

ZELPH S. CALDER

IBLA 73-433

Decided June 20, 1974

Appeal from a May 31, 1973, decision by the Utah State Office, Bureau of Land Management, imposing rental charges for right-of-way application U-10278.

Vacated and remanded.

Applications and Entries: Generally – Rights-of-Way: Act of March 3, 1891 –
Rights-of-Way: Applications

A right-of-way under the Act of March 3, 1891, does not vest until the Secretary of the Interior has approved the application. The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected.

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

Pursuant to a regulation, applications to acquire a right-of-way for the main purpose of irrigation should be made under the Act of March 3, 1891.

Public Lands: Generally—Rights-of-Way: Generally— Water and Water Rights: Generally

Federal laws govern the rights a holder of a state water right has to inundate federal lands for a portion of a reservoir.

Rights-of-Way: Act of March 3, 1891 – Rights-of-Way: Conditions and Limitations

A reservoir right-of-way under the Act of March 3, 1891, does not give the grantee exclusive fishing or stock-watering rights in the reservoir over federal lands. Fish culture or stock-watering is not a public use nor an authorized

subsidiary use of a right-of-way under the Act of March 3, 1891, as amended.

Rights-of-Way: Act of March 3, 1891 – Rights-of-Way: Conditions and Limitations

There is no rental charge for the uses authorized by a right-of-way approved under the Act of March 3, 1891.

APPEARANCES: H. Byron Mock, Esq., of Mock, Shearer and Carling, Salt Lake City, Utah, for appellant. Eleanor S. Lewis, Esq., Office of the Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Zelph S. Calder has appealed from a decision by the Utah State Office, Bureau of Land Management (BLM), dated May 31, 1973, which concluded that Calder's right-of-way application U-10278 could be approved under the Act of February 15, 1901, 43 U.S.C. § 959 (1970). The decision notified Calder that advance permission given on February 20, 1970, to use and occupy public land for a reservoir right-of-way had expired, and requested that he submit rental in the amount of \$240 for the period from February 20, 1970, to February 19,

1974, or that he pay \$260 for the five-year rental period ending February 19, 1975.

On November 9, 1969, Zeph Calder requested advance permission to begin construction of a reservoir which would inundate government-owned lands. He indicated he would file a right-of-way application for the affected lands, and stated the reservoir construction was under the authority and jurisdiction of the State Engineer of Utah. On December 11, 1969, Zeph and Tessie Calder filed a joint application for a right-of-way to impound water on the Pot Creek for irrigation purposes in a reservoir which would inundate land in the south half of section 15, T. 1 S., R. 24 E., S.L.M., Uintah County, Utah. The application estimated the capacity of the reservoir to be about 1500 acre-feet with less than ten percent covering federal land. Included with the application was a copy of a letter granting Calder the right to appropriate water under Utah law. The copy of the application to the State stated that they would use the right-of-way primarily for irrigation, but would also use it for stock-watering and fish culture. On February 20, 1970, BLM granted Calder advance permission to construct a reservoir and to use and occupy federal lands for one year. The February 20 notice expressly provided that the grant of advance permission was not a commitment that the right-of-way application would be approved.

On March 20, 1972, Calder amended the application to include the use of fish culture under the authority of the Act of February 15, 1901, 31 Stat. 790, as amended, 43 U.S.C. § 959 (1970). On September 27, 1972, BLM authorized a right-of-way for a commercial fish hatchery and for irrigation under the Act of February 5, 1901, upon payment of a rental charge mentioned above of \$60 for one year or \$260 for five years.

Calder objected to this disposition of his application. He stated that the main purpose of the reservoir was for irrigation and that he felt the right-of-way could be granted under the Act of March 3, 1891, as amended, 43 U.S.C. § 946 et seq. (1970). BLM reconsidered its decision by letter of May 31, 1973, clarifying that one of the proposed uses was for fish culture, not for a fish hatchery, but it reiterated its position that the right-of-way could be granted only under the 1901 Act. Calder appealed in a letter dated June 13, 1973, in effect, contending that the application is allowable under the 1891 Act without a rental charge.

