

**Editor's note: 80 LD. 197**

RIMROCK CANAL COMPANY

IBLA 71-71      Decided February 14, 1973

Appeal from decision (Idaho 3002) of Idaho Land Office, Bureau of Land Management, which rejected a right-of-way application.

Affirmed.

Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891

There is no grant of a right-of-way under the Act of March 3, 1891, as to withdrawn lands without approval of the Secretary of the Interior, who may deny an application and approval of maps filed thereunder upon reasonable grounds, or condition approval as to the location of the improvements to be constructed.

Administrative Practice—Fish and Wildlife Coordination Act: Generally—Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891—Withdrawals and Reservations: Generally

Where land has been withdrawn for state management as a wildlife area under the Fish and Wildlife Coordination Act, the Bureau of Land Management must consider the recommendations of the state and of the Bureau of Sport Fisheries and Wildlife to assure conservation of the fish and wildlife before approving a right-of-way application under the Act of March 3, 1891, for a pumping site and irrigation system.

Applications: Generally—Fish and Wildlife Coordination Act: Generally—Rights-of-Way: Generally—Rights-of-Way: Act of March 3, 1891

A Bureau of Land Management decision which rejected an application under the Act of March 3, 1891, for a pumping station and irrigation system within a small cove of a reservoir withdrawn for a fish and wildlife management area pursuant to the Fish and Wildlife Coordination Act, will be sustained where it was made in due regard for the public interest in managing the area in light of that Act.

APPEARANCES: James L. Morrison, for appellant.

## OPINION BY MRS. THOMPSON

James L. Morrison for Rimrock Canal Company has appealed a decision of the Idaho Land Office, Bureau of Land Management, dated September 15, 1970, which rejected a right-of-way application for an irrigation system filed pursuant to the Act of March 3, 1891, 43 U.S.C. § 946 (1970). The public land over which the right-of-way is sought is the S 1/2 NE 1/4 sec. 35, T. 5 S., R. 4 E., B.M., Idaho. The SW 1/4 NE 1/4 of this section has been withdrawn for a wildlife management area and a federal power project.

The application for the right-of-way was filed on June 6, 1969. It stipulated that if it were approved, it would be subject to the applicable regulations. The application was signed by James L. Morrison for Rimrock Canal Company. It was also originally signed by Dolly V. Morrison and Joe Morrison. Thomas Timbers subsequently signed the application on October 13, 1970.

The application includes a proposed water pumping site within the withdrawn area and on the shore of C. J. Strike Reservoir, and also an irrigation pipeline and ditch right-of-way. On August 6, 1969, the Land Office notified James L. Morrison that the State of Idaho Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife, United States Department of the Interior, objected to

the proposed location of the pumping site in a small cove of the reservoir because it might adversely affect waterfowl hunting. The letter stated that the Fish and Game Department had no objection to the site if it were to be located at least 1,000 feet south of the proposed location. Morrison was invited to discuss any alternative proposals and to make a field inspection with state and federal officials to locate a new site.

Subsequently, on February 17, 1970, representatives of the Bureau of Land Management, the Idaho Department of Fish and Game, and the Bureau of Sport Fisheries and Wildlife, made a field trip with Morrison to inspect the proposed site. The Idaho Department of Fish and Game and the Bureau of Sport Fisheries and Wildlife continued their objection, but would consent to the application if the site were relocated 1,000 feet to the north or south.

The Land Office decision recited the history heretofore discussed and rejected the application. The rejection was for the reason the Bureau of Sport Fisheries and Wildlife and the Idaho Department of Fish and Game objected to the proposed location of the pumping plant in that it would detrimentally affect the value of the cove site for fish and wildlife habitat and recreational purposes. The decision also held that the application was deficient in that: (1) the proper

documents were not filed to evidence that the Rimrock Canal Company was legally organized as a corporation, association, or partnership; (2) evidence from the state was not submitted to show that the water right had been granted; (3) Thomas Timbers, whose name was in the mutual agreement and water permit application as a participant, was not included as an applicant in the right-of-way application or on the map. Although the application was rejected, appellant was given the right to amend the application by relocating the pumping plant to an acceptable location, and to correct the procedural deficiencies within 60 days of the decision. The decision advised appellant if additional time was needed to comply with the requirements, a written request would be given immediate consideration.

