 371.

[3]By far the greater number of irrigation projects now investigated by the Bureau of Reclamation for post-war construction concern themselves with "firming up" present hazardous irrigation water supplies. Municipal water demands likewise call for construction work in settled areas. The same is true of hydro-electric developments. Necessarily more and more people will be affected by the exercise of this canal right reserved to the United States.

[4]General Land Office circular of July 25, 1903.

The practitioner's acquaintance with the 1890 Act ordinarily arises when his client presents him with a notice issued by the Bureau of Reclamation which is customarily mailed out by registered mail.[5] There is nothing in the act which limits its exercise to the Bureau of Reclamation and it is possible that the Department of Agriculture, the United States Indian Service, the Grazing Service or the Fish and Wildlife Service might have some projects under which these rights can be claimed.[6] On January 27, 1943, the Assistant Secretary of the Interior approved a decision by the Solicitor of that Department whereby it was held that Indian Reservations created subsequent to October 2, 1888, are subject to this right of way in favor of the United States, and on August 9, 1943, the Assistant Secretary of the Interior approved his Solicitor's opinion that the right of way reserved by the Act of August 30, 1890 (26 Stat. 391) may be used to convey water for domestic purposes to National Parks and Monuments.

The first decisions to arise under the act presented the contention of the landowner that the reservation in favor of the United States was limited to existing canals at the time of the passage of the act and that

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[5]The right of way notice is in the following form:

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
.....Irrigation Project

RIGHT OF WAY NOTICE

.....
..... (Date)

.....

It is understood that you have an interest in the land described as ....., Section....., T....., R. ..... M., ..., and that the United States has an interest in the same land because it was entered after October 2, 1888, and is accordingly subject to the following provision of law:

> "That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States." (Act of Aug. 30, 1890, 26 Stat., 391.)

Under the Act of June 17, 1902 (32 Stat., 388), and related enactments the United States is advancing large sums of money for irrigation work in the West, creating much larger values in the lands benefited. Operations have reached the point where such work calls for the use of the right of way reserved to the United States across the land described above. The purpose of this letter is to notify you and any others interested in the land that the United States is about to utilize its right of way across the land. If desired, the project office will be glad to answer questions or give more definite information concerning the location of the proposed ditch or canal, etc.

Very respectfully,
Project Superintendent.

No statutory requirement of mailing or giving this notice exists. It is a matter of policy, however, to mail it.

[6]There are no decisions of courts, of the Land Department, or administrative rulings extant where any other agency other than the Bureau of Reclamation is involved. See also note 40, and last quotation in this article.

prospective or future canals were without the scope of the legislation.[7] The court determined that the legislation was applicable to canals to be constructed by the government in the future, saying:

> As at that time it (United States) had no ditches or canals Congress must and could have referred only to those it intended to construct.

The same decision in the state court[8] gives an excellent summary of the legislative history of the act and apparently there was a substantial difference of opinion in Congress concerning the act at the time of the passage thereof, for Senator Reagan, in speaking of the reservation in patents to be issued in the future, states:

> However much may be said about the House of Representatives in resisting that, they, in my judgment, are entitled to the profound gratitude of the American people for saving to them the little that they have saved in this conference report.

And Senator Dolph said:

> This provision, while it will be of no practical value to anyone, will be a cloud or encumbrance on every man's title who secures a portion of the public domain.

This decision likewise held that the language, "constructed by the authority of the United States," in said act, was applicable without reference to time of construction and that future construction was included within the scope of the act. The ruling in the Green v. Willhite decision was affirmed again in United States v. Ide, Wyoming, 277 Fed. 373, and affirmed in 68 L. Ed. 407, so that today it has been conclusively established that the reservation was made for the benefit of future as well as past construction and includes ditches constructed after patent has issued as well as ditches constructed prior to issuance of patent.

It was next contended in a decision arising in Colorado,[9] in connection with the Uncompahgre Project, that the reservation in the 1890 Act was void because of an indefinite description and this contention also was rejected by the court and the officials of the United States were held to be authorized by the act to determine the route of the canal.[10]

It is a well known fact that where irrigation is practiced extensively, the need for drainage commonly arises, and the United States in connection with an irrigation project which required drainage claimed that the reservation in the 1890 Act was applicable to drainage ditches;[11] the drainage waters collected by the ditches were to be delivered to land privately owned and outside of the boundaries of the federal project.