On September 5, 1973, counsel filed an appearance on Calder's behalf, and requested that the case be returned to the BLM office in Utah for his personal review. On September 18, 1973, we ordered the case file to be returned to Utah for counsel's inspection. The file has now been returned to this office and both appellant's

counsel and the Regional Solicitor have filed briefs. ^{1/}

Appellant's counsel argues five major points in his brief. One, Calder's rights under the 1891 Act "vested upon his filing [application] U-10278 and filing the required maps to show his completion of work." Two, contrary to BLM's conclusion, the main purpose of the reservoir is for irrigation, not fish culture, and as a result, any application for a reservoir must be made under the 1891 Act. Three, only 7.8 acres out of approximately 70 acres are BLM land and the BLM land will be inundated only when full storage for irrigation water is achieved. Therefore, Calder's use of reservoir waters over private lands for secondary purposes of stock-watering and fish culture does not require a BLM permit. Four, in any event, fish culture and stock-watering are permissible subsidiary uses under the 1891 Act. Five, if a separate permit is required under the 1901 or other Act for the secondary uses, that permit may be obtained separately. The brief also notes that a grant under the 1891 Act is preferable to a 1901 right-of-way because it gives the grantee more security of time and investment.

In response to appellant's argument that a right-of-way under

^{1/} The Regional Solicitor objects to our considering counsel's brief on the grounds it was not timely filed. Supplemental briefs can be considered by this board in our discretion where a timely statement of reasons has previously been filed, and the briefs are served upon an adverse party.
43 CFR 4.414.

the 1891 Act has already vested, BLM's reply brief correctly notes that the right-of-way does not vest until all requirements have been met and the Secretary of the Interior has approved the application. The Secretary's approval is a prerequisite to the vesting of the grant of a right-of-way under the 1891 Act. United States ex rel. Sierra Land & Water Co. v. Ickes, 84 F.2d 228, 231 (D.C. Cir.), cert. denied, 299 U.S. 562 (1936); United States v. Rickey Land & Cattle Co., 164 F. 496, 500 (C.C.N.D. Cal. 1908); Rimrock Canal Co., 9 IBLA 333, 343, 80 I.D. 197, 200 (1973). The Secretary may withhold his approval if the grant is not in the public interest or he may condition the grant to ensure that the public interest will be protected. Solicitor's Opinion, M-36500 (May 5, 1958).

The decision giving advance permission for construction expressly withheld approval and reserved a final determination. This negates the vesting of a right contrary to the conditions for the advance permission to construct.

Appellant's second argument is that contrary to BLM's conclusions, the main purpose of the project is irrigation, not fish culture, and as a result, the irrigation right-of-way application must be made under the 1891 Act.

Calder's original application stated that the main use of the

right-of-way would be irrigation. Calder still asserts that the original application is correct, and that although it did not so state, it was intended to be made under the 1891 Act. Calder's letter of March 20, 1972, amended his original application to include fish culture and referred to the 1901 Act. In view of the clarification in the appeal that this was not to suggest that the main purpose was not for irrigation but only to include rights for fish culture, as BLM personnel had suggested, the primary intended use of the right-of-way appears to be for irrigation. This leads to the next issue. Does an applicant for a right-of-way which will be used mainly for irrigation need to apply for a right-of-way under the 1891 Act? The answer is yes.

A Departmental regulation directs that:

* * * (1) All applications where it is sought to acquire a right-of-way for the main purpose of irrigation, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1101; 43 U.S.C. 946-949), and section 2 of the act of May 11, 1898 (30 Stat. 404; 43 U.S.C. 951), must be submitted under the 1891 and 1898 acts, in accordance with the applicable regulations in this part.

43 CFR 2873.1(b)(1). BLM is bound by the regulation and should have adjudicated the right-of-way application for irrigation under the 1891 Act.