Appellant's letter of September 24, 1970, attempted to remedy the procedural deficiencies mentioned. Statements were made that Rimrock Canal Company is an unincorporated association composed of James Morrison, Dolly Morrison, Thomas Timbers, and Joe Morrison; and that Bernard Morgan, a former associate, quitclaimed his interest to James and Dolly Morrison. The letter also constitutes a notice of appeal. In it, appellant characterizes the refusal to grant the right-of-way as arbitrary. It contends: (1) the Idaho Fish and Game Department and the Bureau of Sport Fisheries and Wildlife, who objected to the location of the pump site, can act only in an advisory capacity

and have no jurisdiction in this matter; (2) the reclamation of 1,500 acres of land embraced in their desert land entries should have priority over maintaining a "semi" permanent duck blind; (3) the pump station would not interfere with hunting; (4) any negative effects created by the pump station would be offset by the crop residue from the reclaimed land which would benefit both water fowl and upland game birds.

Appellant asserts that the pump site was selected because it was most feasible from an engineering standpoint in that: (1) the penstock covered the shortest possible distance across public lands; (2) the transmission lines would not mar the shoreline; and (3) detrimental dredging would not be required because the water was of sufficient depth. As to the suggested proposal to locate the site 1,000 feet to the north or south, it contends this would entail extensive dredging, would require an additional 1,000 feet of penstock on public lands, and the construction of a power transmission line along the shoreline.

In a further statement of reasons for appeal, appellant reiterates previous arguments and emphasizes that the pump site is aesthetically located because it is concealed from public view. It further contends with respect to the pump site that: (1) the cove is not extensively used for recreational purposes; (2) it is a poor habitat

for fish and wildlife; (3) the vegetation is sparse; (4) turbidity created by the pumps will be imperceptible; (5) the pump site would not have a deleterious effect on the shoreline; (6) the personnel who objected to the proposed location lack technical knowledge; (7) there are no other feasible sites; and (8) other pumping stations located on the reservoir and rights-of-way have been previously granted. It enclosed copies of the approved rights-of-way grants.

In addition to these objections to the denial of approval of the pump station site, appellant also raises a threshold issue as to whether he might construct the improvements without approval by Government officials. The short answer to this question based upon the facts in this case is that such an alternative is not available to appellant. This is evident because of the status of the land and applicable law.

As to the status of the land, prior to the date appellant's application was filed, the land was withdrawn as a power site. The administering agency of the power site reserve, the Federal Power Commission, has no objection to appellant's application. However, the site upon which the pumping station is planned, as has been indicated, has also been withdrawn "from all forms of appropriation

under the public land laws \* \* \* for management by the State of Idaho as part of the C. J. Strike Wildlife Management Area \* \* \*." Public Land Order No. 4153, 32 F.R. 2888 (February 15, 1967). The withdrawal order also provided for the issuance of leases, licenses, or permits and disposals but "only if the proposed use of the lands will not interfere with the proper management of the C. J. Strike Wildlife Management Area." Id.

The withdrawal for the wildlife management area was made in furtherance of the purposes of the Fish and Wildlife Coordination Act of March 10, 1934, as amended, 16 U.S.C. §§ 661-64 (1970), to provide equal consideration of wildlife conservation and coordination with other water-resource development programs. Under the Act (16 U.S.C. § 661):

\* \* \* the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; \* \* \*

The withdrawn status of the land places it within the ambit of the word "reservation" as used in the Act of March 3, 1891. <sup>1/</sup> It is well established that there is no grant of the right-of-way under the Act of March 3, 1891, as to withdrawn lands, without prior approval of the Secretary and subject to such conditions

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<sup>1/</sup> Section 20 of the Act of March 3, 1891, (43 U.S.C. § 948 (1970)) makes applicable to corporations, individuals, or associations of individuals the right-of-way provided for irrigation purposes by sections 18 and 19 of the Act. Section 18 of the Act, as amended, (43 U.S.C. § 946 (1970)) provides: "That the right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation or, if not a private corporation, a copy of the law under which the same is formed and due proof of its organization under the same, to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Section 19 of the Act of March 3, 1891, 43 U.S.C. § 947 (1970), requires the filing of a map for approval by the Secretary of the Interior. The regulations applicable to rights-of-way under the Act of March 3, 1891, 43 CFR Parts 2800 and 2870, contemplate official approval of the maps and location plans of the proposed rights-of-way before the grant under the Act may be effectual.

as he may impose. Assistant Attorney General's Opinion, 33 L.D. 563 (1905); James W. McKnight, et al., 13 L.D. 165 (1891).