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[7]Green v. Willhite, Ida. 1906, 160 Fed. 755.
[8]Green v. Willhite, Ida. 1908, 93 P. 971.
[9]U. S. v. Van Horn, 197 Fed. 611, Colo. 1912.
[10]See note 26 as to reasonableness of choice of route.
[11]Griffiths v. Cole, Ida. 264 Fed. 369.

The court determined that drainage ditches were included within the meaning of the act, stating:

> putting it in another way, the proposed disposition of the water is incidental to the construction and maintenance of the Boise Project, and, therefore, the proposed canal is within the scope of the authority conferred by law and for it the Government may occupy rights of way under the Act of August 30, 1890, or exappropriate them by suitable condemnation proceedings.

This conclusion was subsequently affirmed in the United States v. Ide, supra. This liberal construction of the act has been applied by courts to the same type of legislation under other acts dealing with irrigation development and right of way for canals and ditches for private companies.[12]

The statutory right of way reserved by this Act of 1890 in favor of the United States includes the power to straighten, widen or deepen a natural ravine or draw to be used in the conveyance of water,[13] and this decision states that the patentees are estopped by acceptance of patent to question propriety of reservation being inserted therein. This does not preclude the patentee from challenging the necessity of exercising the reserved rights nor the reasonableness of the route chosen for these issues were raised in a decision in Colorado[14] and the court reserved judgment upon these points until the case was finally disposed of on its merits, indicating that the court, at least, considered the objections of the landowner. In the Ide decision, the court stated that the right in favor of the United States must be exercised with ordinary care, otherwise damages can be recovered, and concerning the issue of the necessity of exercising the right, the court heard evidence and determined that the changes sought to be made by the United States were in fact necessary. The mere fact that the court heard evidence upon the issue indicates that the necessity of exercising the right was considered a proper issue.[15]

Where a canal has been constructed by the United States under the authority of this act and the canal is crossed by a railroad or other improvement, such crossings must be made without expense or loss to the United States and any increased cost of maintenance of canals caused thereby must be borne by the person crossing the same.[17]

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[12]See Section 18, Act of March 3, 1891 (26 Stat., 1101, 43 U. S. C. 946) and U. S. v. Big Horn Land and Cattle Company, 17 Fed. 2d 357. holding that the words "canal" or "ditch" were used in an inclusive sense and embrace the entire project. This holding was affirmed in Twin Falls Canal Company v. American Falls Reservoir District No. 2, 59 Fed. 2d 19. Johnson Irrigation Company v. Ivory, 24 P. 2d 1053; U. S. v. Tujungha Co., 48 Fed. 2d 689.

[13]Ide v. U. S., Wyo., 277 Fed. 373, affd. 68 L. Ed. 407.

[14]United States v. Van Horn, Colo. 1912, 197 F. 611.

[15]See notes 30 and 31.

[17]U. S. v. Minidoka and S. W. Railroad Company, 176 Fed. 762, Aff. 59 L. Ed. 200.

It has been the policy of the Bureau of Reclamation to interpret the words "ditches" or "canals" to include any form of conveyance of water, such as siphon, penstock, tunnel, drain, flume or conduit, in addition to open ditches and canals and there is ample justification for this interpretation. Thus in Sefton v. Prentice,[18] the term "conduit" as defined by Webster was accepted by the court to mean, "a general word which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe or any kind of aqueduct," and in Colorado,[19] Section 7 of Article 16 of the State Constitution provides, "All persons and corporations shall have the right of way across public, private and corporation lands for the construction of ditches, canals and flumes for the purpose of conveying water * * *," and the court stated, concerning the condemnation of a right of way for a pipe line:

> It does not mention a pipe line but its evident object was to permit a right of way for a conduit through which to convey water for the purposes designated and hence the kind of conduit employed and utilized is of no material moment so far as any question in the case at bar is involved.