We now turn to the problem of the other uses of the reservoir.

Appellant has contended that no other federal permit or right-of-way is needed for fish culture and stock-watering and that the BLM decision interferes with state law. First, we point out that there is no interference with the State's jurisdiction to decide who may appropriate and control water. Instead, the questions pertain to what rights an applicant may have to store or divert that water over federal land. The use, controls, occupancy, and disposition of federal lands, including a right-of-way for the inundation of those lands by water acquired under state laws, must be governed by federal laws. U.S. Const., Art. IV, Sec. 3, cl. 2; Utah Power & Light Co. v. United States, 243 U.S. 389, 404, 411 (1917).

The Department of the Interior is charged with the duty to administer all public lands, including those pertaining to rights-of-way for irrigation purposes. United States ex rel. Sierra Land & Water Co. v. Ickes, *supra*; United States v. Rickey Land & Cattle Co., *supra*; Rimrock Canal Co., *supra*. Cf. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337 (1963). See also, Board of Commissioners, City and County of Denver, A-27748 (October 13, 1959). Therefore, what rights appellant may have to inundate federal lands for a reservoir are circumscribed by federal laws. This leads to a consideration of those laws.

Appellant contends that BLM can grant a right-of-way under the 1891 Act where its main use is irrigation, and its secondary

uses are for fish culture and stock-watering. A right-of-way granted under the unamended 1891 Act could be used for only one purpose – irrigation. Act of March 3, 1891, §§ 18, 21, 26 Stat. 1101, 1102, 43 U.S.C. §§ 946, 949 (1970). "Irrigation" was interpreted to mean "the reclamation of arid lands so they may be capable of producing ordinary crops." South Platte & Reservoir Co., 20 L.D. 464, 465 (1895). Before the Act was amended, the Department rejected applications for rights-of-way which, in addition to being used for irrigation, would also be used for electric power generation, H. H. Sinclair, 18 L.D. 573 (1894); public water supply, South Platte & Reservoir Co., *supra*; floating timbers and other industrial uses, Chaffee County Ditch & Canal Co., 21 L.D. 63 (1895); and domestic and industrial purposes, William Marr, 25 L.D. 344 (1897).

In the 54th Congress, a bill was introduced to broaden the uses of a right-of-way under the 1891 Act. As originally drafted, the bill allowed Act of 1891 rights-of-way to be used for "furnishing water for domestic, public and other beneficial uses." The Secretary of the Interior objected that the amendment was too broad. He maintained that the 1891 Act was for public purposes, and that inclusion of the words "other beneficial use" would open the Act to "all sorts of private uses * * *." H. REP. NO. 2790, 54th Cong., 2nd Sess., 3 (1897). Revisions suggested by the Secretary of the Interior

were incorporated into the amendment. The reworded amendment, passed by the 55th Congress, 30 Stat. 404, 43 U.S.C. § 951 (1970), says:

* * * [R]ights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act * * * approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation. 2/

The amendment did not create a new class of grantees; it allowed the right-of-way, once granted for irrigation, "to be used for other purposes named in the section." Kern River Co. v. United States, 257 U.S. 147, 152 (1921); United States v. Portneuf-Marsh Valley Irrigation Co., 213 F. 601, 605 (9th Cir. 1914); Instructions: Applications for Rights-of-Way for Irrigation Purposes, 39 L.D. 309 (1910); see Johnson Irrigation Co. v. Ivory, 24 P.2d 1053, 1056 (Sup. Ct. Wyo. 1933). Is use of a reservoir right-of-way for fish culture or stock-watering permissible under this section? According to the Congress that passed the law, the amendment's purpose was to furnish "water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water supply to many cities and in many of the states and territories, and aid in supplying the same for many

2/ A further amendment by section 2 of the Act of March 4, 1917, 39 Stat. 1197-98, added "or drainage" to the end of the sentence. That does not change any of the conclusions reached here.