In an early court case interpreting the Act of March 3, 1891, United States v. Rickey Land and Cattle Company, 164 F. 496, 500 (C.C.N.D. Cal. 1908), where improvements had been constructed, it was stated:

\* \* \* in order to acquire a right of way over public lands for canal and reservoir purposes under the act of which it forms a part, it is essential that the map of the location of the canal and the reservoir shall be approved by the Secretary of the Interior. Such approval is a condition precedent to the taking effect of the grant of right of way \* \* \*.

In Rickey the lands were withdrawn for a reservoir site and the Secretary of the Interior refused to approve the maps filed by an irrigation company under the Act of March 3, 1891. The Court held that the company acquired no right or easement to the land in the absence of approval by the Secretary. Of a similar effect is United States v. Henrylyn Irr. Co. et al., 205 F. 970 (D. Colo. 1912), involving lands in a national forest reserve. The Court specifically referred to the Act of March 3, 1891, in stating at 972:

\*\*\* the legislative intent is manifest that as to these reserves, created as they are for a special purpose, no occupancy nor use thereof by private parties shall be permitted save upon the exercise of a discretion by the proper departments as to whether such use will interfere with the purposes of such reserve. U.S. v. Lee, 15 N.M. 382, 110 Pac. 607.

Furthermore, in any case where prior approval is requested, the Secretary may deny approval or condition approval upon reasonable conditions. Thus, in a case not involving a withdrawal, United States ex rel Sierra Land & Water Co. v. Ickes, 84 F.2d 228 (D.C. Cir. 1936), cert. denied, 299 U.S. 562 (1936), the Court upheld the Secretary of the Interior's refusal to approve a right-of-way under the Act of March 3, 1891, for a ditch and reservoir system where the State of California had refused the applicant a water right. The Court denied that there was an absolute right to the grant stating at 231:

The contention that the grant is one in praesenti, and therefore vests title in the applicant, irrespective of the approval by the Secretary of the Interior, cannot be sustained. So long as the exercise of the power of approval by the secretary is not unreasonable, or contrary to statutory mandates governing allowance of rights of way for canals and reservoirs, the jurisdiction of the secretary to act under reasonable regulations respecting such grants cannot be controlled by the mandatory orders of the courts.

That a right of way grant in praesenti does not vest until approval of the application by the secretary has been determined by direct interpretation of the statutes under which appellant company claims its rights of way in the present case. \*\*\*

In view of the foregoing discussion of the Act of March 3, 1891, and in view of the policies and requirements imposed by the Fish and Wildlife Coordination Act, it was imperative of the Bureau of Land Management officials to consult with and consider the recommendations of the Bureau of Sport Fisheries and Wildlife and the Idaho Fish and Game Department to assure conservation of the fish and wildlife together with appellant's proposed usage of the water resource before appellant's application could be approved.

The essence of appellant's objections to an alternative site for the proposed pumping station is a disagreement as to the reasonableness of alternative sites in view of environmental and engineering considerations.

An investigative report by a Bureau of Land Management official states that the cove desired by appellants for its pumping station is the only cove on the east shore of the Bruneau arm of the reservoir. Its use for fish, wildlife, and recreational purposes has significant value. The Regional Director of the Bureau of Sport Fisheries and Wildlife indicated that the site is one of the few coves along the reservoir, and the coves contain fish spawning and rearing habitat and wildlife cover. He stated that a reduction in fish spawning area, already in short supply, would occur and

young fish would be faced with a hazard at the pump intake, and cover vegetation for wildlife would be reduced if the pumping station were allowed in the cove site desired by appellant.

As indicated previously, Morrison and representatives of the State and the two Bureaus within this Department inspected the site together. His objections to the proposed alternative to the site were undoubtedly manifested at that time, but the alternative was determined to be better for the preservation of the fish and wildlife and over-all environment than locating the pumping station within the cove site. In view of the shortage of natural cove areas along the shoreline of the reservoir and the alternatives offered appellants, the denial of the application as to the cove site is supported by reasonable grounds. Appellants have not shown clearly that the exercise of discretion in this matter is unfounded and arbitrary or capricious. As the decision was predicted upon due regard for the public interest in managing the wildlife area in light of the purposes of the Fish and Wildlife Coordination Act, it was a proper exercise of discretionary authority and is sustained. Cf. George S. Miles, Sr., 7 IBLA 372 (1972); Clear Creek Inn Corporation, 7 IBLA 200, 79 I.D. \_\_ (1972).

Therefore, 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.

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Joan B. Thompson, Member

We concur.

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Douglas E. Henriques, Member

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Martin Ritvo, Member

