

Editor's note: Set aside -- See Molybdenum Corporation of America, 12 IBLA 339 (Aug. 15, 1973).

MOLYBDENUM CORPORATION OF AMERICA

IBLA 70-141

Decided November 3, 1971

Rights-of-way: Applications -- Rules of Practice: Hearings

Where the Board concludes that a fuller presentation of facts is necessary for the adjudication of an application for a right-of-way for the disposal of decant water from a proposed mine tailing operation across land which is a component of the wild and scenic rivers system along the Rio Grande River, it will refer the matter to a hearing examiner to hold a hearing.

4 IBLA 53

MOLYBDENUM CORPORATION
AMERICA right-of-way

: Application for pipeline OF

: Referred to hearing examiner

DECISION

Molybdenum Corporation of America (hereafter referred to as Moly) has appealed to the Secretary of the Interior from the decision of April 21, 1970, by the Bureau of Land Management, wherein the decision of the Director of the New Mexico land office rejecting appellant's application for a pipeline right-of-way was affirmed.

On December 2, 1969, the appellant corporation, the operator of a large molybdenum mine, filed an application for a right-of-way across the SE 1/4 sec. 5, T. 29 N., R. 12 E., N.M.P.M., pursuant to the Act of February 15, 1901 (43 U.S.C. 959), for the express purpose of disposing of decant water from a proposed tailings area located on its privately owned land within sec. 4, T. 29 N., R. 12 E., N.M.P.M. into the Rio Grande River.

By virtue of § 1274(a)(4) of the Wild and Scenic Rivers Act (16 U.S.C. § 1271 et seq.(1968)), a portion of the Rio Grande River and the land adjacent to it were designated as components of the national wild and scenic rivers system. The part of section 5, supra, that would be crossed by the right-of-way lies within the designated area.

The purpose of the Act is to ". . . preserve . . . selected rivers with sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes" (§ 1271).

Section 1274(a)(4) designates the Secretary of the Interior as the administrator of the Rio Grande component.

Section 1281 deals with the administration of these lands:

Each component . . . shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features.

Finally, § 1284(g) empowers the Secretary of the Interior to ". . . grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic rivers system in accordance with the laws applicable to the national parks system. . . ."

The clear intent of this legislation is to preserve and protect certain designated rivers in their free-flowing condition and protect them and their immediate environment.

There appears to be some disagreement between the appellant and the Bureau of Land Management as to whether Moly may use the right-of-way it desires by virtue of the provisions of the Act of July 26, 1866, 1/ without filing an application. We do not, at this time, find it necessary to resolve this issue.

The question raised by this appeal is whether granting a right-of-way to facilitate the appellant's proposed decanting operation would be consistent with the purposes of the Wild and Scenic Rivers Act.

1/ 43 U.S.C. 661. The Act provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, 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; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to a party injured for such injury or damage."

At the present time, Moly has been disposing of up to 16,000 tons of tailings per day by routing them (in a solution, 60 percent water and 40 percent solids) through pipelines to a tailings area. At that point, the solids are allowed to settle and the nearly clear water (the decant water) is carried by a natural drainage into the Red River.

Moly states that in a few years its operations will require it to develop a new tailings area. The land selected, which it owns, lies some 15 miles from their mill and five miles north of the present area. The decant water will drain through an arroyo into a protected portion of the Rio Grande.

It was the contention of the Director of the New Mexico land office that since early 1966,

. . . There have been several failures in the slurry pipes and the tailings dam which allowed the waste slurry material to flow into Red River. These spills on occasion have degraded Red River water quality, killed fish, and damaged scenic values. Molybdenum Corporation has expended considerable efforts to prevent such failures. They have re-occurred nonetheless, the most recent being in December of 1969. There is no assurance that failures will not occur in the future (State Director's Opinion at 3).

He concluded that the appellant's application must be rejected as it would not be "in the public interest to jeopardize the protected wild and scenic rivers section of the Rio Grande" (State Director's Opinion at 3).

Appellant responded to these contentions in its "Statement of Reasons" filed pursuant to its appeal to the Bureau of Land Management. Moly urged that "no fish were killed when the tailings line broke in December, 1969, nor have any fish ever died from similar accidents" (appellant's "Argument and Authorities" at 2).

Moly next attempts to dispel the notion that its operation will cause pollution damage to the Rio Grande:

There is also a strong implication in the State Director's decision that the appellant's decant water is dumping impurities into the Red River at the present time. If that were true, the State Health and Social Services

Department would not have indicated approval of the same decant water line over state land (appellant's "Argument and Authorities" at 2 and 3).

In affirming the decision of the State Director, the Chief of the Branch of Land Appeals perceived and weighed the evidence as follows:

A report of a field examination of the area in question, and of the Corporation's present disposal area for its decant water, shows that there have been several failures involving the Red River. The slurry pipes and tailing dam failures have allowed slurry material to flow into the Red River, degrading the river water quality and damaging scenic values. Reports of massive fish kills in the river occasioned by these incidents have been denied by the appellant, which submitted news articles and editorials quoting officials of the Red River Fish Hatchery to the effect that, as yet, pollution from the Molybdenum Corporation mine has not killed any fish at the hatchery. However, these same sources go on to say that the hatchery trout are maintained in lakes where 50 percent of the water is supplied by springs and 50 percent is taken from the river. The hatchery foreman is quoted as stating that when mine pollution occurs in the river, the river supply is shut off before the pollution reaches the fish at the hatchery, but that this results in a reduction of oxygen which causes an interruption of the feeding patterns and a consequent weight loss. He is further quoted that the oxygen could be increased by letting in the muddy river water, but then he couldn't feed the fish as the water would be too muddy for the fish to see the food. Finally, he states that although the pollution spills by the appellant are not expected to decrease the hatchery's production, sportsmen may find the fish somewhat less weighty than they might have been were it not for the spills.