other useful purposes." H. REP. NO. 279, 55th Cong., 2d Sess., 1 (1898). The use of a right-of-way for "public purposes," according to the legislative history of the bill, means helping municipalities procure a supply of pure water. Non-irrigating private uses, such as manufacturing, are not permissible uses under the "public purpose" clause of this section, even if they incidentally benefit the general public. Cf. Smith v. Arkansas Irrigation Co., 142 S.W.2d 509, 511 (Ark. Sup. Ct. 1940); San Joaquin & Kings River Canal & Irrigation Co. Inc. v. Stevenson, 164 Cal. 222, 128 P. 924 (1912). The inclusion of private uses was specifically rejected by Congress when it eliminated the "other beneficial use" language from the 1898 amendment. H. REP. NO. 2790, 54th Cong., 2nd Sess. (1897). "Public use" of a right-of-way authorized under the amendment to the 1891 Act therefore, does not include private uses for stock-watering and fish culture.

The amendment also permitted the use of an 1891 right-of-way "for water transportation, for domestic purposes, or for development of power as subsidiary to the main purpose of irrigation." 30 Stat. 404, 43 U.S.C. § 951 (1970). The subsidiary uses are those that aid the goal of irrigation, such as water for the owner of the reservoir, and electrical power to drive pumps to distribute the water. Instruction: Applications for Rights-of-Way for Irrigation Purposes, supra at 310. The proposed uses by appellant for fish culture and stock-watering are not authorized uses under the 1891

Act as they are not named, Kern River Co., v. United States, supra, nor are they subsidiary.

That a reservoir right-of-way obtained under the 1891 Act does not include exclusive piscatorial privileges in the reservoir and allow the grantee to bar the public from fishing from federal lands covered by the right-of-way is clear. United States v. Big Horn Land & Cattle Co., 17 F.2d 357 (8th Cir. 1927). ^{3/} Likewise, we see no authorization for an exclusive stock-watering right based upon an 1891 Act right-of-way. The scope of rights obtained under the 1891 Act have been limited to those expressly authorized by the Act. The limitation in 43 U.S.C. § 949 (1970), as to occupancy of a right-of-way only for the purposes of the Act is applicable to reservoirs as well as ditches and canals which are expressly mentioned. Each provision of the Act is applicable to the entire irrigation project. United States v. Big Horn Land Cattle Co., supra. Therefore, we reject appellant's contention that authorization of an 1891 Act right-of-way would include rights for fish culture and stock-watering. If appellant still desires an 1891 Act right-of-way on the basis that the main purpose for the reservoir is irrigation, approval of such a right-of-way would carry only the rights authorized by the 1891 Act and no other. Id.

^{3/} Note the requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq. (1970), where water is impounded under a federal permit or license. See also Board of Commissioners, City and County of Denver, supra, and 43 CFR 24.3(b).

In view of statements made in the appeal it is somewhat unclear as to whether the applicant still has, in effect, applied for a right-of-way under the 1901 Act or whether it has withdrawn its "amendment" of its application to come under that Act, and contemplates, as suggested by its attorney, other applications for additional uses. When this case is returned to the Bureau, appellant should clarify his position with respect to the other uses and file appropriate applications. Such applications should set forth in more detail than has been done in this case the extent of the right desired and other information whereby a proper determination may be made. Although the Bureau gave a conditional approval for a 1901 Act right-of-way for all the proposed uses, in the present posture of this case it is premature to decide whether a right-of-way under that Act or some other authority may be granted for the additional uses. It is also, therefore, premature to determine what rentals or other charges should be made for appellant's use of the federal land. It is sufficient to point out that there is no rental requirement for a right-of-way under the 1891 Act, 43 CFR 2802.1-7(c)(2). Charges may be required under appropriate authority, however, for uses of the federal land additional to those authorized by the 1891 Act. Cf. Utah Power & Light Co. v. United States, supra.

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 vacated and the case is remanded to BLM for appropriate action consistent with this opinion.

Joan B. Thompson
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Frederick Fishman
Administrative Judge