And in Washington,[20] Section 16 of Article 1 of the Constitution provided that private property shall not be taken except "for drains, flumes or ditches on or across the land of others for agriculture * * * purposes," and the court decided that the condemnation of a right of way for a private pipeline was a public use and never mentions the fact that a pipeline is being built; apparently it was assumed by all the parties involved to be beyond question. Recently in Colorado[21] in an action to condemn a right of way for a pipeline across a placer claim, the court affirmed its earlier decision in the Lyons case by stating, "the provisions quoted above (Section 7, Article 16, Colorado Constitution) cover pipe lines."

In an article in the Reclamation Era,[22] D. G. Tyree, attorney for the bureau, concludes with the words, "ditches and canals include a tunnel," quoting Webster's definition of a "tunnel" as "a subterraneous passage way, especially one horizontal and open at both ends, as for a railroad, canal, drain, etc.," and the author concludes:

> If a tunnel is correctly defined as a passageway for a canal, it is evident that a canal may be an underground waterway as well

[18] 37 P. 641, Calif. 1894.
[19] Town of Lyons v. City of Longmont, 129 P. 198, 1913.
[20] State v. Superior Court, 266 P. 198.
[21] Pine Martin Mining Company v. Empire Zinc Co., Colo. 1932, 11 P. 221.
[22] 25 Reclamation Era, 246.

as an open ditch and that the right of way for a tunnel is, in fact, right of way for a canal.[23]

The Federal Government has been consistent in a liberal interpretation of the words "ditches" and "canals," not only when it sought to exercise a right existing in favor of the United States, but also when a private party sought to exercise such a right across federal lands. In a decision arising in Colorado[24] the applicant sought a right of way for a pipeline under the Act of March 3, 1891, which granted to private parties rights of way for "ditches, canals or reservoirs," which request was refused and on appeal the decision was reversed, stating:

> From the foregoing authorities, it appears that the words "canal" or "ditch" are used to designate any artificial waterway for irrigation * * * the methods used for conveying water * * * to the lands to be irrigated vary according to topography of the country, character of the soil, climate, permanency of the works, etc. The purpose for which the conduit is constructed and the water conveyed will largely control the descriptive term used and is very material in cases arising before this Department in connection with applications for rights of way under the several laws governing the granting of such easements or licenses. That purpose is irrigation and the fact that the words "reservoir, canal, and lateral" are used in the act does not warrant the assumption that it refers to and only authorizes the use of the rights of way granted for open canals or laterals. On the contrary, it is the evident purpose of Congress to grant the necessary rights of way through public lands for any and all structures essential or necessary to the accomplishment of the purpose of irrigation.

There are numerous states which have statutes granting to the United States a right of way for ditches and canals across state lands and the validity of these statutes have been challenged and sustained.[29] The status of these statutes in Colorado is a bit uncertain.[30]

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[23]The Bureau of Reclamation has interpreted the 1890 Act to cover pipe lines, whether above the ground or buried, including penstocks to power plants.

[24]Fraser Sources Irrigation and Power Company, 43 Decisions Public Lands, 110.

[29]United States v. Fuiler, Ida. 1937, 20 Fed. Supp. 839.

[30]The present statute is found in 4 C. S. A. Chap. 134, Par. 81, and Sec. 29 of Chap. 187 of the 1919 Session Laws, Page 651, repeals the Acts of 1905 and 1917, but does not mention Chap. 207 of the Session Laws of 1909, which act resembles the first statute quoted, save that attached to it was the following language:

> "The right of way is hereby given * * * to the United States to locate, construct and maintain such roads, bridges, canals, ditches, tunnels, pipelines, telephone and transmission lines as may be constructed for the purpose of irrigation by authority of the United States over and through any of the lands which are now or may be the property of the State. All conveyances of State lands hereafter shall contain a reservation of such rights of way,"

and it would therefore seem that the sentence last quoted from the 1909 Act is still in