As an argument that the proposed decanting of mine water into the protected stretch of the Rio Grande poses no threat, the foregoing is less than persuasive. It is apparently true that although they suffered deleterious effects, the trout at the hatchery survived. However, since the water supply was controlled by the hatchery attendants, and as the hatchery ponds mixed at least equal portions of pure spring water with the river water, we are forced to conclude that conditions in the river itself were at least twice as bad. No evidence is offered in rebuttal of reports of fish killed in the river, or of damage to natural spawning beds or eggs from siltation, nor does the evidence submitted by appellants respond to the report of a substantial kill of river trout in 1965 caused by its spillage of mine effluents.

Moreover, fish are not the only consideration. A clean river is simply more desirable than a dirty river, and where the Congress has mandated by law that this portion of the river be preserved and protected in its natural and scenic state, the artificial introduction of industrially processed water from a pipeline, with the attendant risk of spillage, would clearly violate the letter and intent of the statute. We note that although the company intends to decant only 'clean' water from which the sediments have settled, it admits that 'Appellant cannot give a blanket assurance that no future breaks will occur in the tailing line.' Therefore, we find nothing arbitrary or capricious in the State Director's decision to reject an application for this purpose for the reasons given (Bureau of Land Management decision at 3 and 4).

In its appeal to this Board, Moly has again attempted to refute each of the arguments set forth in the prior decision denying its application.

Appellant points out that both the State Director and the Bureau of Land Management referred to the decanting of water through a pipeline when, in fact, the "clear water from the settling ponds will be decanted through a natural arroyo . . ." (appellant's "Statement of

Reasons" at 2). Thus, ". . . no pipeline tailings breaks can occur since the clear water is decanted through a natural arroyo and not through a pipeline" (appellant's "Statement of Reasons" at 2).

In response to the assertion that no evidence was offered to rebut the report of trout deaths in 1965, appellant replies as follows:

The simplest refutation to such an allegation is that the applicant was not operating in 1965. Therefore, the cause of the trout loss must have originated from another source (appellant's "Statement of Reasons" at 3).

On June 22, 1970, an Amicus Curiae Brief was filed by the New Mexico Conservation Coordinating Counsel. They reasserted most of the above noted arguments as to why Moly's application should be denied. The gist of their position would appear to be contained in their conclusion that:

One of the primary purposes of the Wild Rivers legislation was to preserve the few large rivers left in the United States which have not yet been developed and polluted, so that future generations may see untamed rivers in their natural state. It was realized that rivers which already were sludge pots and which were already developed along each shore were not suitable for Wild Rivers action. There were other rivers, however, which still could be saved. The Rio Grande and Red Rivers in New Mexico were two of these. It also was envisioned that as the United States developed even further and population grew, there would be pressures to use the wild rivers for commercial purposes, just as there had been pressures to use the Mississippi River, Ohio River, the Great Lakes and other bodies of water.

The threat of Molybdenum Corporation of America's application is not as imposing as the threats which already have killed many other large rivers. Nevertheless, decant water will degrade the quality of the water in and the scenic value of the Rio Grande. And if the Molybdenum Corporation of America can do it, why can't Corporation A and Corporation B?

And in the end, the Rio Grande will be no different from the other polluted rivers. No doubt the first industry's polluting effect on most eastern rivers was barely noticeable. Then more industry moved in and before it was over, the rivers were sludge and the fish were gone (Amicus Curiae Brief at 9).

Appellant responded to this conclusion with one of its own:

The Council's concluding paragraph sums up an array of horrors if the applicant were permitted to decant this clear water from the tailings dam into the Rio Grande. Rather than refute these arguments again applicant will quote from the Bureau of Land Management's own report on the decant water (page 17 of 'Rivers to Enjoy', October 1969):

Water quality tests have been run on the tailings decant water by the New Mexico Department of Game and Fish in the ground water division of U.S. Geological Survey. The results showed no observable detrimental effects upon fish or plant life in Red River at the time. Moly-Corp. asserts that all chemical activities used in the milling process are recovered with the metal concentrates and that the chemical composition of the tailings decant water is essentially the same as the water entering the mill. This assertion was confirmed by John Wright, New Mexico State Health Officer, after an investigation.

If the Council can refute the above statement, then it should come up with its own chemical analysis of the decant water. Otherwise, the Council's assertions to the contrary should be disregarded.

As the above summary has indicated, the appellant rests its application and appeal upon a factual basis which the decisions below and the New Mexico Coordinating Council do not accept. Moly has asked for a hearing at which it may offer evidence to support its contentions.

We agree that the proper disposition of appellant's application requires a much fuller presentation of the pertinent facts.

Accordingly, pursuant to 43 CFR 4.415, 36 F.R. 7200, we direct that the case be referred to a hearing examiner for a hearing on the following issues of fact:

1. A full description of the system that Moly proposes to use in disposing of the tailings from the time they leave the mill to disposal of the decant water in the Rio Grande;
2. The quality and quantity of the decant water that will flow through the arroyo into the Rio Grande;
3. The effect of the water flow upon the River and the adjacent land;
4. The effect of the water flow upon the wildlife habitating within the River;
5. The possibility of slurry escaping into the Rio Grande prior to its reaching the settling ponds and the consequences of such an escape;
6. Alternative methods and their cost of disposing of tailings; and
7. Any other fact that the hearing examiner may find necessary for the evaluation of Moly's application.

Martin Ritvo, Member

We concur:

Francis E. Mayhue, Member

Anne Poindexter Lewis, Member.