Although the United States has reserved the right for canals in patents to lands issued by it, it has not exercised its right oppressively and it has made it a policy to pay for all improvements injured or damaged by reason of the construction of the canal. This is not required by the law. The ordinary procedure is to appraise all improvements on the lands and to offer the landowner a sum of money which will compensate him for the damages sustained. Thus it has been held[32] that a contract between employees of the Bureau of Reclamation and a contractor constructing a canal for the bureau whereby the government would assume one-half of the cost of removing an electrical transmission line constructed upon lands subject to the Act of 1890 was not binding upon the United States because the reservation in the patent under the Act of 1890 constituted a conveyance running with the land of which the Power Company had notice and therefore the company could not obtain a right of way superior to that of the United States, and, accordingly, there is no authority for the payment from public funds for a right of way which the United States possesses. This decision was overruled, or at least since issuance thereof, it has been consistently distinguished. Thus, it has been held that a landowner is entitled to damages sustained by him through the exercise of the 1890 canal right by the United States[33] as to any improvements owned by him, but not as to his land.[34]

Compensation has likewise been paid by the United States for any materials removed in the construction of the canal and utilized by the United States in construction of some feature of the project off of the right of way where found;[35] likewise, where a project has been constructed for a mixed purpose, i. e., irrigation and flood control, and a canal was built for irrigation purposes and also levees several hundred feet on each side of the canal, compensation has been paid for the addi-

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effect. No litigation on this point exists in Colorado. Other statutes for cooperation with the United States will be found in Vol. 2 C. S. A. Chap. 134, Sections 68, 69. See also the Ide decision (supra).

[32]7 Comp. Gen. 217. "Reclamation Service—Rights of Way."

[33]Albert W. C. Smith, 47 Public Lands Decisions 158, 1919.

[34]"The rights of the owner of an easement are paramount to the extent of the grant or reservation to those of the owner of the soil. An easement gives to the owner thereof all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement. Where the easement is not specifically defined, the rule is that it need be only such as is reasonably necessary and convenient for the purpose for which it was created. A grant or reservation of an easement in general terms is limited to a use such as is reasonably necessary and convenient, and as little burdensome to the servient estate as possible for the use contemplated. In other words, an unlimited conveyance of an easement is in law a grant of unlimited reasonable use. Under the above principles, it is clear that the United States, under the reservation of the right of way contained in the Act of August 30, 1890, has the right to use such portion of the tract entered as is necessary for the construction, operation, and maintenance of the lateral. The United States is not liable for damages resulting to land 'because it did that which it had a right to do'."

[35]Reclamation decision July 26, 1913.

tional area occupied by the levees and not needed for the canal, the Comptroller General stating:[36]

> The Act of August 30, 1890, does not specify for what purposes the ditches and canals to be constructed by the United States are to be used. The history of the act, however, clearly indicates that it had reference to ditches or canals to convey water for the reclamation of arid lands by irrigation. To the extent therefore that the proposed project is for irrigation purposes alone the title to right of way is already vested in the United States and no payment may be made for the lands required therefor * * * for the additional area required for flood control purposes payment may be made at a reasonable price not in excess of the appraised value of the land involved.[37]

Denver, Air Center of the World

BY STEADHAM ACKER

Following is a summary of remarks made by Mr. Acker, aviation consultant for Denver, at the March 4, 1946, meeting of the Denver Bar Association:

Aviation is transportation. It is past the stage where it is a thrill. It is a business, in its infancy and rapidly developing. It is the newest form of transportation, which means new markets and new thinking. It has romance, which makes it more interesting as a business.

The atomic bomb will make people in large cities think of decentralization and decentralization will make more transportation.

Air transportation will connect Denver with all the rest of the world. In a few months Denver will be less than sixty hours by air from every major city in the world.

How will air transportation help the lawyer? It will help the lawyer generally as it adds to the development of the city. The prosperity of a city depends upon its transportation. No transportation means no communication, which means no business. Air transportation will help the community in proportion to its use. Denver depends more than any other city on air transportation. It has obstacles of terrain which it is overcoming and it has a future of greatness in air transportation. If Denver becomes prosperous, its citizens will become prosperous and the lawyer will participate in the city's prosperity. Therefore, the lawyer will encourage air transportation so as to add to the general prosperity of the city.

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[36] 17 Comp. Gen. 1039. "Real Estate—Rights of Way—Rio Grande Canalization Project."

[37] All decisions, administrative rulings and articles extant to September, 1944, are cited herein.